

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

KSP Enterprises, Inc.,

Respondent.

OSHRC Docket No. **13-0647**

Appearances:

Lydia J. Chastain, Esquire, U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Complainant

Andrew N. Gross, Esquire, HB Training & Consulting., Lawrenceville, Georgia
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

KSP Enterprises, Inc., (KSP) is a family-owned business in Auburn, Georgia, engaged in landscaping and underground construction. On February 5, 2013, a Compliance Safety and Health Officer (CSHO) from the Occupational Safety and Health Administration (OSHA) conducted an inspection of a KSP worksite in Norcross, Georgia. As a result of the inspection, the Secretary issued a one-item Citation and Notification of Penalty to KSP on March 14, 2013, alleging a willful violation of 29 C.F.R. § 1926.652(a)(1), for failing to provide cave-in protection for employees working in an excavation. The Secretary proposed a penalty of \$11,000.00 for this item.

KSP timely contested the Citation and Notification of Penalty. A hearing was held in this matter on December 3, 2013, in Atlanta, Georgia. The parties filed post-hearing briefs on February 21, 2014. KSP denies the Commission has jurisdiction over this proceeding because, it claims, KSP had no employees at the time of the inspection. KSP's position is that it was not, therefore, an employer within the meaning of the Occupational Safety and Health Act of 1970 (Act).

For the reasons that follow, it is determined that KSP was an employer within the meaning of the Act at the time of the inspection. The Commission has jurisdiction over this proceeding. Item 1 of the Citation is AFFIRMED as willful and a penalty of \$11,000.00 is assessed.

BACKGROUND

On February 5, 2013, CSHO Lynne Bollinger was driving on Holcomb Bridge Road in Norcross, Georgia, when she spotted a pile of dirt by the side of the road. She noticed a person's head emerging from what turned out to be an excavation next to the roadway. After parking her vehicle, the CSHO approached the excavation on foot. She observed a man standing at the edge of the excavation, speaking to someone below. When the CSHO got closer, she realized there were actually two men in the excavation. A fourth man was also on the site, next to KSP's work truck. The CSHO took photographs of the site, held an opening conference, took measurements and a soil sample, and interviewed the two men in the excavation, as well as the man she observed standing next to it (Tr. 30-33).

The man the CSHO had first observed in the excavation was Dale Overstreet, owner of Overstreet Construction (Tr. 34). Overstreet Construction had hired KSP to help locate and repair a leak in a residential waterline (Tr. 40). KSP is owned by Kenneth (Ken) Earl Pruett, his wife Mary Pruett, and their son Kenneth Shad Pruett, who goes by Shad (Tr. 161). Shad Pruett was the man the CSHO observed standing at the edge of the excavation as she approached the worksite. The second man in the excavation was Richard (Ricky) Delk (Delk is married to Ken Pruett's sister). The fourth man she saw by the work truck was identified only as Bob (Tr. 32-33).

Dale Overstreet identified himself as the owner of Overstreet Construction. He had no other employees (Tr. 60). The CSHO interviewed Shad Pruett and Delk. She wrote down their answers in narrative form and then gave the statements to each of them to review. Shad Pruett and Delk signed their respective statements (Exhs. C-11 and C-13).

In his statement, Shad Pruett identified himself as KSP's foreman on the site and stated KSP had three employees onsite and four employees overall (the fourth employee is Ken Pruett, Shad's father (Tr. 50)) (Exh. C-11). Delk told the CSHO that his title at the worksite was "operator and everything." He stated, "Shad is my foreman. . . . Bob is the third guy in the crew.

He was handing tools and going to the truck. He was a gopher. He has worked for the Company 6-8 months” (Exh. C-13).

The morning of the inspection, Delk drove over to Shad Pruett’s house. Delk then rode along with Shad Pruett in KSP’s truck to the worksite. Delk brought no tools with him and provided no equipment for use at the worksite (Tr. 163). Using KSP’s excavator, Shad Pruett dug out half of the excavation and then Dale Overstreet dug out the other half. The men wanted to locate the underground telephone line before repairing the waterline, but they were having trouble doing so. Shad Pruett had joined Dale Overstreet and Delk in the excavation prior to the CSHO’s arrival, looking for the telephone line (Tr. 163-164). They had not found the line at the time of the inspection (Exh. C-11).

The CSHO inspected the excavation. Its walls were nearly vertical. The CSHO used a trench rod to measure the excavation and found it to be 6.7 feet deep (Tr. 38, 40). The lab results for the soil sample the CSHO took identified the soil as Type B (Exh. C-8; Tr. 38). KSP provided no form of cave-in protection in the excavation. It did not have a trench box onsite (Tr. 40).

