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OCT 20 2022
BY *K Kennedy*

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

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CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION OF
THE DIVISION OF INDUSTRIAL
RELATIONS OF THE DEPARTMENT
OF BUSINESS AND INDUSTRY, STATE
OF NEVADA,

Complainant,

vs.

CAPRIATI CONSTRUCTION CORP.,
INC.

Respondent.

Docket No. LV 19-1997

Inspection No. 1366584

DECISION AND ORDER OF THE BOARD;
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER

This case arose out of a referral alleging one or more safety violations at a construction site located in Henderson, Nevada. *See*, Tr. p. 15;21-23. The State's inspection resulted in the issuance of three citations consisting of five items for violation of Federal regulations and State law.¹ *See*, State's Exhibit 1, pp. 13-16.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing on December 11, 2019. *See*, Tr. p. 5. The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing dated June 5, 2019. In attendance

¹ Only one of those citations is at issue here because the Respondent did not contest the others. *See*, State's Exhibit 1, p. 59.

1 to hear the matter were Board Acting Chairman Rodd Weber and Board Members Lance
2 Semenko and James Halsey. *See*, Tr. p. 5. The same Board Members deliberated the case after
3 the conclusion of the hearing on the merits. *See*, Tr. pp. 234-241.

4 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
5 and Health Administration of the Division of Industrial Relations of the Department of Business
6 and Industry (the State), appeared at the first hearing on behalf of the Complainant (the State).
7 *See*, Tr. pp. 3, 4. The Respondent (hereinafter, Respondent or Capriati Construction) was
8 represented by Whitney Selert, Esq., Garg Goldman Law Firm (Mr. Selert). *See*, Tr. p. 2.

9 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes,
10 NRS 618.315. Jurisdiction was not disputed. As there were three members of the Board present
11 to decide the case, with at least one member representing management and one member
12 representing labor in attendance, a quorum was present to conduct the business of the Board.

13 Nevada's Federal Occupational Safety and Health Standards follow the regulations the
14 Secretary of Labor has promulgated, revoked or amended. They are, then, deemed the Nevada
15 Occupational Safety and Health Standards. *See*, NRS 618.295(8). A complaint may be
16 prosecuted for circumstances which arise before or during an inspection of the employer's
17 workplace. *See*, NRS 618.435(1).

18 The Notice of Alleged Safety or Health Violations generally alleged that Capriati
19 Construction's employees were working in an excavation with the approximate dimensions of six
20 to seven feet deep and seven feet wide. *See*, State's Exhibit 1, pp. 54, 57. It is alleged that the
21 excavation was not in stable rock, was in a two-sided vertical wall configuration in close
22 proximity to vehicular traffic, and was not protected from cave-in by an adequate protective
23 system. *See, Id.* The excavation was dug in previously disturbed soil and was, therefore, at best,
24 B type soil. *See, Id.* Nevada OSHA alleged that the employees were exposed to a cave-in hazard,
25 which could result in serious, irreversible injury or death by asphyxiation. Nevada OSHA issued
26 a Citation and Notice of Penalty which recommended a \$4,410 fine. *See*, State's Exhibit 1, pp.
27 54, 57.

28 The Citation and Notice of Penalty were issued on April 3, 2019. *See*, State's Exhibit 1,

1 p. 61. Respondent, through its attorney, Anthony B. Golden, Esq., notified the State of its intent
2 to contest the matter on April 26, 2019. *See*, State's Exhibit 1 pp. 58-29. On May 15, 2019, the
3 State filed its formal Complaint for resolution by the Review Board. *See*, State's, Exhibit 1 pp.
4 60-66.

5 Capriati Construction was given notice of the proceedings by first class, certified mail,
6 return receipt requested. *See*, Notice of Hearing dated June 5, 2019. The Complaint sets forth the
7 allegation of the violation of one Federal Regulation. *See*, State's Exhibit 1, pages 69-77.
8 Citation 1, Item , charged a serious violation of 29 CFR 1926.652(a)(1), as stated below:

9 Each employee in an excavation shall be protected from cave-ins by an adequate
10 protective system designed in accordance with paragraph (b) or (c) of this section
11 except when: Excavations are made entirely in stable rock; or 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.

