



United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

SPEEDY ROOTER/CAPITAL PLUMBING,  
INC.,

Respondent.

OSHRC Docket No. 17-0274

APPEARANCES:

Matthew R. Epstein, Esquire,  
U.S. Department of Labor, Office of the Solicitor  
Philadelphia, Pennsylvania  
For the Secretary

Richard H. Mylin, III, Esquire,  
York, Pennsylvania  
For the Respondent

BEFORE: Keith E. Bell  
Administrative Law Judge

**DECISION AND ORDER**

On October 5, 2016, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Elaine Dailey responded to a complaint of an employee working in an unprotected trench at a residence at 1735 East Canal Road, Dover, Pennsylvania (worksite or Canal Road worksite). Speedy Rooter/Capital Plumbing, Inc. (Speedy Rooter or Respondent) had excavated a trench and was replacing a lateral sewer line at the worksite.

On January 13, 2017, OSHA issued a Citation and Notification of Penalty (citation) to Speedy Rooter with one willful and three serious violations of OSHA's construction standard for a total proposed penalty of \$29,394. The citation alleged Respondent had not trained its employees on cave-in hazards, had not kept materials at least two feet from the edge of the trench, had not inspected the trench, and had not provided an adequate cave-in protection system in the trench.

Respondent filed a timely notice of contest, bringing this matter before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (Act).

A one-day hearing was held in Philadelphia, Pennsylvania on June 13, 2018. Four witnesses provided testimony: OSHA Compliance Officer, Elaine Daily; William Fishel (owner of the residence at the worksite); Austin Bryant (worker at the Canal Road worksite); and Andrea Crone (owner and manager of Speedy Rooter). Both parties submitted post-hearing briefs.

### **STIPULATIONS**

The parties agreed to and stipulated the following facts.

1. Respondent was hired to repair a sewer line at 1735 E. Canal Road, Dover, Pennsylvania (the "worksite"), in September 2016. Successive service calls resulted in Respondent who hired Jerry Ricketts and Austin Bryant to replace the entire sewer line from the home at that property to the sewer main on Canal Road. (Tr. 261).
2. Andrea Crone is the sole owner of Respondent and is a licensed plumber. She hired Jerry Ricketts and Austin Bryant to perform work at the worksite. Ms. Crone obtained permits and One-Call documentation for the worksite. (Tr. 261).
3. Andrea Crone or Respondent owned the excavator used at the worksite which was used by Jerry Ricketts who had signed an equipment use agreement. (Tr. 261).
4. The plywood and 2x4s installed in a trench and photographed by CSHO Dailey were not an OSHA approved shoring system and not intended as such. (Tr. 261-62).

The primary dispute is whether the individuals working at the Canal Road worksite, Mr. Ricketts and Mr. Bryant, were employees of Speedy Rooter. Respondent asserts that because Mr. Ricketts and Mr. Bryant were independent subcontractors the citations against Speedy

Rooter must be vacated.<sup>1</sup> Respondent presented minimal assertions to refute the Secretary's allegations that the four cited OSHA standards had been violated.

For the following reasons, I find Mr. Ricketts and Mr. Bryant were employees of Speedy Rooter, the citations are affirmed and a penalty of \$29,394 is assessed.<sup>2</sup>

### **JURISDICTION**

Based upon the record, I find that at all relevant times Speedy Rooter was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I find that the Commission has jurisdiction over the parties and subject matter in this case.<sup>3</sup> (Tr. 259-60).

### **FACTS**

#### ***The Company and the project***

At the time of the hearing, Speedy Rooter had been in business for 14 years and performed interior and exterior plumbing work, including repair and replacement of sewer lines. (Tr. 24, 244). Speedy Rooter was solely owned and managed by Andrea Crone, a licensed plumber. (Tr. 242, 261).

The project at the Canal Road worksite started a few weeks before the OSHA inspection. The Fishels hired Speedy Rooter to repair a clogged sewer line. (Tr. 30, 59, 79). Mrs. Fishel called Speedy Rooter and spoke to Andrea Crone. (Tr. 78-79, 232). Ms. Crone sent Jerry Ricketts and Austin Bryant<sup>4</sup> to the Fishel home on two consecutive days to clear the line. (Tr. 59-60, 261). When the clog reoccurred the third day, Mr. Ricketts told Mr. Fishel that the house

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<sup>1</sup> Respondent asserted the affirmative defense of employee misconduct. (Tr. 260). However, this defense was not pursued during the hearing or in the post-hearing brief. The defense is deemed abandoned. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

<sup>2</sup> The following facts and analysis are based upon facts found to be credible and supported by the totality of the evidence. As a general note, I find the majority of Ms. Crone's testimony and assertions to be self-serving in nature and unsupported.

<sup>3</sup> The parties agreed and stipulated that Respondent was an employer engaged in business affecting commerce and that the Commission has jurisdiction over the matter. (Tr. 259-60).

<sup>4</sup> Mr. Ricketts was interviewed by CO Dailey on October 13, 2016, eight days after the inspection was opened. (Ex. CX-14A). His statement in response to the CO's interview questions was documented and then read back to Mr. Ricketts. (Tr. 134-35). Mr. Ricketts signed the written statement in the presence of the CO. *Id.* Mr. Ricketts did not testify and could not be found for service of the subpoena to appear at the hearing. (Tr. 133-34).

sewer trap, which was underground and located seven to eight feet from the house, needed to be replaced. (Tr. 35, 60).

Ms. Crone contacted Pennsylvania's One-Call<sup>5</sup> service with a request to have the underground utilities marked before digging out the sewer trap. (Tr. 174, 246, 261; CX-13). Ms. Crone informed One-Call that the excavation would be about 4x8 feet wide and 5 to 6 feet deep. (CX-13). Ms. Crone assigned Jerry Ricketts and Austin Bryant to replace the sewer trap and delivered the backhoe owned by Speedy Rooter to the Canal Road worksite. (Tr. 179-80, 261; CX-14C).

On September 18, 2016, Mr. Bryant and Mr. Ricketts used the excavator to dig a hole that was approximately six feet deep. (Tr. 35, 60-61, 63-64; CX-13). Mr. Ricketts was in the excavation about 10 minutes to replace the trap. (Tr. 247). Mr. Fishel saw that "mostly" Mr. Ricketts worked inside the excavation. (Tr. 64). No cave-in protection was used. (Tr. 38).