The CSHO held a closing conference with Dale Overstreet and Shad Pruett together (Tr. 59). She informed them she would recommend that the Secretary issue citations to both Overstreet Construction and KSP. She explained that Dale Overstreet was technically an employee of Overstreet Construction, but since he was the company’s only employee (as well as the owner), she was uncertain whether the Secretary would cite the company. Shad Pruett did not take that opportunity to assert Delk was not an employee of KSP (Tr. 60).

Upon the CSHO’s recommendation, the Secretary cited Overstreet Construction and KSP each for violating § 1926.652(a)(1). The Secretary subsequently deleted the Citation and Notification of Penalty issued to Overstreet Construction (Tr. 60-61, 65-66). Dale Overstreet informed Ken Pruett that the Secretary deleted the Citation because his company did not have any employees and “[t]hat’s why he got out of it” (Tr. 170).

JURISDICTION AND COVERAGE

The issues of jurisdiction and coverage have become muddled in this proceeding. In Paragraph I of the Complaint, the Secretary asserts, “Jurisdiction of this action is conferred upon the Commission by § 10(c) of the Act.” KSP responded in Paragraph I of its Answer, “Respondent admits the allegations of this paragraph as to jurisdiction.” Paragraph II of the

Secretary's Complaint states, "Respondent, KSP Enterprises, Inc., is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act." To that assertion, KSP replied in Paragraph II of its Answer, "Respondent denies each and every allegation of this paragraph."

At the hearing, KSP's counsel stated, "[W]e are challenging jurisdiction," based on KSP's contention that "there were no employees" working for KSP at the time of the inspection (Tr. 11). When reminded that KSP had admitted jurisdiction in its Answer, KSP's counsel responded, "I would like to amend the Answer to challenge jurisdiction" (Tr. 12). The Secretary's counsel objected on the basis of undue prejudice (Tr. 13). The undersigned granted KSP's motion to amend its Answer to deny jurisdiction (Tr. 13).

KSP's counsel then asserted it also was denying that KSP was engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 13). At the start of the hearing, the parties had adduced a document captioned Joint Stipulations, which lists nineteen stipulated facts. Paragraph 4 of the Joint Stipulations states, "Respondent is in a business affecting commerce" (Exh. J-1; Tr. 16). Section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees." The Secretary's counsel reminded KSP's counsel that KSP had already stipulated that it is in a business affecting commerce. KSP's counsel responded, "Oh, yeah. Yeah, it was a business—I'm just confused, Your Honor. . . . For purposes of the statement, yes, but not for purposes of having employees" (Tr. 14). The undersigned sought clarification of KSP's position: "I want to be sure that the record is clear, that Respondent denies jurisdiction, that the Occupational Safety and Health Review Commission has jurisdiction of this proceeding, but Respondent does not deny it is an employer engaged in a business affecting interstate commerce." KSP's counsel replied, "That is correct, Your Honor" (Tr. 15).

The undersigned determines that the issue in dispute is coverage, not jurisdiction. KSP timely contested the Citation and Notification of Penalty. "It is well established . . . that a timely notice of contest establishes jurisdiction with the Commission." *Sharon & Walter Const., Inc.*, 23 BNA OSHC 1286, 1288, n. 2 (No. 00-1402, 2010). The Commission has held "that whether an entity is an employer under the OSH Act is not a question of jurisdiction, but of coverage. . . . See *Arbaugh v. Y&H Corp.*, 126 S.Ct. 1235, 1244 (2006) (definitional issues are issues of coverage, not jurisdiction; Title VII employee-numerosity requirement is issue of coverage, not

jurisdiction).” *StarTran, Inc.*, 21 BNA OSHC 1730, 1732 (No. 02-1140, 2006), *aff’d in relevant part*, 290 Fed. Appx. 656 (5th Cir. 2008) (unpublished).

The undersigned concludes the Commission has jurisdiction in this proceeding under § 10(c) of the Act and KSP is engaged in a business affecting commerce under § 3(5) of the Act. The question before the court is whether KSP had employees at the time of the OSHA inspection.¹

The answer is yes. KSP is operating under the mistaken assumption that family members are not employees of a family-owned business. The Commission long ago established that any member of a family owning a business who performs work for that business as an employee would perform it is covered under the Act. “Coverage of family members is implied by 29 CFR 1975.3, which states that the legislative history clearly indicates that no employees were to be exempted from the provisions of the Act.” *Howard M. Clauson Plastering Co.*, 5 BNA OSHC 1760 (No. 76-2669, 1977).

Shad Pruett testified he dug out half of the excavation at the Holcomb Bridge Road worksite. He ventured into the excavation along with Dale Overstreet and Delk to help locate the telephone line (Tr. 163-164). Under these circumstances, Shad Pruett was an employee, as well as a co-owner, of KSP. A single employee is sufficient to bring the company within the purview of the Act. Section 1975.4(a) provides:

Any employer employing one or more employees would be an “employer engaged in a business affecting commerce who has employees” and, therefore is covered by the Act as such.