12 Capriati Construction, through counsel, Anthony B. Golden, Esq., answered the
13 Complaint on June 3, 2019. *See*, State's Exhibit 1, pp. 67-70. Capriati Construction's answer
14 contained six affirmative defenses. *See*, State's Exhibit 1, p. 68. Specific to this Decision were
15 allegations that Capriati Construction was not the employer of the workers who performed work
16 which is at issue in the citation and that it did not know or could not have known with reasonable
17 diligence of the violation at issue in this case. *See, Id.*

18 At the hearing on the matter, the State offered for admission its Exhibits 1-3, consisting
19 of 155 pages. *See*, Tr. p. 10;5-9. The State's exhibits were admitted, subject to objections made
20 by the Respondent at the time the exhibit is offered into evidence. *See*, Tr. p. 10;2-9. The
21 Respondent offered for admission 10 exhibits of an unspecified number of pages. The
22 Respondent's exhibits were also admitted, subject to objections as made by the State as they
23 might arise. *See*, Tr. p. 10;2-9.

24 FINDINGS OF FACTS

25 Capriati Construction is a Rhode Island corporation authorized to do business in the State
26 of Nevada. *See*, State's Exhibit 1, pp., 1-2. Capriati Construction is in the construction industry.
27 *See*, State's Exhibit 1, pp. 14-16, *see also*, Tr. p. 129;22-24, 130;1-4. Capriati Construction's
28 principal place of business in the State of Nevada is 1020 Wigwam Parkway, Henderson,

1 Nevada, 89074. *See*, State's Exhibit 1, pp., 1-2.

2 The construction site is located near the intersection of East Starr Avenue and St. Rose
3 Parkway in Henderson, Nevada (hereinafter referred to as the Starr Multi-Family Apartments
4 Project). *See*, State's Exhibit 1, p. 3, *see also*, Tr. p. 15;21-23. Pier Construction was the general
5 contractor for the construction site. *See*, State's Exhibit 1, p. 4, *see also*, Tr. p. 130;13-16.
6 Capriati Construction was one of the subcontractors at the Starr Multi-Family Apartments
7 Project. *See*, State's Exhibit 1, p. 5, *see also*, Tr. p. 130;8-12. Capriati Construction was
8 contracted to install the wet utilities, water and sewer drains. *See*, Tr. p. 130;8-12.

9 On November 7, 2018, Nevada OSHA inspector Francis Lauritzen (Mr. Lauritzen) went to
10 the Starr Multi-Family Apartments Project in response to a referral indicating that employees were
11 working in an unprotected trench. *See*, State's Exhibit 1, p. 3, *see also*, Tr. p. 16;11-18. At the job
12 site, Mr. Lauritzen found two individuals, J. Guadalupe Gonzalez and Eddie Scott, working in an
13 unprotected trench. *See*, State's Exhibit 1, p. 20, *see also*, State's Exhibit 3, pp. 139, 140. Another
14 individual, Kevin Summers, the foreman of the group, was operating an excavator at one end of
15 the trench. *See*, State's Exhibit 1, p. 14, *see also*, Tr. pp. 16;19-21, 18;6-10.

16 Opening conferences were conducted with Sean Burke of Pier Construction and Cliff
17 Goodrich of Capriati Construction. *See*, State's Exhibit 1, pp. 4, 5, *see also*, Tr. p. 17;6-10. Both
18 Mr. Burke and Mr. Goodrich signed the employers' Opening Conference Worksheet wherein they
19 acknowledged that they understood their rights and consented to an inspection of the work site.
20 *See*, State's Exhibit 1, pp. 4, 5. In this inspection, Mr. Lauritzen measured the trench at its deepest
21 point and found it to be 5.7 feet deep and approximately 8 feet wide. *See*, State's Exhibit 1, pp. 74,
22 97, *see also*, Tr. pp. 33,13-14, 34;13-16.

23 Mr. Goodrich told Mr. Lauritzen that there was an engineering report indicating that the
24 trench did not require any protective systems as a result of the type of soil present. *See*, State's
25 Exhibit 1, p.14, *see also*, Tr. p. 22;20-22. Mr. Goodrich did not have that report at the time of the
26 inspection but promised to provide it to Mr. Lauritzen. *See*, Tr. p. 22;20-24. Mr. Goodrich told
27 Mr. Lauritzen that, in the absence of an engineer's report, Capriati Construction always defaulted
28

1 to C-type soil.² *See*, State's Exhibit 1, p.14, *see also*, Tr. p. 22;16-19.

