



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

SECRETARY OF LABOR,  
Complainant,  
  
v.  
MARTIN CONSTRUCTION, INC.,  
  
Respondent.

OSHRC Docket No. 06-0700

**APPEARANCES:**

Ronald J. Gottlieb, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Jonathan L. Snare, Acting Solicitor; U.S. Department of Labor, Washington, DC  
For the Complainant

J. Burruss Riis, Esq., and Paul T. Beckmann, Esq.; Hand Arendall, LLC, Mobile, AL  
For the Respondent

**DECISION**

Before: THOMPSON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

This case involves the petition for review of two orders<sup>1</sup> issued by Administrative Law Judge Stephen J. Simko, which dismissed, as untimely, a fee application filed under the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504, by Martin Construction, Inc. (“Martin”), the prevailing party in an underlying administrative proceeding brought by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. §§ 651-78.

In the underlying OSH Act proceeding, the judge issued a decision on February 23, 2007, vacating all citation items issued to Martin following a safety inspection conducted subsequent to

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<sup>1</sup> The two orders are the original decision on the merits and a subsequent order of reconsideration of the original decision.

a fatality at a construction project in Wetumpka, Alabama. On March 9, 2007, the Commission's Executive Secretary docketed the judge's decision on the merits. Neither Martin nor the Secretary filed a petition for discretionary review ("PDR"), nor was the case directed for review by a member of the Commission. By operation of law, the judge's decision became a final order of the Commission on April 9, 2007. *See* Commission Rule of Procedure 90(d), 29 C.F.R. § 2200.90(d) ("If no Commissioner directs review of a report on or before the thirtieth day following the date of docketing of the Judge's report, the decision of the Judge shall become a final order of the Commission."); 29 U.S.C. §§ 659(c), 661(j).

Martin then filed an EAJA application for fees and other expenses on June 11, 2007—sixty-three days after the final order date. The Secretary subsequently filed a motion to dismiss Martin's EAJA application as untimely, which the judge granted by order dated July 13, 2007 ("EAJA Order"). In his EAJA Order, the judge relied on *Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976) ("*Keystone*"), and determined that, because neither party had filed a PDR with the Commission, "[b]oth parties were barred from appealing the decision to a United States court of appeals," resulting in "no potential for appeal." *Cf.* Section 11(a) of the OSH Act, 29 U.S.C. § 660(a) ("No objection that has not been *urged before the Commission* shall be considered by the court [of appeals], unless the failure or neglect to urge such objection shall be excused because of *extraordinary circumstances*." (emphasis added)). Consequently, the judge concluded that Martin was required to file its EAJA application within thirty days of the final order date—April 9, 2007—and, therefore, Martin's June 11, 2007 application was untimely.

Martin petitioned for review of the judge's EAJA Order, and Commissioner Thomasina V. Rogers directed the case for review.

#### ISSUE ON REVIEW

At issue before the Commission is when, for purposes of the Commission's EAJA Rule at 29 C.F.R. § 2204.302(a), "the period for seeking appellate review expires" for an unreviewed judge's decision where no party filed a PDR. Both Martin and the Secretary raise various arguments on review as to how this time should be calculated. According to the Secretary, if the parties do not file a PDR, then the final order date for the judge's decision under Commission Rule of Procedure 90(d), 29 C.F.R. 2200.90(d), becomes the date of "final disposition" for purposes of EAJA, § 504(a)(2) because neither party has "an unqualified right" to obtain judicial review of the underlying final order "despite the theoretical possibility" of obtaining judicial

review in extraordinary circumstances. *See* section 11(a) of the OSH Act, 29 U.S.C. § 660(a).<sup>2</sup> According to Martin, even if neither party files a PDR, the OSH Act permits the parties to seek appellate court review for a period of sixty days after the final order date in extraordinary circumstances and, thus, only after that period expires does the judge’s decision become a “final disposition” for purposes of EAJA, § 504(a)(2). For the following reasons, we vacate the judge’s EAJA Order dismissing Martin’s fee application as untimely and remand the case to the judge for further proceedings consistent with this opinion.