Replacing the sewer trap did not fix the problem. (Tr. 64-65). A week later, Ms. Crone sent Mr. Ricketts and Mr. Bryant back to the Canal Road worksite where they determined the cast iron sewer lateral from the house to the Dover Borough's main line needed to be replaced. (Tr. 65, 240-41, 247). Mr. Bryant was then assigned to a service call at another location, so Mr. Ricketts did most of the work for the sewer lateral excavation. (Tr. 39, 65). The trench was open for two days when work was interrupted by a four-day rainstorm. (Tr. 66, 248; CX-14A). Ms. Crone visited the worksite during the rainstorm to check on the trench. (Tr. 186, 235). Ms. Crone visited the Canal Road worksite three times during the project. (Tr. 186-87, 235).

Mr. Ricketts used the backhoe to dig the rest of the fifty-foot trench on October 3 and 4, 2016. (Tr. 65, 248-49; CX-9, CX-14A). Mr. Ricketts estimated the trench was about 6½ feet deep from the top of the sewer pipe. (Tr. 248; CX-14A). The excavated soil was piled along the edge of the trench. (Tr. 97; CX-9 p. 0048, CX-11A, CX-11B). Mr. Ricketts used a shovel to even out the trench floor so the pipe could be installed at the correct elevation. (Tr. 69). Gravel for the trench floor was delivered on October 4, 2016. (Tr. 166, 242).

Mr. Fishel observed Mr. Ricketts working in the trench below the spoil pile. (Tr. 81-82; CX-11A). Mr. Fishel saw that the trench was over six feet deep because it was over Mr. Ricketts' head.<sup>6</sup> (Tr. 81-82). After the old pipe was removed, 10-foot sections of new pipe were

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<sup>5</sup> One-Call is the Pennsylvania Underground Utility Line Protection Request service. (CX-13).

<sup>6</sup> Fishel was six feet tall and saw eye-to-eye with Mr. Ricketts. (Tr. 81-82).

connected and then lowered into the trench by Mr. Ricketts and Mr. Bryant. (Tr. 248-49; CX-14A).

On October 5, 2016, the main sewer line was damaged during Speedy Rooter's work. As a result, the Dover Borough issued an order for Speedy Rooter to cease work on the project. (Tr. 68, 252). When the cease work order was eventually lifted, Mr. Fishel did not allow Speedy Rooter to complete the project. (Tr. 209).

### ***The Inspection***

On October 5, 2016, CO Dailey was assigned to investigate a complaint of an employee working in an unprotected trench at the Fishel residence (Canal Road worksite). (Tr. 96). CO Dailey arrived at the worksite that afternoon. (Tr. 96; CX-10, p. 2).<sup>7</sup> The CO immediately saw, next to a long trench, a posted notice from the Dover Borough to "cease work until further notice" (cease work order). (Tr. 97; CX-11A). The Borough shut down the worksite that morning after the city's main line was damaged. (Tr. 84; CX-10, p. 2).

No one was working at Canal Road worksite when the CO arrived. After observing the open trench, CO Dailey identified herself to Mr. Fishel. They discussed the open trench and the work that occurred at the worksite. (Tr. 106). Mr. Fishel told her that he hired Speedy Rooter about three weeks earlier to fix a clogged sewer line. (Tr. 59, 249; CX-13). Mr. Fishel believed the project took so long because Mr. Ricketts and Mr. Bryant had been reassigned to other work sites during the project. (Tr. 65).

CO Dailey photographed the open trench and the pile of excavated soil alongside it. (Tr. 99-105). The trench was approximately 2 feet wide by 50 feet long. (Tr. 115-16, 143, 248; CX-9, pp. 0045-0047). The trench walls were vertical. (Tr. 108; CX-11A, CX-11B). The CO saw the new sewer pipe resting on fresh gravel at the bottom of the trench. (Tr. 166; CX-9, p. 0044). CO Dailey collected a soil sample and observed that the soil type in the trench was "previously disturbed" because it was in the same location as the pre-existing sewer line. (Tr. 111-12). An excavator, ladder, sump pump, and shovels were near the trench. (Tr. 117).

In the area of the trench where the new pipe connected to the old pipe, a plywood sheet had been placed on each side of the trench, connected by perpendicular 2x4s. (Tr. 108-111, 113-14; CX-9, p. 0046; CX-11B). The plywood configuration was not designed to be a shoring

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<sup>7</sup> Record exhibits will be referenced as RX for Respondent, CX for Secretary, and JX for joint exhibits.

system to prevent cave-ins; it had been placed in the trench after Mr. Fishel expressed concern that something was needed to hold the soil when someone worked in the trench. (Tr. 68, 113-14, 261-62).

CO Dailey measured the depth of the trench at four places around the pipe connection. (Tr. 110-11, 115-16; CX-9, pp. 0045-0046, CX-10). The first depth measurement was 4 feet 2 inches, the second was 4 feet 7 inches, the third was 5 feet 8 inches, and the fourth was 6 feet 8 inches. (Tr. 110, 115-16; CX-9, pp. 0045-0046, CX-10). The spoil pile extended along the 50-foot length of the trench. (Tr. 97; CX-9 p. 0048, CX-11A, CX-11B). CO Dailey measured the spoil pile as six feet high by eight feet wide. (Tr. 97, 100, 143; CX-7, CX-11B). The spoil pile was less than two feet from the edge of the trench. (Tr. 108, 139; CX-9, p. 0048).

The CO testified that during the investigative interview, Ms. Crone admitted the trench was deeper than five feet and that she knew that shoring was required for a trench over five feet in depth. (Tr. 123, 183). Further, when the CO provided OSHA's definition of a competent person, Ms. Crone admitted the trench had not been inspected by a competent person. (Tr. 124).

## **DISCUSSION**

### ***Ricketts and Bryant were employees of Speedy Rooter***

Respondent asserts that Mr. Ricketts and Mr. Bryant were not employees. Respondent argues that Mr. Ricketts and Mr. Bryant were paid as independent subcontractors and that it did not control the worksite. (R. Br. 7, 9). As discussed below, these arguments are rejected as unsupported by the evidence. For the following reasons, I find Mr. Ricketts and Mr. Bryant were employees of Speedy Rooter under the Act.

### ***Darden Analysis***

“[T]he Secretary has the burden of proving [the] cited respondent is the employer of the affected workers at the site.” *All Star Realty Co., Inc.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) (citation omitted). The Act defines an employee as “an employee of an employer who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(3).<sup>8</sup>

The Supreme Court has relied on the common law for guidance to determine whether an individual is an employee, or alternatively, the kind of person the common law would consider

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<sup>8</sup> The Act defines an employer as a “person engaged in a business affecting commerce who has employees.” 29 U.S.C. § 652(5). Person means “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.” 29 U.S.C. § 652(4).

an employee, in similarly worded statutes. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (*Darden*). The Commission applies the *Darden* factors to determine if an individual is an employee of the cited employer. *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010) (*S&W*).