2 On the day of the inspection, Mr. Lauritzen obtained a statement from Kevin Summers.
3 *See*, State's Exhibit 1, pp. 22-23. Therein, Mr. Summers stated that he receives daily assignment
4 from Shane Stewart, Capriati Construction's superintendent on the construction site. *See, Id.* Mr.
5 Summers also stated that Mr. Stewart performs daily trench inspections. *See, Id.* Mr. Summers
6 expressly stated, "[w]e have an engineering document that says we don't need to use shoring due
7 to the type of soil." *See*, State's Exhibit 1, p. 23. Mr. Summers was part of a four person crew,
8 consisting of himself, J. Guadalupe Gonzalez, Mason Summers and Eddie Scott.³ These four
9 individuals were all from Texas (hereinafter referred to as the Texas Crew). *See*, State's Exhibit 1,
10 pp. 20. Mr. Summers never mentioned working for an employer other than Pier Construction or
11 Capriati Construction.

12 Mr. Lauritzen also interviewed Mr. Stewart, who stated that he supervised the employees
13 working in the trench. *See*, State's Exhibit 1, pp. 26-27, *see also*, Tr. p. 21;2-15. Mr. Stewart ex-
14 pressly stated that he supervises the Texas crew. *See*, State's Exhibit 1, p. 26. "On that site I
15 supervise 6 employees, Kevin, Manson, Eddie and Jose." *See, Id.* Mr. Stewart further stated that
16 an engineer was coming to inspect the trench. *See*, State's Exhibit 1, p. 26, *see also*, Tr. p.
17 21;18-24.

18 At some time on the day of the OSHA inspection, Raymond Brennan received a call from
19 Cliff Goodrich requesting that he inspect the trench which was the subject of the violation. *See*,
20 Tr. pp. 198;21-24, 199;1-13. Mr. Brennen is an engineer with more than forty years of experience.
21 *See*, Tr. p. 197;10-19. Mr. Brennen arrived at the job site at about 5:00 p.m. to commence his
22 inspection. *See*, Tr. p. 29;8-14. Mr. Brennen inspected the trench from the excavator to the
23 opposite end of the trench. *See*, Tr. p. 200;6-24, 201;1-4. His inspection indicated that the sides of
24 the trench were composed of cement, sand, gravel and cobbles. *See*, Tr. p. 201;5-9. Based on Mr.

26 ²A trench of over 5 feet deep in C-Type soil requires a sloping at a ratio of 1.5 to 1 or a support
27 or shield system. 29 CFR 1926, Subpt. P, App. B

28 ³The Respondent's documents state that all four of these individuals were hired on October 15,
2018. *See*, State's Exhibit 3, pp. 139-141.

1 Brennen's observations of the soil composition, he determined that the trench was safe to enter.
2 *See*, Tr. p. 201;13-15, *see also*, Respondent's Exhibit 7. Mr. Brennen's report was supplied to Mr.
3 Lauritzen some number of days after the Nevada OSHA inspection. *See*, Tr. p. 23;2-5.

4 On November 11, 2018, Mr. Lauritzen sent Mr. Goodrich a list of requested documents.
5 *See*, State's Exhibit 3, pp. 139, 140. Specific to this matter was Request No. 8. "Employee roster
6 for the employees working at the Starr and Rose site; Full Name, Position/Title and Date of Hire.
7 *See, Id.* In response to Request No. 8, Mr. Goodrich supplied a roster containing the names of 11
8 employees including Kevin Summers, J. Guadalupe Gonzalez, Mason Summers and Eddie Scott.
9 *See, Id.*

10 On December 12, 2018, Mr. Lauritzen interviewed Mr. Gonzalez. *See*, State's Exhibit 1
11 pp. 19-21. Mr. Gonzalez stated that he worked for Capriati Construction *See*, Tr. p. 27. Mr.
12 Gonzalez stated that he was hired because of his previous experience installing underground water
13 lines. *See*, Tr. p. 27;10-13. Mr. Gonzalez also explained Capriati Construction's hiring process.
14 *See, Id.* On his first day Mr. Gonzalez filed out an employment application and had a photograph
15 taken for his company identification card. *See, Id.* On the second day, Mr. Gonzalez signed a W2
16 and filled out some more paperwork. *See, Id.*