#### PRINCIPLES OF LAW

The EAJA entitles certain parties who prevail in particular types of litigation against the government to receive attorney’s fees. 5 U.S.C. § 504. For a party that prevails in litigation before an agency, the EAJA requires its fee application to be filed within thirty days of the agency’s “final disposition.” 5 U.S.C. § 504(a)(2). Pursuant to the EAJA, the Commission promulgated its EAJA Rules at 29 C.F.R. part 2204, establishing uniform procedures for the submission and consideration of applications for an award of fees and other expenses. 5 U.S.C. § 504(c)(1). The Commission’s current EAJA Rules provide that a fee application must be filed “in no case later than thirty days after the period for seeking appellate review expires.” 29 C.F.R. § 2204.302(a).

Nowhere in the EAJA or the Commission’s EAJA Rules is the term “final disposition” defined. 5 U.S.C. § 504(a)(2). Previously, the Commission had considered the agency’s “final disposition” of an unreviewed judge’s decision issued under section 10(c) of the OSH Act, 29 U.S.C. § 659(c), to be thirty days after the judge’s decision was issued if not directed for review by the Commission (the “final order date”). *See* Commission Rule of Procedure 90(d), 29 C.F.R. § 2200.90(d); 29 U.S.C. §§ 659(c), 661(j); *Scafar Contracting, Inc.*, 19 BNA OSHC 1248, 2000 CCH OSHD ¶ 32,244 (No. 97-0960, 2000). The United States Court of Appeals for the Third Circuit reversed the Commission, finding that this interpretation conflicted with section 11 of the OSH Act, 29 U.S.C. § 660, which provides that any party may appeal a final

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<sup>2</sup> Section 11(a) of the OSH Act, 29 U.S.C. § 660(a), provides in pertinent part: “No objection that has not been *urged before the Commission* shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of *extraordinary circumstances*.” 29 U.S.C. § 660(a) (emphasis added). Section 11(b) of the OSH Act, 29 U.S.C. § 660(b), which gives the Secretary the authority to request judicial review, incorporates the provisions in 29 U.S.C. § 660(a) “to the extent applicable.” *See* 29 U.S.C. § 660(b).

order of the Commission to the relevant United States court of appeals within sixty days following its issuance. *Scafar Contracting, Inc. v. Sec’y of Labor*, 325 F.3d 422 (3d Cir. 2003) (“*Scafar*”). The court held that “the term ‘final disposition’ means final and unappealable.” *Scafar*, 325 F.3d at 423. The court went on to state “[w]hen a potential appeal exists under the relevant statute, the time for appeal must lapse, or the appeal be complete before the 30-day deadline begins to run.” *Scafar*, 325 F.3d at 431 (quoting *Adams v. SEC*, 287 F.3d 183, 191 (D.C. Cir. 2002)).

As a result of the Third Circuit’s decision, the Commission revised its EAJA Rules to require that a party file its fee application within thirty days “after the period for seeking appellate review expires.” Commission EAJA Rule 302(a), 29 C.F.R. § 2204.302(a). *See also* Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission, 70 Fed. Reg. 10,574, 10,576 (Mar. 4, 2005) (codified at 29 C.F.R. pts. 2200, 2204) (“The Commission proposes to bring its rule in line with the Act, [Federal Rules of Appellate Procedure,] and developing case law and allow a party 30 days after the Commission decision becomes unreviewable in a Federal Circuit Court to file an EAJA application.”).

#### ANALYSIS

The Secretary contends that in cases where no PDR is filed, a judge’s decision becomes “final and unappealable” when the decision becomes a final order of the Commission because a party who fails to file a PDR does not have an unqualified right to appeal. Thus, according to the Secretary, the thirty-day period for filing an EAJA application begins on the final order date when no PDR has been filed. In response, Martin argues that a judge’s decision only becomes “final and unappealable” when the sixty-day period for an appeal to federal circuit court expires, regardless of whether a PDR has been filed, because section 11(a) of the OSH Act allows a party to obtain an appeal when its failure or neglect to urge an objection before the Commission can “be excused because of extraordinary circumstances.” 29 U.S.C. § 660(a). Thus, according to Martin, the thirty-day EAJA filing period only begins once the sixty-day appeal period expires.