The common-law agency doctrine set forth in *Darden* focuses on the company's "right to control the manner and means by which the product" is accomplished. *S&W*, 23 BNA OSHC at 1289 (citation omitted). The company's control over the worker is a "principal guidepost" to determine the existence of an employment relationship. *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1506 (No. 97-1839, 2004) (citations omitted). Additional factors relevant to the analysis 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; [and] the provision of employee benefits and the tax treatment of the hired party.

*S&W*, 23 BNA OSHC at 1289 (citing *Darden*, 503 U.S. at 323-24).

***Control over the manner and means of accomplishing work***

"Control over the 'manner and means of accomplishing the work' must include control over the *workers* and not just the results of their work." *Don Davis*, 19 BNA OSHC 1477, 1482 (No. 96-1378, 2001) (emphasis in original).

Respondent argues that Speedy Rooter did not have control of the Canal Road worksite, that Mr. Ricketts determined scope of work, that the homeowner's sole contact for the job was Mr. Ricketts (not Speedy Rooter), and that Speedy Rooter provided no instructions for the worksite. (R. Br. 5, 7). As discussed below, I find Mr. Ricketts and Mr. Bryant did not have control over the means and manner of accomplishing the work.

To support its claim that Mr. Ricketts, not Speedy Rooter, had control of the worksite, Respondent asserts that Mr. Ricketts determined the scope of work. (R. Br. 8). This assertion is not supported by the record. Mr. Ricketts was assigned to the Canal Road worksite by Ms. Crone. (Tr. 59-60, 261). Mr. Ricketts and Mr. Bryant called in from the job site to let Ms. Crone know the approximate measurement for the length of the trench (from house to sidewalk),

what materials were needed, and that a backhoe was required. (Tr. 38, 252, 257; CX-14A, CX-14B). Mr. Ricketts and Mr. Bryant provided information to Ms. Crone, so that she could determine the scope and costs of the job. Further, neither Mr. Ricketts nor Mr. Bryant could control the scope of work at the Canal Road site because they could not obtain a permit from the Dover Borough. (Tr. 177-78, 182). This demonstrates Speedy Rooter's control over the worksite.

Respondent also asserts that because Mr. Ricketts was the homeowner's primary contact, Mr. Ricketts controlled the worksite. (R. Br. 8). This is not supported by the record. The initial call for repair was made to Speedy Rooter directly, and then Speedy Rooter sent Mr. Ricketts out to make the repair. (Tr. 59, 79, 231). Further, Mr. Fishel testified that when the job was taking too long, he called Speedy Rooter and discussed the problem with Ms. Crone. (Tr. 80). He stated, "I never called Jerry. I don't have his phone number. I have no connection with Jerry other than when he was on the job site." (Tr. 80). This shows that, through Ms. Crone, Speedy Rooter had control of the worksite. Mr. Fishel's contact with Mr. Ricketts was not related to overall control of the site.

Ms. Crone accepted, scheduled, and assigned plumbing jobs for the Respondent. (Tr. 59-60, 231, 252, 261; CX-14A). Ms. Crone hired Jerry Ricketts and Austin Bryant to perform work at the Canal Road worksite. (Tr. 261). Mr. Ricketts and Mr. Bryant received Ms. Crone's approval before work began. (Tr. 29-30, 38, 252, 257). If additional supplies were required, Ms. Crone had to approve and authorize payment for the supplies.<sup>9</sup> (Tr. 30).

Ms. Crone assigned the work and determined the scope of work at a job site.<sup>10</sup> Ms. Crone exercised significant control over the means and manner to accomplish the work. This factor weighs in favor of finding a traditional employer-employee relationship.

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<sup>9</sup> Ms. Crone asserted that any purchase for additional supplies, such as plywood, was a cost for Mr. Ricketts and not Speedy Rooter. Ms. Crone claimed that Mr. Ricketts provided a bid for a job, which included supplies; she then simply marked up the bid with a profit margin for Speedy Rooter. (Tr. 237). I find this assertion is not credible. There is nothing in the record that suggests Mr. Ricketts evaluated a project's cost or presented a bid to Speedy Rooter. Further, Ms. Crone acknowledged that in 2016 Speedy Rooter's total payment to Mr. Ricketts was \$15,000 for 15-20 excavation jobs. (Tr. 238). This total income indicates that Mr. Ricketts was receiving wages only and was not receiving payment based on a bid that included the cost of supplies.

<sup>10</sup> Ms. Crone claimed that she did not re-assign anyone from the Canal Road worksite to another worksite. (Tr. 212). She claimed they only stopped work at the Canal Road worksite due to rain. (Tr. 212). Ms. Crone's claim is not credible. Both Mr. Fishel and Mr. Bryant stated that Ricketts and Bryant

### ***Work location, hours worked, and right to assign additional projects***

Ms. Crone controlled the daily schedule and work location. Mr. Bryant described that for a typical assignment, he received a text message with the location of the assigned job. He picked up Speedy Rooter's van, which included the tools for plumbing work, and went to the assigned job. When finished with that job, he contacted Ms. Crone for his next assignment. (Tr. 19-20).

Ms. Crone scheduled the Canal Road project with the homeowner and then assigned Mr. Ricketts and Mr. Bryant to the project. (Tr. 252, 261). Ms. Crone directed Mr. Bryant to leave the Canal Road job to work at a different Speedy Rooter site. (Tr. 39, 247). Mr. Ricketts described himself as on-call 24 hours a day for plumbing emergencies. (Tr. 252; CX-14A). Ms. Crone determined which Speedy Rooter jobs were assigned to Mr. Ricketts and Mr. Bryant, thus controlling both the work location and schedule. (Tr. 19, 39, 231, 261; CX-14A). *See Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1867 (No. 02-0865, 2007), *aff'd*, 296 F. App'x 211 (2d Cir. 2008) (unpublished) (finding employer-employee relationship where respondent made daily assignments).

This control over work assignments and location is indicative of an employer-employee relationship, not of an independent contractor relationship.

### ***Skills required***

Mr. Bryant described himself as self-trained and that he and Mr. Ricketts worked together to solve problems at a worksite. (Tr. 27-29, 34). Mr. Ricketts and Mr. Bryant were not licensed plumbers. (Tr. 34, 182). Only a licensed plumber could obtain a Dover Borough work permit for the Canal Road job. (Tr. 182). Ms. Crone was Speedy Rooter's licensed plumber for the project. (Tr. 182, 261; CX-12).