17 There was a significant amount of time between Mr. Lauritzen's inspection and the closing
18 conference conducted which did not occur until March 19, 2019. *See*, State's Exhibit 1, p. 4-5, 17-
19 18. During this time period, several communications were exchanged between Nevada OSHA and
20 Capriati Construction. In one of these communications Capriati Construction alleged that it was
21 not the Texas crew's employer. *See*, Tr. pp. 47;21-24, 48;1-6. Instead, Respondent alleged that an
22 entity known as Summex, LLC, (Summex) was the employer of the Texas Crew. *See, Id.* Upon
23 receipt of this information, Nevada OSHA attempted to locate information on Summex. *See*, Tr.
24 pp. 48;4-10, 49;22-24, 50;1-4. However, Nevada OSHA was unable to locate any information
25 regarding Summex. The State searched several public sources including the Nevada State
26
27
28

1 Contractor's Board, Nevada Secretary of State and business licenses for the City of Henderson.⁴
2 *See*, Tr. pp. 67-76, *see also*, State's Exhibit 2, pp. 123-138.

3 To support its allegation that Summex was the employer, Capriati Construction supplied
4 the contract document under which it engaged Summex to work at the site. *See*, Respondent's
5 Exhibit 3. The document is entitled "Service Agreement" and designates Summex as the service
6 provider.⁵ *See*, Respondent's Exhibit No. 3. p. 1. The Service Agreement provided a section
7 entitled "Scope of Work" wherein Summex expressly promised to "furnish all labor requested and
8 to perform work at the direction of the General Contractor for the hourly wages as in [the
9 attached] schedule rates." *See*, Respondent's Exhibit 3. Stated another way, Summex agreed to
10 provide whatever services Capriati Construction requested.

11 At the evidentiary hearing, the State presented the testimony of Mr. Lauritzen and Jamal
12 Sayegh. *See*, Tr. p. 3. During direct examination, Mr. Lauritzen generally testified to the facts
13 provided above. *See*, Tr. pp. 14-38. On cross examination Mr. Selert questioned whether Mr.
14 Lauritzen had attempted to evaluate whether Capriati Construction was a controlling employer or
15 a creating and/or exposing employer under the OSHA Multi-Employer Citation Policy. *See*, Tr. p.
16 48;16-24, 49;1-21. Stated another way, Mr. Selert wanted to know if Nevada OSHA had
17 considered whether the Texas crew's employer was Summex or Capriati Construction. *See, Id.*
18 Mr. Lauritzen testified that he had not been able to determine whether Summex was an employer,
19 at all, because no public information was available on the entity. *See*, Tr. pp. 48;4-6, 50;1-4.

20 Mr. Selert challenged Mr. Lauritzen's conclusion that the same standard applied to
21 Capriati Construction as would apply to Summex, as set forth below:

22 Mr. Selert: Weren't you confusing the standard when Capriati is digging a trench
23 and thereby creating and exposing employer verses when they are simply looking at
24 what a subcontracted contractor is doing and having a different duty as you have

25 ⁴At some time after the closing conference, Capriata Construction supplied the name and
26 telephone number of Rich Sitts, the purported owner of Summex, LLC. *See, Respondent's Exhibit 10.*
27 However, Nevada OSHA did not attempt to contact Mr. Sitts because it does not continue an
28 investigation after the issuance of a citation. *See*, Tr. p. 86;7-12.

⁵ Despite the name of the document and the identification of Summex as a service provider, Mr.
Selert repeatedly referred to it as a subcontract. *See*, Tr. pp. 43;20-22, 45;19-20,

1 described as a controlling employer?

2 Mr. Lauritzen: No, sir. I don't believe.

3 Mr. Selert: Did you ever draw that distinction with them or explore the distinction
4 with them explicitly?

5 Mr. Lauritzen: No. Because on that day, there was no discussion about the
6 employees. They were – on November 7th, everybody in was in agreement that is
7 Capriati employees in there. Mr. Goodrich said, "We have an engineer's report. If
8 we don't have an engineers (sic) report we default to C-type soil." And so in the
9 absence of the engineering report, I would have expected Capriati to default to C-
10 type soil and provide an appropriate protective system for the employees. *See*, Tr.
11 p. 59;9-24.

12 Mr. Lauritzen's response showed that Capriati Construction's own policies committed it to
13 provide the type of protective systems set forth in 29 CFR 1926.652(a)(1). Mr. Lauritzen also
14 testified that the engineering report obtained subsequent to the Nevada OSHA did not absolve
15 Capriati Construction of the violation;

16 Ms. Ortiz: As far as the standard that was cited here goes, does it require an
17 employer to make sure a trench is safe to enter before an employee enters it?