See also, Don Davis d/b/a Davis Ditching and Davis Ditching, Inc., 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001) (“The bare minimum of one single employee is sufficient to invoke coverage under the Act. *Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1727, 1979 CCH OSHD ¶ 23,888 (No. 76-4026, 1979)”).

Proceeding under the misconception that a family member is not an employee of a business despite performing the work of an employee, KSP sought at the hearing to establish it had no non-family employees that might jeopardize its presumed status as a non-employer. This strategy required KSP to dispense with the inconvenient Bob. When the CSHO arrived at the

¹ Despite KSP’s confusion regarding admissions, denials, and stipulations on the jurisdiction/coverage issue, KSP’s essential position was clear throughout this proceeding. The parties fully litigated the issue of whether KSP had employees at the time of the inspection and addressed the issue in their respective briefs. The Secretary has not been prejudiced by KSP’s confusion regarding the issues of jurisdiction and coverage.

worksite, she encountered four men: Dale Overstreet, Shad Pruett, Richard Delk, and a young man identified as Bob (Tr. 33-34). Shad Pruett told the CSHO that KSP had three employees on the site (this count excludes Dale Overstreet) (Exh. C-11; Tr. 34). Delk told the CSHO, “Bob is the third guy in the crew” (Exh. C-13).

At the hearing, KSP edited its employment history by disavowing any knowledge of Bob’s existence. Ken Pruett testified KSP had no employees in 2013 (Tr. 133). Shad Pruett’s memory regarding the details of the OSHA inspection that had occurred just ten months earlier proved faulty:

Q. [W]ho did you mean when you said there were three KSP employees onsite?

Shad Pruett: I don’t know who I meant, but I never said—I never said Ricky and I never said a Bob.

Q. But you did tell [the CSHO] that there were three KSP employees on the worksite?

Shad Pruett: That’s what the paper says.

(Tr. 166-167).

Q. Now, you’ve got a number of employees on the site, three. Who are those three?

Shad Pruett: Like I said, I don’t—I know—as far as I can remember, I remember me and—me, Ricky and Overstreet out there. That’s all I can remember.

Q. Do you know anybody named Bob who has worked for you in the recent past?

Shad Pruett: As far as I can remember, I can’t recall anybody named Bob.

Q. So you don’t recall anybody named Bob who either worked with you or for you? And by you I mean KSP Enterprises.

Shad Pruett: No, sir, I don’t remember.

Q. Was there a time that there were tools needed while Rick was in there—or Mr. Overstreet were in the trench.

Shad Pruett: Yes, sir.

Q. Who would go get the tools?

Shad Pruett: Overstreet would go get the tools, I, myself went and got the tools.

(Tr. 177-178). Shad Pruett’s testimony contradicts his statement signed on February 5, 2013: “I generally handle the equipment and *one of the crew* handles the tools and one works in hole” (Exh. C-11, emphasis added). During the inspection, Delk told the CSHO that Bob handled the tools: “He was handing tools and going to the truck. He was a gopher. He has worked for the Company 6-8 months” (Exh. C-3).

The undersigned credits the CSHO's testimony that she observed a fourth man on the site named Bob, whom Shad Pruett and Delk both identified as a KSP employee. Delk's signed statement describing Bob's duties for KSP, taken contemporaneously during the OSHA inspection, is also credited. Shad Pruett's testimony that he "can't recall anybody named Bob" is rejected as a transparent attempt to make it appear KSP had no employees on the site that day (under the incorrect assumption that Shad Pruett was not an employee and that Delk was an independent contractor).

It is determined that KSP had at least two employees (Shad Pruett and Bob) onsite the day of the OSHA inspection. KSP was, therefore, an employer "engaged in a business affecting commerce who has employees" within the meaning of § 3(5) of the Act. Coverage is established. Whether Delk was one of those employees is discussed below.

THE CITATION

Item 1: Alleged Willful Violation of § 1926.652(a)(1)

Item 1 of the Citation alleges:

On or about February 5, 2013, an employee was exposed to struck-by hazards when the employee was working in an excavation approximately 6.7 feet deep with no cave-in protection.

Section 1926.652(a)(1) provides:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

...

(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Elements of a Violation

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

If it is determined that Delk was an employee of KSP at the time of the OSHA inspection, the elements of the alleged § 1926.652(a)(1) violation are not in dispute.²

(1) Applicability of the Cited Standard

Section 1926.652(a)(1) appears in “Subpart P—Excavations” of the 1926 Construction Standards. Section 1926.650(a) provides that Subpart P “applies to all open excavations made in the earth’s surface. Excavations are defined to include trenches.” Here, KSP dug an excavation in the earth’s surface next to Holcomb Bridge Road in Norcross, Georgia. The cited standard applies.