Mr. Ricketts and Mr. Bryant were not plumbers and had no specialized skill or training in excavations. This factor weighs in favor of a traditional employer-employee relationship. *See A.C. Castle Constr.*, 882 F.3d 34, 39 (1st Cir. 2018) (finding an employer-employee relationship

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would be called away to other Speedy Rooter jobs during the Canal Road project. (Tr. 39, 65, 247; CX-14A).

Generally, Ms. Crone's testimony is given little weight because of her self-interest as Speedy Rooter's owner. Further, Ms. Crone testified that Mr. Fishel sued Speedy Rooter in small claims court and Speedy Rooter countersued. (Tr. 214). According to Ms. Crone, Speedy Rooter was ordered to pay \$2,000 to Mr. Fishel. (Tr. 214). I find that Ms. Crone's testimony was affected by the defensive position of Speedy Rooter in the instant OSHA matter and the separate matter with Mr. Fishel.

where the company owner held the license that permitted work); *see also, Absolute Roofing & Constr.*, 580 F. App'x 357, 361 (6th Cir. 2014) (unpublished) (*Absolute*) (high level of skill suggests an independent contractor relationship and a low-level of skill suggests an employer-employee relationship).

### ***Source of tools***

Speedy Rooter provided the essential tools necessary to complete the excavation and plumbing work at the Canal Road worksite. Mr. Bryant and Mr. Ricketts drove a Speedy Rooter van to the job site. (Tr. 19, 242; CX-14C). Speedy Rooter owned the backhoe used to excavate the trench. (Tr. 261). Ms. Crone delivered the backhoe to the Canal Road site. (Tr. 235, 241, 254; CX-14B, CX-14C). The ladder, shovels, and sump pump at the worksite were provided by Speedy Rooter.<sup>11</sup> (Tr. 19-20, 202, 241-42, 251-52; CX-14A, CX-14B). Ms. Crone contacted One-Call so utilities could be marked before excavating. (Tr. 174-78; CX-13). Ms. Crone acquired the necessary permit from the Dover Borough. (Tr. 177-78, 182; CX-12).

Mr. Ricketts and Mr. Bryant occasionally used their own small hand tools at a worksite; however, all the essential tools were provided by Speedy Rooter. This factor supports an employer-employee relationship because the tools necessary for the job were supplied by Speedy Rooter. *See Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 942 (9th Cir. 1994) (finding employer status where employer provided tools); *Absolute*, 580 F.App'x at 361 (all tools onsite were the property of employer).

### ***The work was a regular part of Speedy Rooter's business***

Speedy Rooter was a plumbing contractor that did interior and exterior plumbing work, including excavation, repair, and replacement of sewer lines. (Tr. 24, 38, 244, 261). The owner, Ms. Crone, was a licensed plumber. (Tr. 261). Mr. Ricketts and Mr. Bryant did plumbing work for Speedy Rooter at the Canal Road worksite. (Tr. 261). The work by Mr. Ricketts and Mr. Bryant was a regular part of Speedy Rooter's business.

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<sup>11</sup> In her testimony, Ms. Crone claimed the ladder at the worksite belonged to Ricketts; no evidence was presented to support this assertion. (Tr. 202). In her October 7, 2016 signed interview statement, Ms. Crone stated the A-frame ladder and extension ladder were owned by Speedy Rooter. (Tr. 241-42; CX-14C). I give her signed statement, which was closer in time to the event and prior to receipt of the OSHA citation, greater weight.

This factor is indicative of a traditional employer-employee relationship. *See generally Slingsluff v. OSHRC*, 425 F.3d 861, 869 (10th Cir. 2005) (stucco contractor that hired worker to help with stucco work, employed the worker in question).

***Duration of the relationship and hiring or paying of assistants***

Mr. Ricketts and Mr. Bryant each worked for Speedy Rooter for about two years. (Tr. 16, 181, 243; CX-14C). During the two years that Mr. Ricketts worked for Speedy Rooter he completed about 30 excavation jobs in addition to other assignments. (Tr. 236-38). Mr. Bryant worked for Speedy Rooter about 40 hours a week during the 2016 busy season. (Tr. 17-18). Neither Mr. Ricketts nor Mr. Bryant hired an assistant. (Tr. 28). Speedy Rooter had a direct, individual relationship with both Mr. Ricketts and Mr. Bryant, and Ms. Crone assigned each to the Canal Road worksite. (Tr. 191).

The duration and open-ended nature of the arrangement reflect a traditional employer-employee relationship. *See Absolute*, 580 F. App'x at 362 (citations omitted) (indefinite duration and indefinite nature of relationship favors employee status). I find these factors weigh in favor of an employer-employee relationship.

***Method of payment***

Each Friday, Mr. Bryant was paid based on an hourly rate, usually around \$11 per hour, and generally in cash. (Tr. 17-18, 210). Mr. Ricketts was also paid on an hourly basis in cash each week. (Tr. 146, 210, 252; CX-14A). Ms. Crone confirmed that she typically paid Mr. Bryant and Mr. Ricketts in cash. (Tr. 210).

I find that payment in cash, at an hourly rate is indicative of an employer-employee relationship. *See Absolute*, 580 F. App'x at 363. (a set hourly wage weighs in favor of employee status).

***Tax treatment and employee benefits***

Speedy Rooter provided no employee benefits to Mr. Ricketts or Mr. Bryant. (Tr. 188-90). Speedy Rooter did not withhold income tax or social security tax from Mr. Bryant's and Mr. Ricketts' pay; it sent IRS 1099 forms to Mr. Bryant and Mr. Ricketts. (Tr. 188, 204; CX-17). The 1099 forms sent to Mr. Ricketts and Mr. Bryant for the 2016 tax year were placed in

evidence.<sup>12</sup> (CX-17). There was no documentation provided for the 2015 tax year.<sup>13</sup> (Tr. 203, 205).

The tax treatment and benefits are like those of an independent contractor relationship. However, the Commission has noted that tax reporting status alone is not the controlling factor in a *Darden* analysis. *See S&W*, 23 BNA OSHC at 1290. (“failure to withhold federal income and social security taxes was . . . not a bona fide reflection of an authentic independent contractor relationship.”) I find the tax treatment and lack of benefits are not dispositive to the determination of the type of employment relationship here, especially when considered in the light of routine payments to Mr. Ricketts and Mr. Bryant in cash.

### ***The agreements***

Ms. Crone testified that the Subcontractor Agreement (RX-15) and Equipment Use Agreement (RX-16) between Speedy Rooter and Mr. Ricketts proved he was an independent contractor. (R. Br. 4). Ms. Crone testified that she considered both Mr. Bryant and Mr. Ricketts to be independent subcontractors; however, she only had a written agreement with Mr. Ricketts.<sup>14</sup> (Tr. 224-25).

