

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

RE: INCIDENT REPORT NUMBER 2018-UFPP-000363

WESTERN MUNICIPAL)	Case No. 747-2019
CONSTRUCTION, INC.,)	
)	
Petitioner,)	
)	
vs.)	
)	FINAL AGENCY DECISION
DEPARTMENT OF LABOR AND)	
INDUSTRY, UNDERGROUND)	
FACILITIES PROTECTION)	
PROGRAM,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On November 21, 2018, Western Municipal Construction, Inc. (Western) requested a contested case hearing regarding civil penalties the Department of Labor & Industry (Department) assessed against it. The matter was then transferred to the Office of Administrative Hearings (OAH) to conduct a contested case hearing. On November 28, 2018, OAH issued a Notice of Hearing and Telephone conference. At the scheduling conference, the parties agreed to a March 14, 2019 hearing date. Both parties subsequently filed motions for summary judgment. Subsequently, the Department filed an unopposed motion to vacate the Scheduling Order because both parties believed the matter could be resolved on summary judgment. On February 28, 2019, the Scheduling Order was vacated.

II. UNDISPUTED FACTS

1. Western Municipal operated as an excavator in this case. Exh. B.

2. Montana-Dakota Utilities (MDU) owned the pipeline and operated as underground utility operator. Exh. C.

3. On June 26, 2018, Western Municipal contacted Montana 811 to get locator information for Clark Street in Billings. See Exh. E.

4. On August 20, 2018, Western Municipal was excavating a trench on Clark Street in Billings when it “failed to maintain clearance,” and “hit a 3/4" natural gas line. . . .” Exh. D. Administrative Record (“AR”), Item 1. Such an event is defined as an “incident.” Mont. Code Ann. § 69-4-501(15).

5. On September 11, 2018, MDU filed an initial incident report form with Montana 811.

6. On September 20, 2018, Montana 811 forwarded MDU’s incident report to the Department.

7. On September 21, 2018, the Department contacted the 811 call center and requested “locate request” info related to the August 20 incident. Exh. E.

8. On September 26, 2018, the Department issued a civil penalty to Western Municipal, pursuant to § 69-4-524, in the amount of \$2,700.00. Exh. F. AR, Item 4.

9. On September 27, 2018, MDU gave notice to Western Municipal that MDU had reported the August 20 incident to the Department. Exh. G. AR, Item 5.1.

10. On October 3, 2018, MDU reported the August 20 incident to the Department. Exh. H.

11. The Department and Western Municipal attempted to mediate this dispute of law on October 12, 2018. The mediation report concluded the state can assess penalties even if it was not notified within 30 days. Exh. I. The Underground Facilities Protection Program Advisory Council Mediation Committee held a Mediation hearing on October 12, 2018. AR, Item 8.

12. On October 26, 2018, in response to the result of the mediation, the Department re-issued the civil penalty. Exhs. J and K.

III. DISCUSSION

Mont. Code Ann. § 69-4-524 provides:

Underground facilities damage — excavator civil penalties. (1) Except as provided in 69-4-529(3), within 14 days of receiving an incident report in

accordance with 69-4-529, the department shall issue a civil penalty in accordance with this section.

(2) Except as provided in subsection (4), if an excavator damages an underground facility that is not a jurisdictional pipeline, the civil penalty is the greater of \$50 or twice the amount of the last civil penalty issued to the excavator, not to exceed \$10,000.

(3) Except as provided in subsection (4), if an excavator damages an underground facility that is a jurisdictional pipeline, the civil penalty is the greater of \$100 or three times the last civil penalty issued to the excavator, not to exceed \$25,000.

(4) If the excavator is also the property owner, the penalties are half the amount established in subsections (2) and (3).

(5) (a) For the purposes of this section and subject to subsections (5)(b) and (5)(c), the last civil penalty is the dollar amount of the civil penalty that would have been issued to the excavator under this part based on incidents occurring in the lesser of:

(i) the last 100 requests for a locate made by the excavator; or

(ii) a rolling 12-month period based on the incident date.

(b) If an incident is subject to subsection (2), the civil penalty must be calculated as if all previous incidents were subject to subsection (2).