(2) Noncompliance with the Terms of the Standard

The excavation was 6.7 feet deep and dug in Type B soil. The walls were nearly vertical. KSP provided no cave-in protection in the excavation (Exh. J-1, ¶¶ 8 through 11; Tr. 36-41). KSP failed to comply with the terms of § 1926.652(a)(1).

(3) Employee Exposure

Shad Pruett and Richard Delk (as well as Dale Overstreet) were in the unprotected excavation on February 5, 2013 (Tr. 31-32, 164, 194-195). They were exposed to cave-in hazards.

(4) Knowledge

While KSP does not stipulate that it was aware of the violative activity, the record firmly establishes KSP knew the excavation was unsafe. Shad Pruett is one of the co-owners of KSP. He was also the foreman on the site. He helped dig the excavation. The CSHO observed him standing at the edge of the excavation, talking to Dale Overstreet and Delk as they worked in it. Anyone viewing the men as they worked in the excavation could tell the walls of the excavation exceeded 5 feet and were nearly vertical. There was no trench box in the excavation (Exhs. C-1 through C-7; Tr. 61). Shad Pruett’s actual knowledge of the unsafe condition of the excavation and the presence of himself and Delk in the excavation is imputed to KSP. *ComTran Group, Inc.*, 722 F.3d 1304, 1317 (11th Cir. 2013) (Supervisor’s knowledge of a subordinate’s misconduct is imputable to the employer).

The remaining issue is whether Delk was an employee of KSP at the time of the inspection.

² Paragraph 19 of the Joint Stipulations states, “If the Court finds that Respondent is the ‘employer’ of Richard Delk, Respondent admits that: (1) the cited standard applies to Respondent if it is an employer; (2) Richard Delk, if he is an employee of Respondent, was exposed to the cited hazard” (Exh. J-1).

Shad Pruett and Richard Delk Admitted KSP Was Delk's Employer

“[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.” *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005). The undersigned concludes KSP was Delk's employer based on the signed statements given by Shad Pruett and Delk to the CSHO on February 5, 2013. Shad Pruett and Delk each told the CSHO that Delk worked for KSP and that Pruett was Delk's foreman on the site. The CSHO wrote down this information in separate statements and then gave each man his statement to review. Pruett and Delk then each signed his statement. The statements constitute strong probative evidence that KSP was Delk's employer the day of the inspection.

KSP attempts to undercut this evidence by erecting a straw man argument:

A favorite tactic of the Secretary is to brandish these written statements at Hearings, contending that they are voluntary, and an accurate representation of the witness's recollection. The reality is far different. The interviewee is typically an uneducated, unsophisticated and unrepresented construction worker, often not fluent in English. Initially intimidated in his interrogation by a government inquisitor specially trained to elicit desired responses useful to the government, at the Hearing he finds himself boxed in a “gotcha” trap from which he cannot escape.

(KSP's brief, p. 14).

Setting aside the question of whether OSHA inspection interviewees are “typically” uneducated, unsophisticated, and not fluent in English, those terms are not descriptive of the interviewees at issue here. Shad Pruett is one of the co-owners of KSP. He was a certified competent person in excavation safety (Exh. C-10; Tr. 52). In 2007, before the downturn in the economy, KSP employed 26 employees (Tr. 139). Richard Delk has operated Delk Construction, a sole proprietorship engaged primarily in septic tank installation, since the early 1990s (Tr. 191). He is also a certified competent person in excavation safety (Exh. C-12; Tr. 58, 194). Delk holds a septic tank license, as required by the State of Georgia for septic tank installers. Since approximately the year 2000, applicants for a septic tank license in Georgia have been required to pass an examination before receiving it (Exh. R-7; Tr. 198-199). Before the downturn in the economy, Delk Construction employed three employees at its peak employment (Tr. 205). Delk has taken a class and received certification as a confined space competent person (Exh. R-7). When asked why he sought this certification, Delk responded, “Because I was going to try to get into the manhole coating business” (Tr. 204).

As owners and operators of small businesses, Shad Pruett and Delk have been required to negotiate and execute contracts, meet payroll, and file employment paperwork. They have taken classes and received certifications as competent persons. These responsibilities are not ones associated with “uneducated, unsophisticated” workers. The undersigned observed Shad Pruett and Delk during their testimony. Neither appeared to have difficulty comprehending the dynamics of the proceeding or answering the questions put to them. While the issue was not raised at the hearing, the undersigned is fairly confident that English is the first language of both men. Other than a shared problem of selective memory regarding the events of February 5, 2013, Shad Pruett and Delk manifested no indication they lacked the education or sophistication required to truthfully answer the CSHO’s questions the day of the inspection, review the answers she wrote down, or exercise their free will not to sign documents if they believed the documents misrepresented their answers.