The Subcontractor Agreement was a boilerplate agreement that was not personalized for Mr. Ricketts or Speedy Rooter. (Tr. 200; RX-15). The names of the parties to the agreement only appear in the signature blocks at the end of the agreement. (RX-15). The Subcontractor Agreement required the subcontractor (Ricketts) to furnish all labor and materials to perform the work and to contact public utilities before excavation. (RX-15, pp. 0128, 0130). As discussed above, Mr. Ricketts did not furnish all labor and materials or contact the public utilities for the Canal Road worksite. Rather, Speedy Rooter provided most of the materials, contacted the utility prior to excavation, and assigned Mr. Bryant to work alongside Mr. Ricketts at the worksite.

Further, the Subcontractor Agreement required the subcontractor to maintain commercial general liability, automobile, commercial umbrella, and workers compensation insurance. (RX-

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<sup>12</sup> The 1099 for Jerry Ricketts misspelled his last name as “Richetts”. The 1099 for Austin Bryant misspelled his last name as “Brant” and had no tax identification number. (Tr. 51-52; CX-17). Mr. Bryant testified that he never provided his social security number to Ms. Crone. (Tr. 51-52).

<sup>13</sup> Ms. Crone claimed that Speedy Rooter sent a 1099 to Mr. Ricketts for the 2015 tax year but provided no documentation to support this claim. (Tr. 203, 205).

<sup>14</sup> Ms. Crone testified that she did not have agreements for every subcontractor. (Tr. 220).

15, p. 0132). Ms. Crone claimed that Mr. Ricketts provided a certificate of insurance to Speedy Rooter in 2015. (Tr. 196). However, Respondent submitted no document to support this claim. (Tr. 196-97).

The Equipment Use Agreement was between Speedy Rooter (Equipment Owner) and Jerry Ricketts (User) to operate a Kubota excavator and a John Deere backhoe. (RX-16). This agreement required Mr. Ricketts to maintain liability insurance with Speedy Rooter as an additional insured on the policy. *Id.*

Both agreements were dated October 5, 2015 and included a signature for Mr. Ricketts. (RX-15, RX-16). The signature of Mr. Ricketts was not authenticated.<sup>15</sup> (Tr. 198). Further, Mr. Ricketts' signature on the OSHA interview statement appeared to be significantly different than the signature on the agreements. (Tr. 199; CX-14A; RX-15, RX-16). Ms. Crone claimed she witnessed Mr. Ricketts signing the two agreements. (Tr. 198). Due to Ms. Crone's clear desire to establish that Mr. Ricketts was an independent subcontractor, I give little weight to Respondent's claim that Mr. Ricketts signed the agreements.

Further, I find these two agreements do not support Respondent's claim that Mr. Ricketts and Mr. Bryant were independent subcontractors. First, despite Ms. Crone's testimony that both Mr. Ricketts and Mr. Bryant were independent contractors, there was no written agreement with Mr. Bryant. (Tr. 191, 225). Second, the requirement to provide labor, materials, and contact the utility was not fulfilled by Mr. Ricketts. Finally, Respondent provided no documents to verify Mr. Ricketts carried the insurance required by the agreements. (Tr. 196-97). *See Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-1343 (No. 00-1968, 2003), *aff'd*, 391 F.3d 56 (1st Cir. 2004) ("The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case") (citations omitted). The evidence does not demonstrate the terms listed in the agreements were in effect.

I find the subcontractor agreement and equipment use agreement do not demonstrate the existence of a true subcontractor relationship with either Mr. Ricketts or Mr. Bryant. *See generally S&W*, 23 BNA OSHC at 1289-90 (finding the existence of a subcontractor disclaimer

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<sup>15</sup> The only attempt to authenticate the signature was Ms. Crone's testimony that she was present when Mr. Ricketts signed the two documents in 2015. (Tr. 198-200).

form and fact that company was paid as a subcontractor did not mean there was not an employer/employee relationship for purposes of the Act).

Considering all aspects of the relationship between Mr. Bryant and Mr. Ricketts with Speedy Rooter, I find the relationship was more akin to that of an employer-employee than that of an independent contractor. In particular, because of the Respondent's significant control in obtaining, assigning, and controlling the work, paying on an hourly basis (often in cash), and providing the tools and permits necessary to complete the work, I find that Mr. Bryant and Mr. Ricketts were employees of Speedy Rooter for purposes of the Act.

### ***Secretary's Burden of Proof***

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving his case by a preponderance of the evidence. *Id.*

### ***Citation 1, Item 1***

Respondent was cited for a serious violation of 29 C.F.R. § 1926.21(b)(2):

(b) Employer responsibility. . . . (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The Secretary asserts that Respondent did not provide training on the recognition and avoidance of cave-in hazards for employees working in a trench excavation at the Canal Road worksite.<sup>16</sup>

### ***The standard applies, employees were exposed, and the standard was violated***

As discussed above, two Speedy Rooter employees, Mr. Ricketts and Mr. Bryant, worked at the Canal Road worksite. Mr. Ricketts and Mr. Bryant removed and installed a lateral sewer pipe in a trench excavation. The standard applies and employees were exposed.

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<sup>16</sup> Respondent's post-hearing brief was limited to the sole argument that Ricketts and Bryant were not employees of Speedy Rooter. Respondent presented no arguments to rebut the Secretary's prima facie case for the four alleged violations. Respondent's position on the citation items is gleaned from Ms. Crone's hearing testimony and her interview with the CO.

Speedy Rooter was required to train employees on hazardous conditions related to trench excavations. *See Superior Custom Cabinet Co., Inc.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997) (instructions must be “specific enough to advise employees of the hazards associated with their work and the ways to avoid them”) (citations omitted). Mr. Bryant testified that he had received no training on the use of trench boxes. (Tr. 37, 255; Ex. CX-14B). When interviewed by the CO, Mr. Bryant stated that he had not received any safety training and did not know about soil classifications for trenching. (Tr. 255; CX-14B).

During Mr. Ricketts’ interview statement to the CO, Mr. Ricketts revealed he had not received any safety training, did not know of any safety program, and did not know about soil classifications. (Tr. 144-45, 250-51; Ex. CX-14A). His only training was some college and plumbing training prior to working for Speedy Rooter. (Tr. 250; CX-14A).

Ms. Crone testified that she knew that Mr. Ricketts had no OSHA training on excavation safety. (Tr. 181-82). When asked about training during the inspection, Ms. Crone told CO Dailey that safety was discussed at a group meeting held every three months. (Tr. 124-25, 243-44; CX-14C). Ms. Crone claimed that she kept a log of the attendees at these meetings. (Tr. 124-25, 243-44; CX-14C). However, Respondent did not provide a copy of the meetings’ logs or contents to support this claim. *See Capeway*, 20 BNA OSHC at 1342-1343 (reasonable to draw inference against the party with control over the evidence).