18 Mr. Lauritzen: Yes.

19 Ms. Ortiz: And that's part of the standard, correct?
20 ...

21 Mr. Lauritzen: Each employee in an excavation shall be protected by (sic) cave-ins
22 by an adequate protective system designed in accordance with paragraphs, and it
23 goes on to list the standards. But it says, yes, an employee in an excavation shall be
24 protected.

25 Ms. Ortiz: Does it indicate that there is an exception as to how long an employee
26 may be exposed to cave-in dangers before the protection kicks in?

27 Mr. Lauritzen : No, it does not. *See*, Tr. pp. 78;11-24, 79;1-4.

28 Jamal Sayegh, a Nevada OSHA supervisor then testified for the State. *See*, Tr. p. 91;11-20.

Mr. Sayegh explained how the State determined the amount of the fine. It was a gravity based fine
that was determined using objective evaluations of certain factors. *See*, State's Exhibit 1, pp. 28-
29, *See also*, Tr. pp. 99-101. He testified that Capriati Construction's violation was considered
serious because there could be serious injuries in the case of a cave-in at the excavation site. *See*,
Tr. p. 99;3-19. Mr. Sayegh further testified that the severity factor was high because a cave-in
could result in death, permanent disability or permanent impairment of an employee. *See*, Tr. pp.

1 99;20-24, 100;1-4. The State found a greater probability of injuries from the condition. *See*, Tr. p.
2 100;5-16. The probability of injury relates to the number of employees involved or exposed to the
3 condition, how often the employees are exposed and similar factors. *See, Id.* The gravity of the
4 violations is the starting point for the calculation of the penalty. The gravity of the violation is a
5 function of the probability of an injury and the severity of the injury, should one occur. *See*, Tr. p.
6 100;19-23. This was a gravity based penalty with a starting amount of \$7,000. *See*, Tr. pp.
7 100;24, 101;1-5. This gravity based penalty was then reduced to \$4,410, as the result of the
8 Respondent's size and its history. *See*, Tr. p. 101;6-10.

9 On cross examination, Mr. Sayegh affirmed Mr. Lauritzen's testimony regarding the need
10 to certify that the trench was safe before any employees entered it.

11 Mr. Selert: So, I guess my question is, in this case, you don't dispute the fact
12 that the engineer who inspected the trench on the very day that your inspector
13 looked at the trench certified it as safe to enter. Do you have any evidence to the
14 contrary?

15 Mr. Sayegh: No, I do not have any evidence to the contrary. However...the
16 condition existed prior to the professional engineer coming out. It should have
17 been inspected prior to the employees going in.

18 Mr. Selert: Well, you didn't cite them for not having it inspected prior. You
19 cited them for a serious violation which requires that the workplace hazard that
20 could cause an accident or an illness which would most likely result in death or
21 serious physical harm. And I guess my question to you is how do you justify a
22 serious citation when the only evidence of the condition of the trench is that it
23 was safe to enter at the time it was inspected by the inspector?

24 Mr. Sayegh: The employer themselves default to C-type soil, so they would have
25 had to make arrangements prior to the engineer coming out. If they are looking
26 at a trench and there's no engineer's report, they themselves default to C-type
27 soil. So they have to make precautions and make arrangements to prevent cave-
28 ins at that point. *See*, Tr. pp. 106;10-24, 107;1-8.

On redirect, Mr. Sayegh told the Board that Nevada OSHA was informed the employees
had been working in the trench for a couple weeks before the inspection. *See*, Tr. pp. 120;16-18,
122;6-10. Further, he testified that the employer had made no effort to address the potential hazard
of a trench over 5 feet deep, in what was presumed to be, C-type soil. *See*, Tr. p. 122;11-23.

The Respondent then put on three witnesses, Ashley Williams, Cliff Goodrich and
Raymond Brennan. Mr. Williams was at all relevant times Capriati Construction's Senior Project
Manager. *See*, Tr. p. 129;15-16. Mr. Williams oversaw Capriati Construction's work on the

1 Starr Multi-Family Apartments Project. *See*, Tr. p. 130;17-19.

2 Mr. Williams testified that the Texas crew was not Capriati Construction's employees and
3 they were, in fact, employees of Summex. *See*, Tr. p. 131;6-19. Mr. Williams referred to
4 Respondent's Exhibits 4 and 5 which were, respectively, Capriati Construction's payroll summary
5 for the Starr Multi-Family Apartments Project and its list of employees. None of the names of
6 Texas Crew were on either of those lists. *See*, Tr. pp. 134;18-24, 135;1-9.