The CSHO testified that Dale Overstreet informed her as soon as she held the opening conference that he was the owner of Overstreet Construction, thus differentiating himself from KSP. Neither Shad Pruett nor Delk used this opportunity to tell the CSHO of Delk’s supposed independent contractor status. At the joint closing conference, the CSHO made a point of telling Dale Overstreet and Shad Pruett that she was uncertain if Overstreet Construction would be cited due to Dale Overstreet’s status as its sole employee. It is reasonable to think that, even if Shad Pruett and Delk were initially “intimidated” by the CSHO, this information would have prompted them to speak up and clarify that Pruett was also the sole employee of KSP at the site and Delk was an independent contractor. They did not do so.

KSP also asserts the CSHO somehow tricked Shad Pruett and Delk into admitting that Delk worked for KSP and Pruett was his foreman. She did this, KSP claims, by failing to define “foreman,” “employer” or “employee” when questioning the men.

CSHO: [Delk] described Mr. Pruett as his foreman—as a foreman, that he had the authority to assign jobs.

Q. Was there any discussion of the definition of a foreman?

CSHO: No, we did not discuss the definition of foreman.

Q. So how did you know what Mr. Delk meant when he described Shad Pruett as the foreman?

CSHO: Other than the fact that the foreman is a general term used in construction and I—and he said that Mr. Pruett was his foreman.

(Tr. 71).

CSHO: My questions to [Delk] were relatively simple, are you—you know, what company do you work for, how long have you worked for them. Then I asked him who was the foreman onsite, Mr. Pruett was the foreman. I didn't ask him the definition of a foreman.

Q. When you said, "who do you work for," did you describe what you mean by worked for?

CSHO: I did not use a definition, I just simply asked who do you work for?

Q. Did you ask whether he was on the payroll of KSP?

CSHO: I did not ask whether he was on the payroll.

Q. Did you ask whether he was an independent contractor?

CSHO: I did not ask if he was an independent contractor.

Q. Did you ask how he came to be at this jobsite at all?

CSHO: He came to the site with Mr. Pruett.

Q. How do you know that?

CSHO: They had one truck.

(Tr. 72-73).

CSHO: I had asked Mr. Pruett how many employees onsite, Mr. Delk was one of the employees, and then when I interviewed Mr. Delk I just simply asked him what was his name, and gave him the form to make corrections if he chose to after I finished writing it up.

Q. But you didn't explain to him the definition of an employee?

CSHO: No, I did not explain the definition.

Q. And you didn't ask him what he meant when you asked him—who he worked for?

CSHO: I did not ask him to quote a definition of that, no.

Q. Did you ask him of his understanding of the word employer?

CSHO: No, I did not ask that.

...

Q. In fact, the discussion of what a foreman is at this jobsite never came up, did it?

CSHO: Other than Mr. Pruett saying that—that Mr. Delk saying that Mr. Pruett was his foreman, yes.

Q. So people used the word foreman, but there's no way to know what anybody meant when they used that word, is there?

CSHO: There's general definitions when you're at a construction site as to who the foreman is.

(Tr. 75-76).

The undersigned agrees with the CSHO that experienced workers in construction are familiar with the words “foreman,” “employer,” and “employee,” and are not likely to be confused by their use. These are not esoteric terms used in questions of metaphysical complexity. Both Shad Pruett and Richard Delk are small business owners who have worked as subcontractors during their careers. They are familiar with the concepts of employees versus independent contractors. An independent contractor on a site is unlikely to identify a supervisor from another company as “his foreman.” A contractor who has hired a subcontractor for a project is unlikely to identify the subcontractor as “his employee.” Assuming for argument’s sake that these distinctions had somehow eluded Shad Pruett and Delk all the years they had worked in construction, they had the example of Dale Overstreet before them. Dale Overstreet immediately informed the CSHO that he was his company’s sole employee and he identified KSP as the company he had hired to help him repair the leak in the waterline. From that moment, the CSHO treated Overstreet Construction as a separate employer. That neither Shad Pruett nor Delk notified the CSHO at any point during the opening conference, the inspection, or the closing conference that Delk was not, in fact, an employee of KSP weighs heavily in favor of finding that, in fact, he was.

