

South Dakota One Call Notification Board



Larry Englerth
Executive Director

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November 16, 2004

Wes Johnson dba
Create-A-Scape Landscaping
1323B Sidney Drive
Rapid City, SD 57701

Mr. Thomas G. Fritz, Attorney at Law
Lynn, Jackson, Shultz & Lebrun, P.C.
P. O. Box 8250
Rapid City, SD 57709-8250

Dear Sirs:

Enclosed is a revised copy of the Notice of Entry of Order for Docket OC04-003. The previously mailed Order did not have the proper signature for the Chairman, Kevin Kouba.

The enclosed order supersedes the previously mailed Order. The only change to this Order is that November 16th has become the official date of this Order.

Sorry for any inconvenience this may have caused.

Sincerely,

Larry L. Englerth
Executive Director

**BEFORE THE SOUTH DAKOTA
ONE-CALL NOTIFICATION BOARD**

IN THE MATTER OF THE COMPLAINT FILED)	FINDINGS OF FACT AND
BY MONTANA-DAKOTA UTILITY CO.)	CONCLUSIONS OF LAW;
AGAINST WESLEY JOHNSON REGARDING)	NOTICE OF ENTRY OF
FAILURE TO PROVIDE NOTIFICATION OF)	ORDER
PROPOSED EXCAVATION AS REQUIRED BY)	
SDCL 49-7A-5 AND A FAILURE TO PROPERLY)	OC04-003
EXPOSE A MARKED UNDERGROUND UTILITY)	
LINE AS REQUIRED BY SDCL 49-7A-8)	
)	

On April 16, 2004, pursuant to SDCL 49-7A-17, the South Dakota One-Call Board (Board) received a complaint filed by Montana-Dakota Utilities Co. of Rapid City, South Dakota (MDU), against Wesley Johnson, the owner of CreateAScape Landscaping, Rapid City, South Dakota (Johnson). According to the complaint, Johnson severed a natural gas distribution pipeline owned by MDU while excavating. The complaint alleged that Johnson: 1) failed to notify the one-call center before excavating in violation of SDCL 49-7A-5 and 2) failed to hand-dig and expose the natural gas facility in violation of SDCL 49-7A-8.

Pursuant to SDCL 49-7A-23 and 49-7A-24, a copy of the complaint was forwarded to Johnson via certified mail sent on April 27, 2004, advising him that he must file an answer in writing by May 21, 2004. Return receipt indicates that Johnson signed for the notice on April 29, 2004. On May 26, 2004, an answer was filed by Johnson. Pursuant to SDCL 49-7A-22, a five member panel (Panel) was appointed by Kevin Kouba, Chairman of the Board, for the purpose of determining whether there was probable cause to believe there had been a violation of any statute or rule of the Board. The Panel met on June 2, 2004. Pursuant to SDCL 49-7A-25, based on the complaint filed by MDU and the answer filed by Johnson, the Panel determined by unanimous vote that there was probable cause to find that there had been violations of the statutes as alleged in the complaint.

With regard to the alleged violation of SDCL 49-7A-5, the Panel found that there was probable cause to conclude that Johnson had violated SDCL 49-7A-5 by commencing excavation without providing the required notice to the South Dakota One-Call Notification Center. Pursuant to SDCL 49-7A-18 and 49-7A-26, the Panel recommended a penalty of five hundred dollars (\$500.00) with three hundred dollars (\$300.00) suspended on the basis that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months following acceptance of resolution of Complaint OC04-003(A). With regard to the alleged violation of SDCL 49-7A-8, the Panel found that there was probable cause to conclude that Johnson had violated SDCL 49-7A-8 by failing to properly expose a marked underground utility line. Pursuant to SDCL 49-7A-18 and 49-7A-26, the Panel recommended a penalty of one thousand dollars (\$1000.00) with four hundred dollars (\$400.00) suspended on the basis that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months following acceptance of resolution of Complaint OC04-003(B).

Pursuant to SDCL 49-7A-27, a copy of the Panel's recommendations was sent to the parties. On June 8, 2004, the Board received an acceptance of the Panel's recommendations from MDU. On June 23, 2004, the Board received a rejection of the Panel's recommendations and a request for a hearing from Johnson.

A hearing was held as scheduled on September 15, 2004, at 1:00 p.m. (CDT) in Conference Room A at the Holiday Inn Express located at 110 East Stanley in Fort Pierre, SD. The issues at the hearing were: 1) whether Johnson violated SDCL 49-7A-5 by commencing excavation without providing advance notification to the one-call center; and 2) whether Johnson violated SDCL 49-7A-8 by failing to properly expose a marked underground utility line. Also at issue was whether penalties should be imposed by the Board pursuant to SDCL 49-7A-18 and/or 49-7A-19, and, if so, what those penalties should be. At the end of the hearing, the Board took the matter under advisement.

