D.P.U. 91-DS-30

Adjudicatory hearing in the matter of a possible violation of G.L. c. 82, § 40 by Ricciardi Construction Co., Inc.

APPEARANCES: Michael Ricciardi
Ricciardi Construction Co., Inc.
P.O. Box 27
E. Weymouth,MA 02189
FOR: RICCIARDI CONSTRUCTION CO. INC.
Respondent

Mario Reid, Compliance Officer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE ENGINEERING AND SAFETY

I. INTRODUCTION

On August 21, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Ricciardi Construction Company, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on July 24, 1991 on Pacific Street, Rockland, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification and failed to exercise reasonable precaution which resulted in damage to underground gas lines operated by Boston Gas Company ("Boston Gas" or "Company"). The NOPV indicated that the Respondent had the right to appear before a Division hearing officer in an informal conference on September 11, 1991 or send a written reply to the Division by that date.

The Respondent sent a written reply dated September 5, 1991 to the Division. In a return letter dated September 17, 1991, the Division informed the Respondent of its determination that the Respondent violated the Dig-Safe Law and informed the Respondent of its rights to request an adjudicatory hearing. An adjudicatory hearing was held on March 26, 1992, pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Mario Reid, a compliance officer for the Division, and Bob Smallcomb, a pipeline engineer for the Division, appeared on behalf of the Division. Jay Giles, a special representative for the Boston Gas legal department, testified for the Division. Mr. Ricciardi testified for the Respondent. All exhibits were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division

Mr. Giles testified that the Respondent did not have a Dig-Safe number (Tr. at 11; Exh. PES-6).[1] The Division asserted that the Dig-Safe Law clearly applies to excavations on private property, and indicated that the only instance in which a Dig-Safe number was not required was when a party was gardening or tilling the soil. (Tr. at 17). The Division maintained that removal of a shrub at depth of 18 to 20 inches is deeper than any normal gardening activity. (Tr. at 25). The Division also maintained that planting a shrub with a small backhoe is earth movement, and thus is excavation and not gardening or tilling of soil (id. at 16). Finally, the Division asserted that the Respondent's activity was landscaping, which the Division argued is excavation and not gardening or tilling the soil (id. at 27).

B. The Respondent

The Respondent testified that damage to the gas line occurred as he was planting a shrub on his property. (Tr. at 4). The Respondent contended that he did not violate the Dig-Safe law because he was planting and gardening on his property and only scratched off the surface of the ground (id., Tr. at 16). The Respondent admitted that he used a backhoe to plant the shrub, but he emphasized that it was a small-sized backhoe (id. at 16; Exh. PES-3).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

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[1] Dig-Safe Systems, Inc. is a non-profit organization which can be contacted by an excavator to properly notify all utilities that have underground facilities in an area of an excavation

> No person shall except in an emergency . . . make an excavation ... which shall not be deemed to include gardening or tilling the soil in the case of privately owned land . . . unless at least seventy-two hours, exclusive of Saturdays, Sundays, and legal holidays, but not more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such public utility companies . . . as supply service . . . to the city or town where such excavation is to be made.

The statute is clear and unambiguous. Any company, contractor or person must properly notify the appropriate operators of underground utilities at least 72 hours before beginning in excavation. Industrial Contractors and Developers, D.P.U. 86-DS-25 (1988); John Farmer, D.P.U. 86-DS-102 (1987).

The Department's regulation at 220 C.M.R. 99.02 define excavation as:

> . . . The movement or removal of earth, rock, ledge, or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to, digging; trenching; grading; scooping; tunneling; auguring . . . [or the] demolition of any structure . . . Excavation shall not mean gardening or tilling the soil in the case of privately owned land.

IV. ANALYSIS AND FINDINGS

The issue to be resolved in this case is whether the activities which damaged the Company's line conformed to the definition of excavation, thereby requiring proper notification pursuant to the Dig-Safe Law. Specifically, the Department addresses whether planting a shrub with a backhoe on private property triggers the gardening or tilling the soil exception within the Dig-Safe law, or whether such activity is considered an excavation within the meaning of the Dig-Safe law.

The record demonstrates that in planting the shrub, the Respondent dug a hole approximately 18 to 20 inches in the ground and removed earth and other materials in order to

firmly plant the shrub. The record also demonstrates that the Respondent used a backhoe to dig this hole.

The Department finds that the removal of earth and other materials as presented here goes beyond the act of gardening or tilling of the soil as set forth in the Dig-Safe law. In reaching this finding, the Department notes that the act of gardening or tilling the soil does not generally involve the use of a backhoe. Further, the definition of excavation as set forth in 220 CMR 99.02 includes the removal of earth...or other materials in the ground to from a cavity... or passage, and includes the act of digging. Here, it is uncontroverted that the Respondent removed earth and other materiess and dug a hole approximately 18 to 20 inches deep. Therefore, based on the above, the Department finds that the Respondent's actions in this case constitute excavation under the Dig-Safe Law.

Accordingly, the Department finds that the Respondent failed to render proper notification prior to excavation on Pacific Street in Rockland Massachusetts, and therefore violated the Dig-Safe Law.[2]

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Ricciardi Construction Company violated the Dig-Safe Law during excavation on July 24, 1991 at Pacific Street, Rockland, Massachusetts, and it is

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[2] The Dig-Safe Law applies to persons performing excavations on private property. When an excavation is started by individuals on private property where underground utilities may be located those individuals must be cognizant of the possible existence of those facilities, and contact Dig-Safe System, Inc. or companies with underground facilities in the area to determine the location of those facilities, and thereby excavate in a safe manner and lessen the possibility of unnecessary damage.

ORDERED: That the Ricciardi Construction Company, Inc., being a violator of the Dig-Safe Law, shall pay a civil penalty of $200.00 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,

_____
Kenneth Gordon, Chairman

_____
Barbara Kates-Garnick, Commissioner

_____
Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. ed., as most recently amended by Chapter 485 of the Act of 1971.