Speedy Rooter did not provide training to recognize and avoid hazards associated with excavations. The standard was violated.

### ***Knowledge***

The Secretary must prove “the employer either knew, or with the exercise of reasonable diligence, could have known of the hazardous condition.” *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1305-06 (No. 06-1201, 2008) (*PSP*). The employer’s knowledge is directed to the physical conditions that constitute a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff’d*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). The Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous. *Id.*

Several factors are considered in assessing reasonable diligence, including the employer’s “obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Cranesville Block Co., Inc./Clark Div.*, 23

BNA OSHC 1977, 1986 (Nos. 08-0316 & 08-0317, 2012) (*Cranesville*) (citation omitted). The employer's conduct is viewed in its totality and “whether a reasonable employer would have done more.” *Capform, Inc.*, 16 BNA OSHC 2040, 2042 (No. 91-1613, 1994).

Ms. Crone knew a trench would be excavated at the worksite and knew that someone had to work in the trench to connect the new sewer line. (CX-12). She knew that Mr. Ricketts had no prior training in trench excavations.<sup>17</sup> Further, she knew that Speedy Rooter had not provided training on trenching hazards to Mr. Ricketts or Mr. Bryant.

Respondent, through Ms. Crone, had knowledge that Mr. Ricketts and Mr. Bryant worked at the Canal Road worksite without any training in trenching hazards. Knowledge is established.

### ***Serious Characterization***

The Secretary characterized this violation as serious. The Act states that “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from” the violative condition. Sec. 17(k) of the Act; 29 U.S.C. § 666(k). A serious characterization is appropriate when “a serious injury is the likely result should an accident occur.” *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

According to CO Dailey, an employee is exposed to serious injury or death from engulfment if a cave-in occurs in a trench excavation. (Tr. 140-41). Training provides an employee with the ability to recognize the hazards of working in a trench excavation. (Tr. 140). The serious characterization is supported. *See Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1047 (No. 08-0631, 2010) (*Mosser*) (recognizing cave-in includes “potentially serious or deadly consequences”); *Communications, Inc.*, 7 BNA OSHC 1598, 1602 (No. 76-1924, 1979) (employees likely would suffer serious physical harm from collapse of trench 6’2” deep, particularly if they were in a bending position).

### ***Penalty***

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer’s business, the gravity of the violation, the

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<sup>17</sup> When asked if Mr. Ricketts had any excavation training, Ms. Crone testified, “I knew he didn’t have any OSHA training when that came up in conversation. But he did have plumbing and some college training.” (Tr. 181-82).

employer's good faith, and the employer's prior history of violations. *Compass Envt'l, Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The maximum penalty for a serious violation is \$12,471.<sup>18</sup> 29 U.S.C. § 666(b), 29 C.F.R. § 1903.15(d)(3) (2016). The penalty was adjusted for a moderate gravity based on a high severity and lesser probability. (CX-6). The size adjustment of 70% reduced the penalty to \$2,672. *Id.* I find the penalty adjustments are appropriate for this violation.

***Citation 1, Item 2***

Respondent was cited for a serious violation of 29 C.F.R. § 1926.651(j)(2):

(j) Protection of employees from loose rock or soil. . . . (2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The Secretary asserts that an employee at the Canal Road worksite worked in a trench where the spoil pile was placed at the edge of the excavation. Respondent does not dispute that the spoil pile was at the edge of the excavation.

***The standard applies, employees were exposed, and the standard was violated***

Excavated soil was piled along the edge of the trench. (Tr. 97; CX-11A, CX-11B). Mr. Ricketts was in the trench connecting the pipes below the spoil pile. (Tr. 81-82, 97, 249; CX-14A). The standard applies and employees were exposed.

The standard requires the excavated soil to be either behind a retaining device or no closer than 2 feet from the edge of the excavation. The spoil pile was six feet high by eight feet wide and less than 2 feet from the edge of the trench. (Tr. 97, 100, 143; CX-7, CX-9 p. 0048). The CO's photographs show the excavated soil was piled along the edge of the 50-foot trench

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<sup>18</sup> OSHA established new penalty maximums effective August 1, 2016, for violations occurring after November 2, 2015, pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015, and the penalty was assessed after August 1, 2016, but on or before January 13, 2017, thus the statutory maximum of \$12,471 applies to serious violations and \$124,709 to willful violations. *Id.*

excavation with no retaining device to keep the soil from falling into the trench. (Tr. 139; CX-9 p. 0048, CX-11A, CX-11B).

No retaining device was used at this worksite and the soil was placed closer than 2 feet from the excavation's edge. The standard was violated.

### ***Knowledge***

The Secretary must prove “the employer either knew, or with the exercise of reasonable diligence, could have known of the hazardous condition.” *PSP*, 22 BNA OSHC at 1305-06. Commission precedent states that the employer's conduct is viewed in its totality and “whether a reasonable employer would have done more.” *Capform*, 16 BNA OSHC at 2042. Further, an employer has constructive knowledge of conditions that are “readily apparent.” *See Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994).

As discussed above, Ms. Crone knew that the work at the Canal Road worksite required digging a long trench to install a new sewer lateral. (Tr. 236: CX-12). The spoil pile was in plain view as demonstrated by photographs and Mr. Fishel's observation of Mr. Ricketts at work in the trench below the spoil pile. (Tr. 81-82; CX-11A, CX-11B). *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1267-68 (No. 06-1416, 2008) (signage was in plain view establishing constructive knowledge); *A. L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (finding constructive knowledge where a condition is “readily apparent to anyone who looked”).

Despite this, Ms. Crone made no effort to anticipate the hazard of the spoil pile and took no action to prevent the spoil pile from being on the edge of the excavation. *See Cranesville*, 23 BNA OSHC at 1986 (reasonable diligence includes the employer's obligation to inspect the worksite, anticipate hazards, and take action to prevent occurrence of hazards). The spoil pile was in plain view and Ms. Crone knew that soil would be excavated to create the trench. Knowledge is established.