7 To support this claim, Mr. Williams testified that the scope of the work set forth in the
8 Service Agreement was to provide labor and equipment to install various items, primarily a water
9 line. *See*, Tr. p. 132;6-13. Despite the name and rather clear language of the Service Agreement,
10 Mr. Williams believed that Summex had primary control of its employees subject to Capriati
11 Construction's general, high level oversight. *See*, Tr. p. 133;7-16. Mr. Williams based this belief
12 in part upon section 5 of the Service Agreement which is entitled Compliance with Regulations,
13 Applicable Law and Safety. *See*, Tr. pp. 132;20-24, 133;1-16. In contrast to Mr. Selert's position,
14 Mr. Williams testified that the document is a Service Agreement as opposed to being a
15 subcontract. *See*, Tr. p. 148;13-17. Mr. Williams did not address the statements made by Mr.
16 Stewart or Mr. Gonzalez, both of which evidenced Capriati Construction's control of the job site.

17 The Respondent's next witness was Cliff Goodrich. *See*, Tr. p. 153;16-24. Mr. Goodrich is
18 and was during the relevant time period, Capriati Construction's safety manager. *See*, Tr. p. 154;2-
19 4. Mr. Goodrich testified that the trench at issue was generally four to four and one half feet deep.
20 *See*, Tr. p. 156;21-24, 157;1-4. At that depth, Mr. Goodrich did not have any safety concerns. *See*,
21 *Id.* However, about the time of the inspection, the trench was dug deeper to allow the water line to
22 tie in under an operative box (and underground utility box). *See*, Tr. p. 157;5-12.

23 Mr. Goodrich then testified that the trench at issue was similar to another trench located
24 approximately 50 to 75 yards from the subject trench and running parallel to it. *See*, Tr. pp.
25 157;16-24, 158;1-11. This second trench was dug by Capriati Construction for a sewer line. *See*,
26 Tr. p. 157;23-24. It was similar to the trench at issue in that it was two to four feet deep with a
27 one-to-one depth to width ratio. *See*, Tr. p. 158;8-11. However, it was located 50 to 75 yards
28 away. *See*, Tr. p. 158;5-4. Capriati Construction had an engineer's report, Excavation Condition

1 Report, for the sewer line trench. This report indicated it was safe to work in the sewer trench.
2 *See*, Respondent's Exhibit 6, *see also*, Tr. p. 158;5-11. This report was dated October 9, 2018.
3 However, the report for the sewer line trench cannot be considered sufficient to cover a trench in
4 another area. *See*, Tr. pp. 112;21-24, 113;1-21. For example, the subject trench was subject to
5 vibrations from traffic from the adjacent road which might cause fissures in the ground that were
6 not an issue with the sewer trench. *See, Id.*

7 Mr. Goodrich testified that he had provided safety training for the Texas crew. *See*, Tr. p.
8 165;4-15. This training occurred on October 15, 2018. *See*, Tr. pp. 172;22-14, 182;7-15. Mr.
9 Goodrich testified that none of the Texas crew were paid by Capriati Construction. *See*, Tr. p.
10 163;19-24, 164;1-2. Mr. Goodrich did not realize that the employees were listed as being hired
11 the day before the execution of the service agreement which he did not see until after the OSHA
12 inspection. *See*, Tr. p. 182;7-19.

13 The Respondent's final witness was Mr. Brennan who testified to his investigation of the
14 subject trench. *See*, Tr. pp. 196-215. Mr. Brennan was questioned about the proximity of the road
15 and the condition of the soil in proximity to the trench. *See, Id.* Mr. Brennan's responses to both
16 inquiries was that these factors would not cause him to alter his conclusion that the trench was
17 safe to enter. *See, Id.*

18 Notable in its absence was testimony of either Shane Stewart or Kevin Summers. Both of
19 these individuals provided statements to the effect that Capriati Construction oversaw the job site
20 and provided for employee safety. Further, none of Capriati Construction's witnesses addressed
21 these statements made the day of the inspection. Moreover, none of the witnesses addressed Mr.
22 Gonzalez' testimony that he was hired by Capriati Construction.