Pursuant to its order issued September 23, 2004, the Board set October 4, 2004, as the date the Board would vote on a decision regarding this matter. The members participating by teleconference were Jerry Schroeder, Todd Chambers, Rod Cundy, Paul Lowe, Pat Gilligan, Gene Solseth, Steve Lehner, Ed Anderson, and Doug Larson. The Board members voted as follows: 1) Johnson violated SDCL 49-7A-5 by failing to provide notification required and violated SDCL 49-7A-8 by failing to maintain a minimum horizontal clearance of 18 inches by any marked facility and the cutting edge of his mechanical equipment (Cundy, abstaining); 2) for violation of 49-7A-5, Johnson is assessed a penalty in the amount of \$500.00, with \$150.00 suspended on the condition that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months from October 4, 2004, and for the violation of SDCL 49-7A-8, Johnson is assessed a penalty in the amount of \$1000.00, with \$250.00 suspended on the condition that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months from October 4, 2004 (Cundy, abstaining; Solseth, Lowe, and Anderson, dissenting).

Having considered the evidence of record and applicable law, the Board makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

1. Montana-Dakota Utilities (MDU) filed a complaint with the South Dakota One-Call Board against Wesley Johnson, the owner of CreateAScape Landscaping, Rapid City, South Dakota (Johnson). Exhibit 1. According to the complaint, Johnson severed a natural gas distribution pipeline owned by MDU while excavating. *Id.* The complaint alleged that Johnson: 1) failed to notify the one-call center before excavating in violation of SDCL 49-7A-5; and 2) failed to hand-dig and expose the natural gas facility in violation of SDCL 49-7A-8. *Id.*
2. Jim Mann, region gas superintendent for MDU, stated that MDU received a call on January 20, 2004, that there was gas blowing at 7137 Prestwick in Rapid City. TR. at 7. He stated that Johnson had been excavating with a skid steer loader and severed a 3/4 inch natural gas service line operating at 30 psi. *Id.* at 7. MDU sent a construction crew to the site. *Id.* at 13.
3. Mann stated that MDU's contract locators could not produce a ticket for Johnson at that address. TR. at 8. Mann further stated that MDU keeps copies of its locate tickets and MDU had no record of a locate. TR. at 9.
4. Josh Sanders, a gas fitter operator for MDU, was part of the construction crew that responded to the pipeline cut. TR. at 20. He stated that he investigated the site and shut off the blowing gas. *Id.* Sanders testified that the gas pipeline was completely severed and was sticking out three or four feet on the upstream side and two to three feet on the downstream side. TR. at 22. Sanders testified that it appeared that Johnson had skimmed the top of the pipe for two or three feet and then severed the pipe when the pipe started to curve up the embankment. TR. at 31-32.

5. Sanders further stated that Johnson had been setting large cement retaining blocks and was leveling off a spot with a skid steer loader. TR. at 23. He stated that the "dirt line on the side of the foundation of the home showed that there was probably 18 to 24 inches of dirt removed from the side hill." TR. at 23. He stated that Johnson told him that Johnson needed the gas line to be another six to eight inches deeper. TR. at 21. Sanders and the rest of his crew hand dug a deeper trench, spliced a piece of pipe, and backfilled the trench. *Id.*

6. Sanders testified that there was a yellow mark three to five feet from where the pipeline had been severed. TR. at 24-25. He stated the marking was very faint and barely visible and thought it was from a previous locate. TR. at 29.

7. Scott Erhart, a witness for Johnson, stated that Johnson was digging no more than two inches deep. TR. at 34. He stated that after the pipe was severed there was no more than a foot of the pipe out of the ground on both sides and the pipe was not moving. TR. at 34-35. He stated that there may have been some excavation prior to the pipe being severed. TR. at 37.

8. Johnson testified that he was just scraping off a half inch to one inch of dirt to make it level when the pipe was severed. TR. at 39-40. He stated that he was not digging but was just pushing dirt. TR. at 43. After he severed the pipeline, he backed up the skid loader, shut it off, and called the one-call center, the fire department, and MDU. TR. at 40. Johnson stated that the gas line was clearly marked and there were flags. *Id.* He said he knew the gas line was right there but he did not think it was that close to the surface. *Id.*

9. Johnson stated that he did not notify the one-call center because the homeowner stated he would make the call. TR. at 45.

10. Johnson disputed the testimony of Sanders in which Sanders asserted that it looked like dirt had been removed by the side of the house 18 to 24 inches. TR. at 51-52.

11. The Board finds that Johnson did not notify the one-call notification center of the proposed excavation as required by SDCL 49-7A-5. Although Johnson stated that the homeowner had called, the statute requires the excavator to notify the one-call notification center. See SDCL 49-7A-5. In addition, there was also testimony that the marks appeared to be older markings. TR. at 29.