(c) If an incident is subject to subsection (3), the civil penalty must be calculated as if all previous incidents were subject to subsection (3).

Mont. Code Ann. § 69-4-529 provides, in pertinent part:

Incident reports — notification of damage — fines. (1) (a) Within 30 days of an incident, an underground facility owner who owns an underground facility that is damaged shall:

(i) report the incident to the appropriate notification center; and

(ii) notify the excavator involved in the incident that the incident has been reported in accordance with subsection (1)(a)(i).

(b) A notification center that receives a report in accordance with subsection (1)(a) shall notify the department.

...

(5) If an underground facility owner fails to file an incident report in accordance with this section, the department shall assess a \$100 fine.

...

Thus, if an incident occurs at an underground facility, the owner must, within 30 days of an incident, report the incident to the appropriate notification center. The notification center must, in turn, notify the Department of the incident. Once the Department receives the report from the notification center, it has 14 days to issue a civil penalty. The underground facility owner must also, within 30 days, notify the excavator that it has notified the call center. There is no requirement for either the underground facility owner, the notification center, or the excavator to inform the Department that the excavator has been notified.

In this case, the incident occurred on August 20, 2018. On September 11, 2018, MDU, the underground facility owner, notified Montana 811 of the incident within the 30-day time requirement. On September 27, 2018, Western Municipal received notification from MDU that it had reported the August 20, 2018 incident to Montana 811. This notification was outside the 30-day notification time requirement.

On September 26, 2018, the Department assessed a civil penalty against Western Municipal. The civil penalty was issued within the 14-day time period the Department had from the “receipt of an incident report.” Receipt of the incident report from the notification center is the only factor triggering the Department’s duty to issue a civil penalty against the excavator. The underground facility owner’s requirement to notify the excavator is not a factor triggering the Department’s duty to assess a civil penalty.

MDU’s failure to timely notify Western Municipal of its report of the incident has no bearing on the Department’s duty to assess a civil penalty.

Western Municipal, on page 4 of its brief, tells the hearing officer he should apply the plain meaning rule in this matter. It makes this argument, however, right in the midst of its citation to HB 365, after which it discusses legislative intent throughout the rest of its brief.

Western Municipal focuses its argument on the “in accordance with” language to argue that, under 69-5-524, MCA, both requirements of Mont. Code Ann. § 69-5-529(1)(a) must have occurred before the Department can issue a civil penalty. Western overlooks the operative language “within 14 days of *receiving an incident report.*” *Id.* (emphasis added). In order for Western’s interpretation to be correct, one would have to engraft language to the effect of “and notice that the excavator has been notified of the incident report” or “the department shall determine that the excavator has been notified by the underground facility owner of the incident,” either of which would be an improper interpretation and expansion of the plain language of the statute. Mont. Code Ann. 1-2-101 (In the construction of a statute, the office of

the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted).

The Department received the incident report from the notification center, as required by Mont. Code Ann. § 69-5-529(1)(b). That provision does not require the notification center to submit the report by any particular deadline. Accordingly, the 30-day requirements of Mont. Code Ann § 69-4-529(1)(a) cannot be a bar to the Department's duty to assess civil penalties in this matter.

Western Municipal also argues that the Department's interpretation of the statute indicating that the incident reporting requirement is more important than the notice to the excavator provision is incorrect. While it is not necessary to resolve this issue for purposes of this decision, it does appear the Department's position is supported by the language of the statute. The Legislature, in Mont. Code Ann. § 69-4-529(5), penalizes an underground facility owner for failure to file an incident report. The Legislature provided no such penalty for failure to notify the excavator of the report of the incident.

IV. CONCLUSIONS OF LAW

An underground facility owner's failure to comply with the requirements of Mont. Code Ann. § 69-4-529(1)(a) does not limit the Department's authority to issue a civil penalty pursuant to Mont. Code Ann. § 69-4-524.

V. ORDER

This matter is dismissed with prejudice.

DATED this 27th day of March, 2019.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. *See* Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

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Legal Unit
P.O. Box 1728
Helena, MT 59624-1728