23 During deliberations, the Board discussed its view of the claim that Capriati Construction
24 was either a creating employer or an exposing employer, regardless of whether Summex was an
25 independent entity. Member Halsey expressed his view that Capriati Construction was either a
26 creating or exposing employer, "Capriati was in control of the workforce out there direction wise.
27 It was in the actual agreement that was written. So with that determination in mind, then you have
28 to go through the actual violation itself." *See*, Tr. p. 234;12-16. Member Semenکو concurred, "I

would almost say the exact same words. The only other thing I have is that they kept referring to this as a subcontract. It's not a subcontract. It's a service provider agreement... Which tells me they are hiring laborers to work for them. That's what that is. And to me you're in control of those guys if you are hiring those guys." *See*, Tr. pp. 234;24, 235;1-7. Chairman Weber stated "I think regardless of who pays the person... if they are being paid through Summex but it's a service agreement, not a subcontract. They are not providing supervision... So they are hiring labor. Just like if I hired somebody out of the union, to me I hire somebody out of the union, right. So technically, they are a union employee but we are paying them, we are directing them... It clearly said that they were suppose to provide - that Summex was providing no direction. Everything was being provided by Capriati." Tr. p. 236;3-16. Accordingly, all Board Members concurred that regardless of Summex' position as the employer of the workers in the trench, Capriati Construction must be viewed as the creating or exposing employer.

Once the standard was established, then the Board turned to the proof of the *prima facie* case. Member Halsey stated, "and the expert on soil testified there was between six and seven feet, and it was at the time that that picture was taken that there was two employees and they were unprotected... in a not inspected trench." *See*, Tr. p. 234;17-20. Member Semenko added that, "[t]he soils did not look like they were sufficient for a 1 to 1 ratio and the trench was not sufficiently sloped. *See*, Tr. p. 235;8 -1. Chairman Webber concurred stating, "there was (sic) two employees in an excavation. There's a standard that requires employees in an excavation deeper than five feet to be protected by one of four or potentially five means...Sloping, benching, shielding, or shortening or you can have an engineered report saying whatever method of sloping or benching you have is adequate. They did not have any at the time. So they came after the fact... how did they know it wasn't hazardous prior to getting them in? They didn't." *See*, Tr. pp. 236;20-24, 237;1-4.

CONCLUSIONS OF LAW

The burden is on the State to prove by a preponderance of the evidence, a *prima facie* case against the Respondent. *See*, NAC 618.788(1), *see also*, *Original Roofing Company LLC v. Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146, 149 (Nev. 2019). Thus, in matters

1 before the Board of Review, the State must establish (1) the applicability of a standard being
2 charged; (2) the presence of a non-complying condition; (3) employee exposure or access to the
3 non-complying condition; and, (4) the actual or constructive knowledge of the employer's
4 violative conduct. *Id.* at 149, *see also, American Wrecking Corp. v. Secretary of Labor*, 351 F.3d
5 1254, 1261 (D. C. Cir., 2003).

6 The State is obligated to demonstrate the alleged violation by a preponderance of the
7 reliable evidence in the record. Mere estimates, assumptions and inferences fail this test.
8 Conjuncture is also insufficient. Findings must be based upon the kind of the evidence which
9 responsible persons are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.* 1982
10 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ). The Board's
11 decision must be based on consideration of the whole record and shall state all facts officially
12 noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974
13 OHSD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of*
14 *Labor*, 525 F.2d 464 (1975). A Respondent may then rebut the allegations by showing: 1) the
15 standard was inapplicable to the situation at issue; or 2) the situation was in compliance. *S.*
16 *Colorado Prestress Co. v. Occupational Safety & Health Rev. Comm'n*, 586 F.2d 1342, 1349-50
17 (10th Cir. 1978).

18 To establish a *prima facie* case under 29 CFR 1926.652(a)(1), the State must show by a
19 preponderance of the evidence that the employer, here, Capriati Construction, allowed two
20 employees to work in a trench at a depth in excess of five feet without sufficient protection, the
21 essence of a 29 CFR 1926.652(a)(1) claim. In this instance, the State must first determine the
22 status of Capriati Construction in the context of Multi-Employer Citation Policy. Directive
23 Number CPL 2-0.124. Should the Board determine that Capriati Construction is a creating or
24 exposing employer, it is subject to citation for any condition which it creates or exposes. *See, Id.*
25 pp. 2, 3. In the alternative, should the Board determine that Capriati Construction is a controlling
26 employer, it must exercise reasonable care for correcting a hazzard. *See, Id.* p. 4.