We agree with Martin that even if no PDR has been filed in a case, an unreviewed judge’s decision does not become a final disposition of the Commission until the sixty-day period for seeking appellate review expires. Although section 11(a) of the OSH Act requires a party to exhaust all administrative remedies before raising an objection to the court, it also gives a party the opportunity to nonetheless obtain appellate review provided it can establish that its

failure to urge an objection before the Commission was due to “extraordinary circumstances.” See *McGowan v. Marshall*, 604 F.2d 885 (5th Cir. 1979) (holding that extraordinary circumstances exist when issue not urged before the Commission is facial constitutionality of OSH Act); *Todd Shipyards Corp. v. Sec’y of Labor*, 586 F.2d 683 (9th Cir. 1978) (finding extraordinary circumstances exist when applying retroactively a recent Supreme Court decision); *Keystone*, 539 F.2d 960 (3d Cir. 1976) (granting Secretary’s motion to dismiss for Respondent’s failure to file a PDR before the Commission after considering whether extraordinary circumstances exist). Because a party retains this legal right even though a PDR has not been filed, we conclude that the period for seeking appellate review does not expire on the date a judge’s decision becomes a final order, but ends only once the sixty-day statutory appeal period has passed. This is consistent with *Scafar*. *Scafar*, 325 F.3d at 431 (“[A] prevailing party will have 30 days following the expiration of the time for the Secretary to appeal a decision on the merits to file its fee application under 5 U.S.C. § 504.”).

We are not persuaded by the Secretary’s arguments to the contrary. The Secretary’s insistence that she would not have appealed this case based on extraordinary circumstances ignores the plain fact that section 11(a) of the OSH Act provides her with the authority to do so, however rarely used. Martin cannot be required to assume the Secretary will not exercise a right she is legally granted by statute, particularly where any pending EAJA application Martin filed would have to be dismissed if the Secretary were to appeal to federal court based on extraordinary circumstances. See Commission EAJA Rule 302(c), 29 C.F.R. § 2204.302(c). Indeed, the finality of a case does not rise and fall on the Secretary’s action or inaction—extraordinary circumstances could in fact be argued by an adversely affected or aggrieved employee or authorized employee representative who was a party before the Commission. See 29 U.S.C. § 660(a) (“Any person adversely affected or aggrieved by an order of the Commission [may appeal to federal circuit court].”).

Moreover, the various scenarios and case law that the Secretary cites as analogous support for her position are either factually or legally distinguishable. Despite the Secretary’s claims, the situation here is not analogous to an application of 28 U.S.C. § 2412 of the EAJA to a federal consent judgment. There has been no affirmative act by either Martin or the Secretary indicating that they have reached any agreement that there will be no appeal, nor has the Secretary given any “clear, unequivocal indication that no appeal will be forthcoming.” *Myers v.*

*Sullivan*, 916 F.2d 659, 672 (11th Cir. 1990) (“So long as the government possesses the right to appeal and has not given a clear, unequivocal indication that no appeal will be forthcoming, a claimant for fees may reasonably assume that the government will be mounting a challenge to the district court’s post-remand judgment.”). Likewise, the Secretary’s assertion that an unreviewed judge’s decision can be analogized to an unobjected-to magistrate’s report also lacks merit. A magistrate’s report is governed by Federal Rule of Civil Procedure 72, which allows for an appeal only if an objection is timely made to the district court. In contrast, section 11 of the OSH Act allows for an appeal in extraordinary circumstances, even if no PDR was filed.

We therefore determine that Commission EAJA Rule 302(a) establishes that the period for appellate review expires sixty days after an unreviewed judge’s decision becomes a final order of the Commission, at which time the thirty-day period for filing an EAJA fee application begins. Commission EAJA Rule 302(a), 29 C.F.R. § 2204.302(a).

#### CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that the period for seeking appellate review in this case expired sixty days after the April 9, 2007 final order date. By the terms of the EAJA and the Commission’s EAJA Rules, the “final disposition” of Martin’s case occurred on June 8, 2007, when the sixty-day “period for seeking appellate review” expired. 5 U.S.C. § 504(a)(2); Commission EAJA Rule 302(a), 29 C.F.R. § 2204.302(a). Accordingly, Martin had until July 8, 2007, thirty days after the “period for seeking appellate review” expired, to file its EAJA application and, therefore, the judge erred in dismissing Martin’s June 11, 2007 EAJA application as untimely.

ORDER

We vacate the judge's order dismissing Martin's EAJA application and remand the case to the judge for further proceedings consistent with this opinion.

SO ORDERED.

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/s/  
Horace A. Thompson III  
Chairman

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/s/  
Thomasina V. Rogers  
Commissioner

Date: January 25, 2008

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

Secretary of Labor,

Complainant,

v.

Martin Construction, Inc.,

Respondent.

OSHRC Docket No. **06-0700**

Appearances:

Amy Walker, Esquire, Atlanta, GA  
For Complainant

J. Burruss Riis, Esquire, Mobile, AL  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

Martin Construction, Inc., is a general contractor engaged residential and commercial construction. In January 2006, Martin Construction was engaged in a construction project in Wetumpka, Alabama. The company had subcontracted with Southern Plumbing and Electric (Southern Plumbing) to install the sewer line on the project. On January 26, 2006, Southern Plumbing owner Harold Scott was killed when an area of the excavation in which he was working caved in. Occupational Safety and Health Administration (OSHA) compliance officer Brian Smith arrived at the site the following day and conducted an inspection. Following his inspection, the Secretary issued citations to Martin Construction and subcontractors, Southern Plumbing and Strickland Brothers, who performed earth-moving and excavation work on the project. No Martin Construction employees were exposed to hazardous conditions on the site; the Secretary issued the citation to the company under the multi-employer worksite doctrine.

The citation issued to Martin Construction alleges six serious violations of the Occupational Safety and Health Act of 1970 (Act). The standards cited are found in 29 C. F. R. Part 1926, Subpart P–Excavations. The citation alleges Martin Construction violated the following standards:

Item 1–29 C. F. R. § 1926.651(c)(2), for failing to provide a safe means of egress from an excavation so as to require no more than 25 feet of lateral travel for employees.

Item 2–29 C. F. R. § 1926.651(j)(2), for failing to place the spoil pile at least 2 feet from the edge of the excavation.

Item 3– 29 C. F. R. § 1926.651(k)(1), for failing to have a competent person make daily inspections of the excavation.

Item 4–29 C. F. R. § 1926.652(a)(1), for failing to have an adequate protective system in the excavation.

Item 5–29 C. F. R. § 1926.652(d)(2), for failing to use and maintain manufactured equipment in a manner consistent with the recommendations of the manufacturer and in a manner preventing employee exposure to hazards.

Item 6–29 C. F. R. § 1926.652(g)(1)(iii), for failing to protect employees from the hazard of cave-ins when entering or exiting areas protected by shields.

Martin Construction argues the citation should be vacated for several reasons, the two most significant being that the Eleventh Circuit, to which this case could be appealed, has not recognized the multi-employer worksite doctrine, and that Martin Construction had no knowledge of any hazardous conditions on the site.

This case went to hearing in Mobile, Alabama, on August 15 and 16, 2006. The parties have filed post-hearing briefs. Items 1, 2, 4, 5, and 6 of the citation are vacated because the Secretary failed to establish Martin Construction knew of the violative conditions at the site. Item 3 is vacated because the Secretary failed to prove noncompliance with the cited standard.

### **Discussion**

In January 2006, Martin Construction was the general contractor for a project in Wetumpka, Alabama, referred to both as the Love Lane Completion and the Love Lane Extension. Subcontractor Strickland Brothers performed earth-moving work for Martin Construction and

excavation work for subcontractor Southern Plumbing. Martin Construction superintendent Jamie Thomas was on the site every day. Martin Construction president Phillip Martin was on the site several times a week.