KSP’s position that it had no employees the day of the inspection is apparently a *post hoc* strategy inspired by Dale Overstreet’s revelation that his status as his company’s sole employee was “how he got out of” the OSHA Citation. To make this strategy work, KSP pretended Bob did not exist and Shad Pruett and Delk testified under oath they had no idea why they claimed him as a crew member the day of the inspection. Shad Pruett and Delk also disavowed their statements to the CSHO that Pruett was Delk’s foreman at the worksite. Credence in KSP’s version of the facts requires acceptance of an implausible scenario. The undersigned instead credits, as more logically consistent, the testimony of the CSHO and the signed statements given by Shad Pruett and Delk the day of the inspection.

The Secretary has established that Richard Delk was employed by KSP as he worked in the unprotected 6.7 foot deep excavation. KSP was in violation of § 1926.652(a)(1).

The Darden Doctrine

Even if the admissions in the interview statements of Shad Pruett and Delk are discounted, the Secretary has still established that Delk was an employee of KSP, under the

Darden doctrine set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992):

To decide whether the party in question was an employer under common law, the *Darden* Court looked primarily to the hiring party's right to "control the manner and means by which the product [was] accomplished." Factors pertinent to that issue include "the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party." *Darden*, 503 U.S. at 322, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers. See *Don Davis*, [19 BNA OSHC 1477 (No. 96-1378, 2001)].

Allstate, 21 BNA at 1035.

Aside from the overriding factor of how much control the purported employer exercises over the hired party, *Darden* lists several contributing factors. These factors can roughly be divided between (1) conditions that existed at the actual worksite and (2) the hiring party's procedures relating to payment, benefits, and taxes.

Worksite Conditions

Under the first set of factors, it is determined that conditions of the actual worksite indicate that KSP acted as Richard Delk's employer the day of the OSHA inspection. Delk has had a longtime association with KSP. He is married to Ken Pruett's sister (Tr. 134). Before 2008, Delk's primary business was with Delk Construction, installing septic tanks. Following the economic downturn, Delk Construction lost all of its employees and sold all of its equipment, including a backhoe and a U-Haul. At the time of the OSHA inspection, Delk Construction owned no equipment with which to install septic tanks (Tr. 202, 205).

For the past couple of years, whenever KSP needed help on a job, the first person the company called is Delk. When asked, "Isn't it true that there are no other people that KSP will call when they need an extra pair of hands," Delk replied, "No, ma'am, I don't think so, just me" (Tr. 187). Delk conceded that back when KSP had more employees, he would act as foreman for KSP on projects (Tr. 193). KSP provided Delk with a copy of the company's safety program and Delk signed a form acknowledging he had read it (Exh. C-24; Tr. 194).

The day of the inspection, Delk, per Shad Pruett's instructions, drove over to Shad Pruett's house and rode with him to the worksite in KSP's truck. Delk brought no tools or equipment to the site. Shad Pruett did not give Delk any details about the job prior to their arrival at the site. Although Delk Construction specializes in septic tank installation, the only task required of Delk at the worksite was to locate the telephone line ("spotting for utilities" (Tr. 172)). This is a task that requires labor, but no advanced skills. KSP used its excavator to dig the excavation and used its tools to perform the work at the site. Delk had no role in hiring or paying assistants. KSP set the starting and ending times for the work (Tr. 188-189, 207). Under these conditions, it is determined that Delk's position was typical of that of an employee and not an independent contractor.

Compensation and Tax Treatment

The second set of factors set out in *Darden* leads to less certain results. The payment arrangement between KSP and Delk is nontraditional, and includes working in exchange for the use of KSP's equipment. KSP had no written contract with Delk or Delk Construction (Tr. 142). When asked to explain how KSP pays him for the work he performs on projects, Delk replied:

Delk: I mean, it's going to sound kind of screwy, but there's different ways we do it. I mean, sometimes I help them on a job, instead of him actually making payments I might have another job and I use his tractors on it, do you know what I'm saying?

Q. A trade out?

Delk: Yeah, a trade out. Yeah.

Q. When there's a job in which you actually do get a check or some money, how is it determined how much money you'll get?

Delk: I guess we percentage it up. Like there's two of them, so that's two 50s there, however that—you know what I'm saying?

Q. I'd like you to be—to explain a little bit more.

Delk: Oh, okay. I guess it'd be—I don't get a true 50 percent because it's Shad and Kenneth, you know, but it—maybe 30 percent. I mean, like 30, 70, something like that probably, if you compare everything.

Q. Who decides when you're working on one of Pruett's jobs how that split is going to be divided?

Delk: I guess we all do.

...

Q. Are there occasionally jobs when there's no money to divide at all?

Delk: Yes, sir.

Q. What happens in that situation?

Delk: Well, like I said, sometimes I swap it out for, you know, using his tractors on one of my jobs. I don't have to pay rent, I don't have to go rent a tractor or nothing like that.

Q. So you make it up on something—

Delk: Yeah, I make it up some other way.

