

SOUTH DAKOTA ONE CALL BOARD
OFFICE OF HEARING EXAMINERS
PIERRE, SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT)
FILED BY RCS CONSTRUCTION, RAPID)
CITY, SD AGAINST MONTANA DAKOTA)
UTILITIES, RAPID CITY, SD, FOR AN)
INCIDENT OCCURRING ON NOVEMBER 3,)
2020, AT CANYON STREET IN LEAD,)
DEADWOOD, SD.)

OC20-089

OHE 21-05

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The above matter came on for hearing before the South Dakota One Call Board (“Board”) and Office of Hearing Examiners on May 20, 2021, via Zoom. RCS Construction, Inc. (“RCS”), appeared personally and by counsel Jason M. Smiley of Gunderson, Palmer, Nelson & Ashmore, LLP, Rapid City, South Dakota. Montana Dakota Utilities Co (“MDU”) appeared personally and by counsel Lindsay Riter-Rapp of Riter Rogers Law Office, Pierre, South Dakota.

The Board having heard all of the testimony and having considered the exhibits and all of the files and records herein including the arguments of counsel, now hereby makes and enters the following Findings of Fact and Conclusions of Law.

Any Finding of Fact which may be deemed to be a Conclusion of Law and vice versa shall be appropriately incorporated into the Findings of Fact and Conclusions of Law as the case may be.

FINDINGS OF FACT

1. RCS is a contractor from Rapid City, South Dakota.
2. MDU is a regulated utility company providing services in South Dakota.
3. ELM Utility Services (“ELM”) is the locating service hired by MDU to locate its utilities.

4. RCS had planned excavation work as part of a waterline project in Lead, South Dakota in October of 2020.
5. RCS submitted a locate ticket to 811 on October 27, 2020. See RCS Exhibit 1 (“Original Locate Ticket”).
6. The Original Locate Ticket stated a meeting time of October 29, 2020 at 4:00 pm.
7. The purpose of the meeting was to inform the responding utility companies of the work area for RCS so that the utilities could be located in the area.
8. The Original Locate Ticket stated a start work date of November 2 at 2:00 pm.
9. Joel Williams, project superintendent for RCS, met with other responding utility companies at the date and time set for the meeting; however, neither MDU nor ELM attended the meeting.
10. Jessica Meyers and Kenneth Kaufman are employees of ELM.
11. Jessica Meyers called Joel Williams on November 2, 2020, at approximately 2:00 pm to discuss the work area. Joel Williams was not on the job site at the time, but he offered to meet her on the job site. Jessica Meyers declined the meeting because she believed that she had sufficient information to mark MDU’s utilities in the work area without a meeting.
12. Jessica Meyers relied upon information provided by another utility provider to determine the work area and not the information provided by RCS.
13. The Original Locate Ticket included a map of the work area; however, ELM’s technology does not make maps available to its field personnel.
14. Jessica Meyers and Kenneth Kaufman attempted to mark the location of MDU’s utilities at the RCS worksite on November 2, 2020; however, they missed marking one of MDU’s utilities.

15. Jessica Meyers and Kenneth Kaufman did not mark a 4” MDU gas line in RCS’s work area. See RCS exhibits 3, 4, 5, and 6.

16. Jessica Meyers and Kenneth Kaufman completed their work at approximately 2:15 pm on November 2, 2020. See MDU Exhibit 4.

17. RCS filed a verification ticket with 811 on November 3, 2020 when it discovered that MDU had not marked the 4” gas line in the work area. See RCS Exhibit 2 (“Verification Ticket”).

18. Jessica Meyers responded to the Verification Ticket on November 3, 2020.

19. Jessica Meyers explained to Joel Williams when responding to the Verification Ticket that she was relying upon maps provided to ELM by MDU in performing the location services, and that those maps were in error. See RCS Exhibit 6.

20. The RCS work area did not include any high-profile underground facilities. See MDU Exhibit 5.

21. The testimony of Joel Williams was credible.

22. The testimony of Evan Walterman was credible.

23. RCS filed a complaint against MDU on November 24, 2020.

24. MDU received notice of the complaint on November 24, 2020, and filed an answer denying the claim on December 15, 2020.

25. On December 17, 2020, the Enforcement Panel (herein “Panel”) convened pursuant to the authority present in SDCL § 49-7A. The Panel found probable cause that an unintentional violation of SDCL § 49-7A-8 occurred.