### ***Serious Characterization***

A serious characterization is appropriate when “a serious injury is the likely result should an accident occur.” *Pete Miller*, 19 BNA OSHC at 1258. This item was characterized as serious because a cave-in would result in serious injury or death. (Tr. 139). CO Dailey testified that a spoil pile on the edge of an excavation creates additional pressure on the trench walls increasing the likelihood of a cave-in. (Tr. 139). The Commission has recognized that a trench cave-in is a

serious hazard. *See Mosser*, 23 BNA OSHC at 1047 (finding cave-in includes “potentially serious or deadly consequences”); *Communications*, 7 BNA OSHC at 1602 (employees likely would suffer serious physical harm from collapse of trench 6’2” deep, particularly if they were in a bending position). The serious characterization is supported.

### ***Penalty***

The maximum penalty for a serious violation is \$12,471. The gravity was assessed as moderate based on high severity and lesser probability. (CX-7). The size adjustment of 70% reduced the penalty to \$2,672. *Id.* I find the penalty adjustments are appropriate for this violation.

### ***Citation 1, Item 3***

Respondent was cited for a serious violation of 29 C.F.R. § 1926.651(k)(1):

(k) Inspections.

(1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

The Secretary asserts that a competent person did not conduct a daily inspection of the trench excavation. Respondent asserts that Mr. Ricketts was a competent person. (Tr. 181).

### ***The standard applies, employees were exposed, and the standard was violated***

A 50-foot long trench excavation was dug at the Canal Road worksite to replace a lateral sewer line. (Tr. 65, 248-49; CX-12). Mr. Ricketts and Mr. Bryant worked in and around the excavation. (Tr. 67, 81-82, 248-49, 261). The standard applies and employees were exposed to the hazard.

A competent person is defined as “one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 C.F.R. § 1926.650(b).

The standard requires the excavation and its adjacent areas to be inspected for hazardous conditions by a competent person before the start of work daily (or more often when conditions

change). The inspection of an excavation consists of more than a “casual observation.” *Capform, Inc.*, 13 BNA OSHC 2219, 2221-22, (No. 84-0556, 1989), *aff’d*, 901 F.2d 1112 (5th Cir. 1990) (unpublished). OSHA’s excavation standard requires a competent person to “ensure compliance with applicable regulations and to make those inspections necessary to identify situations that could result in possible cave-ins, indications of failures of protective systems, hazardous atmospheres, or other hazardous conditions, and then to [e]nsure that corrective measures are taken.” U.S. Dep’t of Labor, OSHA, Interpretation Letter to G. Kennedy (March 23, 1992), <https://www.osha.gov/laws-regs/standardinterpretations/1992-03-23>.

Ms. Crone asserted that Mr. Ricketts was a competent person and that he had inspected the trench. (Tr. 181, 238, 243; CX-14C). She knew he had no OSHA excavation training, but believed he was a competent person because there had been no problems or citations from OSHA or a municipality during the two years Mr. Ricketts had worked for Speedy Rooter. (Tr. 181, 216-17). Ms. Crone believed the lack of citations was proof that he was a competent person.<sup>19</sup> (Tr. 217-18).

Ms. Crone’s belief that Mr. Ricketts was a competent person was not reasonable. The lack of citations from OSHA or a municipality is not a valid benchmark to determine if someone is able to identify hazards and make necessary corrective actions. As explained in the preamble to the excavation rule,

it is important to note that what constitutes a “competent person” depends on the context in which the term is used. In order to be a “competent person” for the purposes of this standard one must have had specific training in, and be knowledgeable about, soils analysis, the use of protective systems, and the requirements of this standard. One who does not have such training or knowledge cannot possibly be capable of identifying existing and predictable hazards in excavation work or taking prompt corrective measures.

Occupational Safety and Health Standards—Excavations, 54 Fed. Reg. 45894, 45909 (Oct. 31, 1989) (to be codified at 29 C.F.R. part 1926).

Respondent presented no evidence that Mr. Ricketts had the skills to identify hazards in a trench excavation or the ability to correct hazards at a worksite. In his signed written statement, Mr. Ricketts stated he did not know about soil classifications. (Tr. 250; CX-14A). Further, he

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<sup>19</sup> When asked why she believed Mr. Ricketts was a competent person for the Canal Road worksite, Ms. Crone responded: “So, not having other OSHA violations or other, any, citations from any other municipality leads me to believe if he’s performing the job for 40 or 50 dig sites and you have no violations or no problems, then he’s a competent person to make decisions on the site.” (Tr. 217).

stated that he had not inspected the trench. (Tr. 251; CX-14A). When questioned by the CO about what makes a trench safe, he could not provide an explanation. (Tr. 145). During the inspection, Ms. Crone admitted to the CO that Mr. Ricketts did not meet OSHA's definition of a competent person. (Tr. 124). Further, Ms. Crone admitted in her testimony that she did not believe a competent person would go into the trench at the Canal Road worksite. (Tr. 238-39).

Mr. Ricketts was not a competent person as defined by the standard. He had no training in trench excavations. Nor did he have knowledge about soil types or protective systems. He was not trained about the hazards affiliated with a trench excavation or use of protective systems in a trench. Without this knowledge he could not adequately assess the hazards in the trench excavation. Respondent cannot rely on a lack of citations at its worksites as proof that Mr. Ricketts was a competent person. *See generally R. Williams Constr. Co. v. Sec'y*, 464 F.3d 1060, 1064 (9th Cir. 2006) (company cannot discharge its duty to have a competent person by relying on general work experience or common sense).

I find that Mr. Ricketts was not a competent person as defined by the standard and thus there was no inspection of the trench by a competent person. The standard's requirement was violated.

### ***Knowledge***

The Secretary must prove "the employer either knew, or with the exercise of reasonable diligence, could have known of the hazardous condition." *PSP*, 22 BNA OSHC at 1305-06. Commission precedent states that the employer's conduct is viewed in its totality and "whether a reasonable employer would have done more." *Capform*, 16 BNA OSHC at 2042.

As discussed above, Ms. Crone knew that the work at the Canal Road worksite required Mr. Ricketts or Mr. Bryant to get into the trench to connect the new pipe to the existing sewer main. (Tr. 236; CX-12). Ms. Crone knew Mr. Ricketts had no training on excavation hazards or abatement. (Tr. 181-82). Further, Respondent provided no training or safety guidelines for trench inspection. Ms. Crone made no effort to ensure the trench excavation was inspected by a competent person before employees worked in the trench. *See Cranesville*, 23 BNA OSHC at 1986 (reasonable diligence includes the employer's obligation to inspect the worksite, anticipate hazards, and take action to prevent occurrence of hazards). Knowledge is established.

### ***Serious Characterization***

A serious characterization is appropriate when “a serious injury is the likely result should an accident occur.” *Pete Miller*, 19 BNA OSHC at 1258. This item was characterized as serious because an inspection is needed to determine if the trench is safe to work in; a cave-in would result in serious injury or death. (Tr. 139). *See Mosser*, 23 BNA OSHC at 1047 (finding a cave-in includes “potentially serious or deadly consequences”); *Communications*, 7 BNA OSHC at 1602 (employees likely would suffer serious physical harm from collapse of trench 6’2” deep, particularly if they were in a bending position). The serious characterization is supported.