Southern Plumbing was an unincorporated sole proprietorship owned by Harold Scott. Martin Construction had subcontracted work to Southern Plumbing on a regular basis for the previous 10 years. Subcontracts with Martin Construction accounted for approximately half of Southern Plumbing's work.

Southern Plumbing began work on the sewer line on January 19, 2006. The installation plan called for Southern Plumbing to install a series of manholes known as "doghouses." Southern Plumbing had already installed two doghouses and was in the process of installing the third on January 26. That day, the open portion of the trench was 110 feet long. Employees entered and exited the trench by accessing two ramps at the east end of the trench. The trench was 11 feet deep where it began, then reached a depth of 12 feet in the area where a trench box was located. The trench box was 20 feet long, 4 feet wide, and 8 feet tall, and was located approximately 11 feet from the bottom of the ramp near the east end of the excavation. The trench was 7½ feet wide and its walls were nearly vertical. The spoil pile was located at the edge of the south side of the trench. The trench was excavated in Type B soil.

Scott and a Strickland Brothers employee were in the trench installing the third doghouse at the west end, about 60 feet from the bottom of the ramp. They were approximately 29 feet from the trench box. At approximately 12:30 P.M., the right side of the area around the third doghouse collapsed. Scott was killed in the cave-in. The Strickland Brothers employee survived.

Compliance officer Brian Smith arrived at the site the next day. Smith originally classified the inspection as a fatality inspection, but upon learning the victim was the sole owner of an unincorporated company, he determined no employee was killed in the accident. Smith then categorized the inspection as a Trench National Emphasis Program (NEP) inspection. Smith took photos, measurements, soil samples, and conducted on site interviews. Based upon his recommendations, the Secretary issued the citation that gave rise to this proceeding.

## **Application of the Multi-Employer Worksite Doctrine in the Eleventh Circuit**

Under Commission precedent, an employer who either created or controls a hazardous condition has a duty under § 5(a)(2) of the Act, 29 U.S.C. § 666(a)(2), to protect not only its own employees, but those of other employers engaged in a common undertaking. *Anning-Johnson*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976); *Grossman Steel*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975). This is known as the multi-employer worksite doctrine.

Final decisions of the Review Commission can be appealed by an aggrieved party to the United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principle office. An adversely affected party other than the Secretary may also appeal to Court of Appeals for the District of Columbia Circuit. Section 11(a) and (b) of the Act; 29 U.S.C. § 660(a). “Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission’s law.” *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Alabama, where the Love Lane Completion project was located, is in the Eleventh Circuit. Martin Construction contends the citation should be vacated because “the multi-employer doctrine has not been recognized by the Eleventh Circuit” (Martin’s brief, p. 1). The Eleventh Circuit itself has not accepted or rejected the doctrine. Shortly after it was created, however, it declared that cases decided by the Fifth Circuit before October 1, 1981, to be precedent for the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11<sup>th</sup> Cir. 1981).

Martin Construction relies on a 1975 case decided by the Fifth Circuit Court of Appeals, *Southeast Contractors v. Dunlop*, (512 F.2d 675) (5<sup>th</sup> Cir. 1975). The court, in a one-paragraph opinion, states:

We are in agreement with the well-reasoned dissent of Chairman Moran of the Occupational Safety and Health Review Commission in this matter, and especially with that portion pertaining to the general rule that a contractor is not responsible for the acts of his subcontractors or their employees[.]

The Commission has expressly addressed the effect of *Southeast Contractors* on the application of the multi-employer worksite doctrine in the Eleventh Circuit. In *McDevitt Street*

*Bovis Inc.*, 19 BNA OSHC 1108, 1112 (No. 97-1918, 2000), the employer cited *Southeast Contractors* and two tort cases decided by the Fifth Circuit in support of its position that the Fifth Circuit (and by extension, the Eleventh Circuit) has rejected the multi-employer worksite doctrine. The Commission disagreed, stating (citations and footnotes omitted):

Although *Southeast Contractors* was originally a Commission proceeding, it was summarily decided and issued before the Commission even adopted the multi-employer doctrine. . . . Indeed, as noted, the Fifth Circuit has not reviewed any Commission decisions on multi-employer liability since the Commission adopted the doctrine. Accordingly, we find the Fifth Circuit cases relied upon by McDevitt do not preclude us from following Commission precedent here.