(Tr. 200-202).

Ken Pruett testified regarding KSP's payment arrangement with Delk: "When we got through with the job, we'd take the material off of it—or everything out of the job, then money leftover, who knows what, [Shad, Ricky, and I] would split the money" (Tr. 140). Shad Pruett could not recall how much money KSP received for the Holcomb Bridge Road project (Tr. 174).

In the absence of a written contract, the exact relationship between the parties is unclear given this informal, unorthodox payment arrangement. Delk's willingness to perform work for KSP in exchange for the use of KSP's equipment, however, may be considered an indication that KSP is Delk's employer. The Commission has held that workers compensated in kind may be employees. In *Arlie R. Hawk, General Contractor*, 4 BNA OSHC 1248 (No. 6688, 1976), the Commission affirmed the ALJ's conclusion that the respondent was an employer under the Act despite the respondent's claim that he had no employees. The ALJ found that a man who was helping the respondent spread sand with a shovel at the bottom of an excavation was an employee, even though the respondent did not pay the man wages. The ALJ found the evidence supported the conclusion the man "was working for respondent for compensation in kind if not in cash at the time of the accident." *Id.*

KSP argues the arrangement has the earmarks of a joint venture. "Unlike an employee, who expects a stated wage, and is guaranteed a minimum wage and other legal protections, Richard Delk's compensation here, as in the case of all of his work with the Puetts, and as that of any other joint venture partner, was entirely dependent on there being some profit to share at the conclusion of the job. Notably, Delk was allocated the same share as Shad Pruett—a typical arrangement between equal partners" (KSP's brief, p. 17). KSP seems to be overlooking its position here that the two parties involved are KSP and Delk Construction, not the three individuals Ken Pruett, Shad Pruett, and Richard Delk. Under this arrangement, Delk Construction is receiving one third the amount of payment that KSP receives.

No evidence of employee benefits was produced at the hearing. KSP adduced a copy of a 1099 Tax Form (the form used to report income for non-corporate independent contractors) from 2010 (but not 2011 or 2012) indicating that KSP had paid \$10,490.00 to Delk that year (Exh. R-6). It is not clear for which project or projects these payments were made, or if they represent the entire amount of payments made to Delk in 2010. Ken Pruett testified that if he needed someone to work “maybe for a day or something, I wouldn’t even write him a check, I’d probably just pay him in cash” (Tr. 155). Ken Pruett stated he always paid Delk by check, if Delk was not taking compensation in the form of borrowing equipment (Tr. 156).

KSP also adduced a copy of two checks made out by KSP to Delk in the amounts of \$330.00 (dated March 4, 2013) and \$300.00 (dated June 13, 2013). The checks are signed by Mary Pruett. Ken Pruett testified the checks were “[f]or a job Ricky helped us with” (Tr. 151). The checks have no probative value. First, they are dated after the date of the inspection, February 5, 2013. They say nothing about Delk’s employment status at the time of the inspection. Second, the memo line of each of the checks indicates the checks are for “Loan” (Exh. R-6). When asked why payment for a job was detailed as a loan, Ken Pruett stated, somewhat bewilderingly, “To be honest, I—I really—it might have been a loan, it might have been—Ricky can weld, where me and my son cannot weld, I might have paid him for welding and my wife put it as loan” (Tr. 156).

The undersigned finds the evidence regarding payment arrangements and tax treatment to be inconclusive in establishing Delk’s employment status. The method of compensation is complicated by Delk’s familial relationship with the Puetts. In the absence of a written contract, detailed payment records, or reliable recall of specific projects by the Puetts or Delk, it is difficult to determine whether or not an employment relationship exists between KSP and Delk based on compensation and taxes. These factors will, therefore, not be considered in the *Darden* analysis.

Right to Control the Hired Party

Finally, KSP’s right to control Delk’s actions at the worksite must be considered as the primary factor. It was apparent at the hearing that the Puetts and Delk were all aware that indicating KSP had authority to tell Delk what to do at a worksite would run counter to KSP’s position that Delk was not its employee. As much as they took pains not to acknowledge KSP’s control, however, they were unable to deny it completely. Ken Pruett testified he had no

authority to assign Delk work at a jobsite, but then added, “I guess, being owner of the company, if something really needed to be done and I could—not assign it, I could ask him” (Tr. 144). Shad Pruett also stated he did not have authority to tell Delk what to do. As discussed above, Shad Pruett told the CSHO that he was the foreman at the Holcomb Bridge Road worksite. When asked what a foreman does, Pruett replied, “A foreman at the jobsite, I mean, I suppose tells somebody what to do” (Tr. 177).