26. The Panel recommended a penalty of \$3,000 with \$1,500 suspended upon the conditions listed below. The conditions for the suspended penalty are as follows:

1. Respondent must not be found guilty of a One-Call violation within 12 months of the Board Order.
2. The penalty payment of **\$1,500** must be made to **South Dakota One Call Notification Board, P.O. Box 187, Rapid City, SD 57709**.
3. Respondent must attend a Damage Prevention meeting in 2021.
4. Respondent must conduct an in-house safety meeting to discuss South Dakota One Call laws. Detail of the discussion material, date, and length of the meeting along with printed and signed names of attendees will be submitted to the Executive Director of South Dakota One Call within thirty (30) days of the Board Order being issued.
5. Respondent will arrange a face-to-face meeting with Claimant to review the damage, dangers while working around utilities, and safe practices. This meeting is to take place within thirty (30) days of the Board Order being issued.

If any of the above conditions are not met, the suspended penalty (**\$1,500**) becomes immediately due and payable to **South Dakota One Call Notification Board, P.O. Box 187, Rapid City, SD 57709**.

CONCLUSIONS OF LAW

1. The South Dakota One Call Notification Board has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-7A and ARSD 20:25 (“Applicable Laws”).
2. MDU is responsible to locate its utilities in compliance with the Applicable Laws.
3. One of the Applicable Laws is SDCL § 49-7A-8, which provides:

An operator shall, upon receipt of the notice, advise the excavator of the location of underground facilities in the proposed excavation area by marking the location of the facilities with stakes, flags, paint, or other clearly identifiable marking within eighteen inches horizontally from the exterior sides of the underground facilities. The board shall promulgate rules, pursuant to chapter 1-26, to establish the response time for operators to mark the underground facilities. The response time shall be no later than forty-eight hours after the receipt of the notice, excluding Saturdays, Sundays, and legal holidays of the state or the excavation start time provided by the excavator, whichever is later. The response time may be less than forty-eight hours for emergency or subsequent inquiries to the original locate request and may be longer than forty-eight hours for nonexcavation requests. Excavators shall maintain a minimum horizontal clearance of eighteen inches between a marked underground facility and the cutting edge of any mechanical equipment. If 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.

4. One of the Applicable Laws Provides:

If it is impractical to flag, mark, or describe an excavation site the following procedures shall be followed:

- (1) An excavator may request an appointment from the one-call notification center for the purpose of meeting the operator at the excavation site. These meetings shall occur only between 9:00 a.m. and 4:00 p.m. local time and appointments for this may be scheduled not less than two business days from the time of the call;
- (2) If appointment requests do not identify the excavation site, the excavator shall identify the excavation site as required in § 20:25:03:04, 20:25:03:04.01, or 20:25:03:04.02 in writing, at the time of the appointment; and
- (3) If the excavation site is not identified on the ticket, the operator shall complete the marking within 48 hours of the conclusion of the appointment.

SDAR § 20:25:03:09

5. MDU violated the Applicable Laws when it failed have its gas line marked within RCS's work area within 48 hours of the Original Locate Ticket.

6. The Original Locate Ticket included an appointment request of 4:00 pm on October 29, 2020.

7. The Original Locate Ticket also included sufficient information to describe RCS's work area by the inclusion of the attached map.

8. MDU's agent, ELM, failed to attend the appointment request meeting on MDU's behalf and failed to obtain other available information regarding the work area, specifically the map.

9. After failing to attend the meeting, ELM declined RCS's offer to meet it onsite to show it the work area, and instead relied upon information from an unauthorized source to establish the work area.

10. MDU's agent, ELM, determined that an onsite meeting was not necessary.

11. MDU's agent, ELM, violated the applicable laws by failing to mark the MDU gas line in RCS's work area within 48 hours of the meeting.

12. One of the Applicable Laws is § 49-7A-18, which provides:

Except as provided in § 49-7A-19 and in addition to all other penalties provided by law, any person who violates or who procures, aids, or abets in the violation of § 49-7A-2, 49-7A-5, 49-7A-8, or 49-7A-12, or any rules promulgated pursuant to § 49-7A-2, 49-7A-5, or 49-7A-8 may be assessed a penalty of up to one thousand dollars for the first violation and up to five thousand dollars for each subsequent violation that occurs within twelve months of the initial violation.

13. The decision of the Panel as noted above is upheld, incorporated, and adopted by reference as if fully set forth herein.

IT IS SO ORDERED.

Dated this 14th day of September 2021.

DocuSigned by:
Fay Jandreau
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Fay Jandreau
Board Chairman

CERTIFICATE OF SERVICE

I certify that on September 14th, 2021, a true and correct copy of this Findings of Fact, Conclusions of Law, and Order of Dismissal was mailed and e-mailed to each party listed below.

Codi M. Gregg

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