The D.C. Circuit has also not expressly accepted or rejected the multi-employer worksite doctrine, but has raised doubts about its validity. . . . Since the D.C. Circuit has yet to decide the issue of multi-employer liability, we will apply our precedent in this case.

Following *McDevitt*, the court will apply Commission precedent to the instant case.

### **The Multi-Employer Worksite Doctrine**

The Commission has determined that a general contractor, such as Martin Construction, is responsible for violations of other employers, such as Southern Plumbing and Strickland Brothers, where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority over the worksite. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). This duty applies to an employer even if its own employees are not exposed to the hazard. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992).

The Secretary does not claim that Martin Construction created the hazardous conditions at the Love Lane Completion site. She argues, however, that the company controlled the site by virtue of its supervisory authority, and could have taken steps to abate any hazardous conditions. Phillip Martin is the president of Martin Construction. His testimony establishes that Martin Construction had sufficient supervisory control of the site to prevent and abate any excavation standard violations (Tr. 202-204):

Q: Martin Construction had a superintendent at this work site almost all of the time that there was work being performed there, didn't they?

Martin: Yes.

Q: And you, yourself, you personally were there several times a week on average right?

Martin: Yes. In and out.

Q: One of the things that your superintendent did was keep track of the man hours and the equipment that was used, including in the trench that Southern Plumbing was digging; is that right?

Martin: He kept track of most everything out there, yes.

Q. Okay. And part of what he kept track of was the work that was being done by Southern Plumbing; is that right?

Martin: Part of what he what?

Q. Part of what he kept track – you said he kept track of everything out there, most everything out there. Part of what he kept track of was the work that Southern Plumbing was doing?

Martin: Yes.

Q. And Martin Construction was responsible for coordinating the work, all the subcontractors at the work site, right?

Martin: Yes.

Q. And as part of that responsibility, that coordinating responsibility, Martin could instruct its subcontractors when to begin work and when to stop work, right?

Martin: Yes.

Q. Martin Construction had the authority to dictate where its subcontractors could place materials, didn't it?

Martin: Yes.

Q. Martin also had the authority to dictate where its subcontractors could put their equipment; is that right?

Martin: Yes, ma'am.

Q. And if someone at Martin Construction observed a subcontractor doing something unsafe, Martin Construction had the authority to make the subcontractor stop, didn't it?

Martin: Yes.

The Secretary properly cited Martin under the multi-employer worksite doctrine.

### **The Citation**

The Secretary has the burden of proving each violation by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 19 BNA OSHRC 2131, 2138 (No. 90-1747, 1994).

Applicability of the cited standards to the cited conditions and employee exposure are not at issue. The trench at the Love Lane Completion location was subject to OSHA's excavation standards. An employee of Strickland Brothers was exposed to any hazardous conditions existing in the trench.

Compliance with the cited standards and employer knowledge are at issue. Martin Construction contends the trench was in compliance with the terms of the cited standards, and that it had no knowledge of any violative conditions.

### **Alleged Serious Violation of 29 C.F.R. § 1926.651(c)(2)**

The Secretary contends Martin Construction violated 29 C.F.R. § 1926.651(c)(2), which provides:

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

In Citation No. 1, Item 1, the Secretary alleges:

A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

- (a) Love Lane Extension - On January 26, 2006, the controlling employer Martin Construction, Inc. failed to ensure that its sub-contractor Southern Plumbing and Electric provided its employees with a safe egress. Southern Plumbing employees installed a precast manhole at one end of the trench that was approximately 110 feet in length and 12 feet in depth with near vertical wall. One egress ramp was available on the opposite end of the excavation.