When Delk was asked if anybody had the authority to tell him what to do on the worksite, he denied it, “Because I’m my own man. I do what I want” (Tr. 209). On cross-examination, however, he softened his stance:

Q. Now, I know you testified, Mr. Delk, that you’re your own man and you don’t take orders from anyone at KSP, is that right?

Delk: No, ma’am. Maybe the superintendent on the job. I mean, I might have overstated that part.

Q. So you will take orders from some people.

Delk: Yes, ma’am. I might have misspoke there.

Q. Okay. But on a jobsite where KSP has gotten the job, if KSP, or Shad, or Mr. Pruett didn’t like the way you were doing something on the worksite or y’all disagreed about how something was meant to be done they could ask you to leave the worksite, couldn’t they?

Delk: Yeah.

Q. And you would have to do that, wouldn’t you?

Delk: Yeah.

(Tr. 210-211).

Ken and Shad Pruett admitted KSP could issue orders to Delk. Delk conceded that KSP had the authority to tell him what to do and to fire him. These are primary characteristics of the employer/employee relationship.

Based on the contributing factors of the conditions at the worksite and the primary factor of control, it is determined that KSP was Delk’s employer. Thus, Delk was a KSP employee exposed to cave-in hazards when working in the excavation on February 5, 2013. Item 1 of the Citation is affirmed.

WILLFUL CLASSIFICATION

The Secretary classified the violation as willful. KSP makes no argument regarding the classification of the violation. “The hallmark of a willful violation is the employer’s state of

mind at the time of the violation—an ‘intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.’” *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000). This state of mind is evident where “the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.” *AJP Constr., Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004).

Based on a review of the record, it is determined that KSP had a heightened awareness that the conditions at the worksite were not in compliance with the requirements of § 1926.652(a)(1), but made a conscious decision to disregard those requirements. Shad Pruett had a heightened awareness of § 1926.652(a)(1) and its specific requirements on February 5, 2013. Pruett is a certified competent person in excavation safety and has received training in the cave-in protection required for an excavation exceeding 5 feet in depth. He believed the excavation was even further outside the limitations of the standard than it actually was—Pruett told the CSHO he thought the excavation was dug in Type C soil (not Type B, as determined by OSHA’s lab) and stated regarding the depth of the excavation, “We did not measure. I said 7 feet deep but [the CSHO] said 6.7 feet when we measured with the trench rod” (Exh. C-11). Shad Pruett was standing at the edge of the excavation while Delk was working in the unprotected excavation. It was immediately adjacent to a busy street, subject to the vibrations caused by the heavy traffic (Tr. 41-42). As foreman, Shad Pruett’s heightened awareness of the unsafe conditions is imputed to KSP. “The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful.” *Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000).

KSP also showed plain indifference to employee safety. The Secretary twice previously cited KSP for violating the same standard as cited here. Shad Pruett was the certified competent person onsite when OSHA inspected KSP’s worksite in Dacula, Georgia, on March 14, 2007, and found employees working in an unsafe excavation (Exh. C-21). OSHA inspected another KSP worksite on June 16, 2007, in Lilburn, Georgia, and found Delk (KSP’s foreman at the site) standing in an unprotected 9½ foot excavation (Exh. C-14). Exhibit C-16 is a copy of a photograph showing Delk and another KSP employee standing in the excavation as the near-vertical walls loom over their heads.

Despite these previous citations, KSP failed to overhaul its safety program or implement the safety rules that appear in its written safety program. Its lax approach towards safety is evident in co-owner Ken Pruett's attitude regarding KSP's safety training policy:

Q. And then if you look at the policy itself, that's on the last page, the fourth page, item number seven for your code of safe practices says that, "the sides of the trench must be shored and stabilized in any excavation of 5 feet or more before an employee or worker begins in the trench." Does that accurately represent your policy regarding trenching?

Ken Pruett: Yeah, unless I'm going to get in it, or my son, or Ricky. I mean, we'd get in a 12 foot ditch, I guess.

(Tr. 123-124).

KSP's violation of § 1926.652(a)(1) is properly classified as willful.

PENALTY DETERMINATION

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

KSP had, as detailed above, four employees at the time of the inspection (Exh. C-11). KSP is accorded no good faith consideration because it did not make a good faith effort to comply with the standard. It has a history of violating the standard at issue here.

The gravity of the violation is high. Both Shad Pruett and Delk entered the unprotected excavation multiple times searching for the telephone line (Tr. 163-164, 208). There is a significant likelihood of death or serious physical injury in a 6.7 foot deep excavation in the event of a cave-in. Based on the relevant factors, it is determined that the Secretary's proposed penalty of \$11,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that Item 1 of the Citation, alleging a willful violation of § 1926.652(a)(1), is AFFIRMED and a penalty of \$11,000.00 is assessed.

SO ORDERED.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Atlanta, Georgia