### ***Penalty***

The maximum penalty for a serious violation is \$12,471. The gravity was determined as moderate based on a high severity and lesser probability. (CX-8). The size adjustment of 70% reduced the penalty to \$2,672. *Id.* I find the penalty adjustments are appropriate for this violation.

### ***Citation 2, Item 1***

Respondent was cited for a willful violation of 29 C.F.R. § 1926.652(a)(1):

(a) Protection of employees in excavations.

(1) 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:

(i) Excavations are made entirely in stable rock; or

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

(2) Protective systems shall have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system.

The Secretary asserts an employee worked in a trench that was 6 feet 8 inches deep without protection against cave-in. Respondent stipulated the plywood in the trench excavation was not intended to be an adequate protective system. (Tr. 261).

### ***The standard applies, employees were exposed, and the standard was violated***

As discussed above, two Speedy Rooter employees, Mr. Ricketts and Mr. Bryant removed and installed sewer pipe in a trench excavation at the worksite. The standard applies and employees were exposed. The trench was over 5 feet in depth. (Tr. 110, 115-16). Mr. Ricketts connected pipes in the trench without using a protective system. (Tr. 261). The standard was violated.

### ***Knowledge***

The Secretary must prove “the employer either knew, or with the exercise of reasonable diligence, could have known of the hazardous condition.” *PSP*, 22 BNA OSHC at 1305-06 (No. 06-1201, 2008). Commission precedent states that the employer's conduct is viewed in its totality and “whether a reasonable employer would have done more.” *Capform*, 16 BNA OSHC at 2042.

Ms. Crone testified that she knew there was a requirement for a trench box or other cave-in protection when an excavation was over 5 feet in depth. (Tr. 182-83). Speedy Rooter owned a trench box that was not delivered to the Canal Road worksite for use. (Tr. 148, 250; CX-14A). A trench box had been used at other jobs and Ms. Crone knew that additional equipment was needed at a site to lift and place the trench box into the excavation. (Tr. 242, 250; CX-14A, CX-14C).

Ms. Crone knew the excavation would be over 5 feet in depth. In her One-Call request for utility marking she stated that an excavation five to six feet deep would be dug at the worksite. (CX-13). Ms. Crone also knew the work at the Canal Road worksite required Mr. Ricketts or Mr. Bryant to get into the trench to connect the new pipe to the existing sewer main. (Tr. 236; CX-12). Despite her knowledge that an excavation was required, Ms. Crone did not exercise reasonable diligence to inspect the worksite. She took no steps to ensure a protective system was used in the trench excavation. *See Cranesville*, 23 BNA OSHC at 1986 (reasonable diligence includes the employer's obligation to inspect the worksite, anticipate hazards, and take action to prevent occurrence of hazards). Knowledge is established.

### ***Willful Characterization***

The Secretary characterized Respondent's violation of the requirement to provide a trench protective system as willful. The Secretary asserts that Respondent, through Ms. Crone, had a heightened awareness of the requirement to use a protective system and was plainly indifferent to the standard's requirements. (S. Br. 24). Respondent did not present an argument to refute the Secretary's position.

A willful violation is “one committed ‘with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.’” *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (citations omitted); *see also, Bianchi Trison Corp. v. Sec'y*, 409 F.3d 196, 208 (3d Cir. 2005) (“Although the Act does not define the

term willful, courts have unanimously held that a willful violation of the Act constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the [OSH] Act's requirements.”) (citations omitted).

“The Secretary must show that 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.” *Burkes*, 21 BNA OSHC at 2140 (citations omitted). “A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.” *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1569 (No. 94-1979, 2009). It is not necessary to find evil or malicious motive to find a violation willful. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). Plain indifference to employee safety is present when the employer possesses a state of mind such that if it had been informed of the standard it would not have cared. *Valdak Corp.*, 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995) *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

Speedy Rooter owned a trench box. (Tr. 242, 250; CX-14A, CX-14C). Ms. Crone knew a trench box or other cave-in protection was needed when an excavation was over 5 feet in depth. (Tr. 183). Ms. Crone had been in business for 14 years and delivered trench boxes to previous worksites. (Tr. 242; CX-14C). Yet, Ms. Crone made no attempt to provide a protective trench system at the Canal Road worksite.

Further, Ms. Crone had a heightened awareness trench protection was needed at the Canal Road worksite. She knew the trench would be over five feet in depth when she called to have the utilities marked and applied for a permit from the Dover Borough. (Tr. 177; CX-12, CX-13). Ms. Crone delivered the backhoe to the worksite and visited the worksite during the rainstorm that delayed the project. (Tr. 186, 235).

Ms. Crone demonstrated plain indifference to the safety of Mr. Ricketts and Mr. Bryant. Ms. Crone knew the trench would be five to six feet in depth, Ms. Crone knew that cave-in protection was needed over five feet, Ms. Crone delivered the backhoe to the worksite to dig the trench, and Ms. Crone knew either Mr. Ricketts or Mr. Bryant would be in the trench to make the pipe connection. Despite this awareness, Ms. Crone made no effort to protect employees from a cave-in hazard. Ms. Crone's actions demonstrate a plain indifference to employee safety. *See Arcadian Corp.*, 20 BNA OSHC 2001, 2019 (No. 93-0628, 2004) (finding willfulness where

employer's approach to employee safety was reckless). Ms. Crone knew an employee would be working in the trench excavation and she did not implement any safety measures to protect employees from cave-in hazards. I find the willful characterization is established.

***Penalty***

The maximum penalty for a willful violation was \$124,709. The penalty was adjusted at a moderate gravity based on a high severity and lesser probability. (CX-9, p. 0037). The size adjustment of 80% reduced the penalty to \$21,378. *Id.* I find the penalty adjustments are appropriate for the violation.

**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 findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.21(b)(2), is AFFIRMED and a penalty of \$2,672 is assessed.
2. Citation 1, Item 2, alleging a Serious violation of 29 C.F.R. § 1926.651(j)(2), is AFFIRMED and a penalty of \$2,672 is assessed.
3. Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1926.651(k)(1), is AFFIRMED and a penalty of \$2,672 is assessed.
4. Citation 2, Item 1, alleging a Willful violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED and a penalty of \$21,378 is assessed.

/s/

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Keith E. Bell  
Judge, OSHRC

Dated: November 19, 2019  
Washington, D.C.