The trench was approximately 110 feet long and 12 feet deep. The only means of entering and exiting the trench was via a ramp that began approximately 60 feet from where Scott and the employee were working when the trench collapsed. Martin claims, “[T]he evidence at trial established that the distance from the ramp to the trench box in place was only 11 feet” (Martin Construction’s brief, p. 10). Since it is undisputed that the two men were working approximately 29 feet from the other end of the 20-foot long trench box, Martin Construction’s argument is irrelevant. The workers were required to travel more than twice the length allowed by the standard to exit the trench. The Secretary has established noncompliance with the terms of 29 C.F.R. § 1926.651(c)(2).

The Secretary argues Martin Construction had actual knowledge on January 26, 2006, that employees were required to travel more than 25 feet to access the ramp. Superintendent Thomas was at the site that day. He was working at another area of the project, approximately 100 yards away from the trench. The trench had been excavated that morning; the cave-in occurred around noon. Thomas did not testify. The Secretary adduced no evidence showing that Thomas actually observed the trench.

Phillip Martin stated he arrived at the site that day shortly after noon. He parked, walked over towards the trench, and began a conversation with an engineer. Martin estimated he had been on the site for a “minute or so,” (Tr. 213) when he “heard all the commotion, the yelling,” (Tr. 214-215) as the trench caved in.

The Secretary disputes Phillip Martin's time line. She called Dennis Hughes, a waste water superintendent for Wetumpka Waterworks. He was at the site the day of the cave-in. Hughes testified he saw Martin on the site as he was leaving for lunch. When Hughes returned approximately 35 minutes later, Martin was still on the site. The second time Hughes saw him, Martin was standing 15 to 20 feet from the trench, talking to the engineer. The trench caved in approximately 30 seconds after Hughes drove up.

The Secretary contends that if Martin was on the site for at least 35 minutes, instead of the "minute or so" he claims, he had enough time to observe the trench with all its deficiencies. Hughes's testimony, however, fails to establish that Martin actually viewed the trench (Tr. 233-234, emphasis added):

Q: Okay. When was the first time you saw Mr. Martin at the work site?

Hughes: Well, I got there about a quarter after eleven when they were putting down a couple of extensions of pipe and I saw him somewhere on the project at the time because I know him when I see him. There was two or three projects going on at the same. Road work was going on. And best I remember, he was between the road work and where we were, but at that time he was not over there where we were at.

Q: Okay. At some point did he - - when you say "where we were at," were you at the trench?

Hughes: I was at the trench.

Q: Okay. And at some point, did you observe Mr. Martin going to the trench?

Hughes: He could have been coming towards - - I remember seeing him in that area. *And it seems like to me he was coming towards that area when I left, but he may not have been.* But it seemed to me that he was coming that direction when I left to go to lunch, and that was about five to twelve.

Q: At that point, when you saw Mr. Martin at the work site, in general, how far was he from the trench before you went to lunch?

Hughes: He probably was, I don't know, somewhere's around two hundred feet or so, I guess, in that area. Because he was with the road work people or had just drove by where they were at, and he had just got out and was doing some talking. There were several people in that general area at that time.

The Secretary's argument that Martin must have observed the trench is speculative. Hughes could not testify with any certainty that Martin actually walked over to the trench while Hughes was at lunch. Hughes's testimony establishes only that Martin arrived on a large worksite where several different projects were proceeding, and that Martin stopped and spoke with several people. At no point does Hughes state that he observed Martin actually looking into the trench. The Secretary has failed to establish that Martin Construction had actual knowledge of noncompliance with 29 C.F.R. § 1926.651(c)(2).

Neither did the Secretary establish that Martin had constructive knowledge of the violation. To prove constructive knowledge, the Secretary must show that the employer could have discovered the violative condition with the exercise of reasonable diligence. "Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1349 (No. 99-0191). However, in exercising reasonable diligence, a general contractor may rely in part upon the assurances of a subcontractor to protect against hazards."In many situations in the workplace, it is natural for an employer to rely upon the specialist to perform the work related to the specialty in accordance with OSHA standards." *Sasser Electric & Manufacturing Company*, 11 BNA OSHC 2133, 2137 (No. 82-178, 1984).