12. The Board finds that Johnson did not use hand tools or noninvasive methods when excavating within eighteen inches horizontally between a marked underground facility and the cutting edge of mechanical equipment as required by SDCL 49-7A-8. Johnson stated that he knew the gas pipeline was there but that he thought it was deeper. TR. at 40. Although Johnson stated he was just scraping off a half inch to one inch of dirt to make it level when the pipe was severed, this still meets the definition of excavating. See SDCL 49-7A-1(3).

13. For the violation of SDCL 49-7A-5, the Board assesses a penalty in the amount of \$500.00, with \$150.00 suspended on the condition that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months from October 4, 2004.

14. For the violation of SDCL 49-7A-8, the Board assesses a penalty in the amount of \$1000.00, with \$250.00 suspended on the condition that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months from October 4, 2004.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to SDCL Chapter 49-7A, including 49-7A-2, 49-7A-4, 49-7A-5, 49-7A-8, 49-7A-10, 49-7A-12, 49-7A-17 through 49-7A-27, inclusive, and SDCL Chapter 1-26.
2. SDCL 49-7A-5 provides, in part, that "[n]o excavator may begin any excavation without first notifying the one-call notification center of the proposed excavation." Johnson admitted that he did not notify the one-call notification center. See Finding of Fact 9.
3. Pursuant to SDCL 49-7A-8, excavators are required to "maintain a minimum horizontal clearance of eighteen inches between a marked underground facility and the cutting edge of any mechanical equipment." The statute further provides that "[i]f excavation is required within eighteen inches, horizontally, the excavator shall expose the facility with hand tools or noninvasive methods approved pursuant to rule and shall protect and support the facility prior to further excavation with mechanical equipment." Excavation is defined as "any operation in which earth, rock, or other material in or on the ground is moved or otherwise displaced by means of tools, equipment, or explosives, and includes grading, trenching, digging, ditching, drilling, augering, tunneling, *scraping*, and cable or pipe plowing or driving. . . . SDCL 49-7A-1(3) (emphasis added). Under these statutes, even scraping the dirt is considered to be excavation and an excavator must use hand digging or other noninvasive methods when within 18 inches, horizontally, of a marked underground facility. Johnson admitted that he was scraping dirt and that he knew the gas pipeline was there. See Finding of Fact 8.
4. Pursuant to SDCL 49-7A-18, the Board may assess a penalty of up to one thousand dollars for a violation of SDCL 49-7A-5 or 49-7A-8. In addition, each violation is a separate offense. SDCL 49-7A-20.
5. The Board finds that Johnson violated SDCL 49-7A-5 by not notifying the one-call notification center of the proposed excavation. See Finding of Fact 11.
6. The Board finds that Johnson violated SDCL 49-7A-8 by not using hand tools or noninvasive methods when excavating within eighteen inches horizontally between a marked underground facility and the cutting edge of mechanical equipment. See Finding of Fact 12.
7. For the violation of SDCL 49-7A-5, the Board assesses a penalty in the amount of \$500.00, with \$150.00 suspended on the condition that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months from October 4, 2004.
8. For the violation of SDCL 49-7A-8, the Board assesses a penalty in the amount of \$1000.00, with \$250.00 suspended on the condition that Johnson fully comply with SDCL Chapter 49-7A and ARSD Article 20:25 for twelve months from October 4, 2004.

It is therefore

ORDERED, that the Board finds that Johnson violated SDCL 49-7A-5 and 49-7A-8; and it is

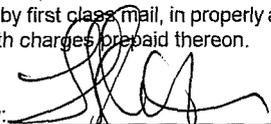
FURTHER ORDERED, that the Board assesses the penalties as set forth above and

Johnson shall pay the penalties within 30 days from receipt of this Order.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 9th day of November, 2004. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

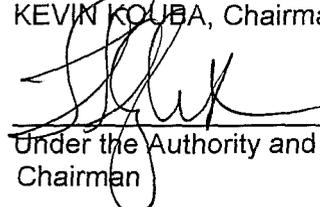
Dated at Sioux Falls, South Dakota, this 16thth day of November, 2004.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	
Date:	11/16/2004
(OFFICIAL SEAL)	

BY ORDER OF THE SOUTH DAKOTA
ONE-CALL BOARD

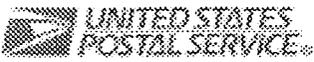


KEVIN KOUBA, Chairman



Under the Authority and on Behalf of the
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LARRY ENGLERTH, Executive Director



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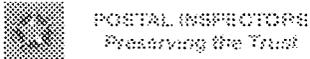
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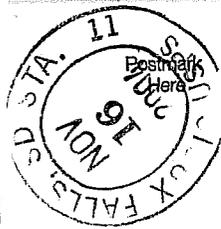
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