27 The Board correspondingly finds and concludes the State showed by a preponderance of
28 the evidence that Capriati Construction is a creating or exposing employer, as follows. First, the

express language of the Service Agreement made Capriati Construction directly responsible for safety at the construction site. Second, Mr. Gonzalez' testimony showed him to be an employee of Capriati Construction. Mr. Gonzalez testified that he was hired by Capriati Construction and that he was processed as a new employee. Moreover, all of the members of the Texas crew were processed in the same fashion. Lastly, Capriati Construction's argument that Summex was the Texas crew's employer lacked credibility because it was inconsistent with the information provided by Mr. Stewart and Mr. Summers at the time of the inspection.

The State then met its burden to show that Capriati Construction violated 29 CFR 1926.652 because it allowed employees to work in an unprotected trench with a depth of over 5 feet without an engineering report showing its safety. As for proof of the employer's knowledge, Capriati Construction knew that the trench was over 5 feet deep because Mr. Summers told the inspector that the trench was anywhere from four and one half feet deep to six and one half feet deep. *See*, State's Exhibit 1, pp. 2, *see also*, Tr. p. 18;11-17. While Mr. Goodrich could not tell the inspector the type of soil present, he indicated that in the case of and in the absence of an engineering report, Capriati Construction defaults to C-Type soil. *See*, State's Exhibit 1, p. 14, *see also*, Tr. p. 22;16-19. Had Capriati Construction followed its own policy it would have sloped at a 1 to 1.5 ratio or provided benching. *See*, 29 CFR 1926.652(b). None of those precautions were taken even though Capriati Construction knew that the trench was deeper than five feet and it lacked an engineering report for the subject trench.

The Board accordingly finds and concludes that the preponderance of the evidence reveals the State met its *prima facie* burden under 29 CFR 1926.652. It is clear that Capriati Construction allowed its employees in this case to work in a trench of a depth of over five feet without protection from cave-ins by an adequate protective system, given the type of soil to which the employees were exposed. The claim and penalty are hereby sustained.

ORDER

It was moved by Board member Halsey that the citation and fine be upheld. *See*, Tr. p. 237;22-14. The motion was seconded by Board member Semenko. *See*, Tr. p. 238;1. The motion was approved unanimously upon a vote of three in favor and none in opposition. *See*, Tr. p. 238;2-

1 3. Accordingly, the State OSH Board of Review hereby upholds the citation and fine assessed
2 against Capriati Construction.

3 This is the Final Order of the Board.

4 IT IS SO ORDERED.

5 On October 12, 2022 the Board convened to consider adoption of this decision, as written
6 or as modified by the Board, as the decision of the Board.

7 Those present and eligible to vote on this question consisted of the four current members
8 of the Board, to-wit, William Steinberg, Frank Mulligan, Jorge Macias and Scott Fullerton. The
9 Board had changed over in personnel at the time of this hearing and Member Frank Milligan was
10 not present for the hearing. Acting Chairman William Spielberg and members Frank Milligan,
11 Jorge Macias and Scott Fullerton were eligible to vote because they had read the transcripts, the
12 pleadings and the exhibits offered and admitted into evidence (e.g., the record). *See*, NRS
13 233B.124. Upon a motion by Frank Milligan, seconded by Scott Fullerton, the Board voted 4-0 to
14 approve this Decision of the Board as the action of the Board and to authorize William Spielberg,
15 the Acting Chairman, after any grammatical or typographical errors are corrected, to execute,
16 without further Board review this Decision on behalf of the Nevada Occupational Safety and
17 Health Review Board. Those voting in favor of the motion either attended the hearing on the
18 merits or had in their possession the entire record before the Board upon which the decision was
19 based.

20 On October 12, 2022 this Decision is, therefore, hereby adopted and approved as the Final
21 Decision of the Board of Review.

22 Dated this 18 day of October, 2022.

NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

23
24
25 By: William Spielberg
William Spielberg, Acting Chairman

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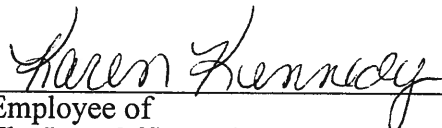
CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Decision and Order of the Board, Findings of Fact and Conclusion of Law, and Final Order*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:

Salli Ortiz, Esq.
DIR Legal
400 West King Street, Suite 201
Carson City, NV 89703

Witney Selert, Esq.
Garg Golden Law Firm
3145 St. Rose Highway Ste. 230
Henderson NV 89052

Dated this 20th day of October, 2022.



Employee of
The Law Offices of Charles R. Zeh, Esq.