In this case, Martin Construction relied on its subcontractors to safely perform the work in which they specialized. Martin Construction employees do not excavate trenches or install sewer lines. Excavating a trench in accordance with OSHA's excavations standards is a skill that Martin Construction's subcontractors reasonably could be expected to have and to use. Martin Construction had worked with Southern Plumbing for the previous 10 years without incident. Southern Plumbing had no history of OSHA violations. It is determined that reasonable diligence did not require Martin Construction to anticipate and discover the violative conditions found in the trench. The alleged violation of 29 C.F.R. § 1926.651(c)(2) is vacated.

### **Alleged Serious Violation of 29 C.F.R. § 1926.651(j)(2)**

The Secretary charges Martin Construction with the violation of 29 C.F.R. § 1926.651(j)(2), which provides:

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.

In Citation No. 1, Item 2, the Secretary alleges:

Protection was not provided by placing and keeping excavated or other materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that were sufficient to prevent materials or equipment from falling or rolling into excavations or by a combination of both if necessary:

- (a) Love Lanes Extensions - On January 26, 2006, the controlling employer Martin Construction, Inc., failed to ensure that its sub-contractor Southern Plumbing and Electric protected its employees from cave-in hazards. Southern Plumbing and Electric employees installed a precast manhole and 8 inch diameter sewer line in a trench that was approximately 110 feet in length and 12 feet in depth with the excavated material (spoils pile) placed at the edge of the South wall of the trench.

Compliance officer Smith testified the spoil pile was at the southern edge of the excavation (Tr. 82-83). Exhibits C-6 and C-8 are photographs that show the spoil pile at the immediate edge of the excavation. The Secretary has established noncompliance with the terms of 29 C.F.R. § 1926.651(j)(2).

For the same reasons discussed above in relation to Citation No. 1, Item 1, the Secretary failed to establish Martin Construction had either actual or constructive knowledge of the improperly placed spoil pile. The company relied on Southern Plumbing's specialized knowledge to implement trench safety. The alleged violation of 29 C.R.F. § 1926.651(j)(2) is vacated.

## **Alleged Serious Violation of 29 C.F.R. § 1926.651(k)(1)**

The standard at 29 C.F.R. § 1926.651(k)(1) provides:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situations 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.

In Citation No. 1, Item 3, the Secretary alleges:

Daily inspections of excavations, the adjacent areas, and protective systems were not made by a competent person for evidence of a situation that could have resulted in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions:

- (a) Love Lane Extension - From January 19 to January 26, 2006, the controlling employer failed to ensure that its subcontractor Southern Plumbing and Electric protected its employees from cave-in hazards. Southern Plumbing employees were exposed to cave-in hazards while laying 8 inch sanitary sewer steel pipes and setting three precast manholes in a trench that ranged from 8 feet to 12 feet in depth with near vertical walls. The employer did not have a competent person knowledgeable in the different types of soil, OSHA excavation regulations, hazards, and the limitations of protective system.

Phillip Martin told Smith that Martin Construction did not have a competent person on site and did not conduct safety inspections of the trench. The company relied on Southern Plumbing to comply with the excavation standards. Smith testified that the only person on the site who had the authority to conduct competent person inspections was Scott, but Smith determined that Scott was not a competent person based on the condition of the trench. The Secretary presented no evidence establishing whether or not Scott actually conducted inspections. No one from Southern Plumbing testified.

The Secretary has failed to prove noncompliance with the terms of the standard. Evidence of violations of other excavation standards alone is insufficient to establish a violation of the standard requiring a competent person to make daily inspections. The alleged violation of 29 C.F.R. § 1926.651(k)(1) is vacated.

### **Alleged Serious Violation of 29 C.F.R. § 1926.652(a)(1)**

The Secretary alleges Martin Construction violated 29 C.F.R. § 1926.652(a)(1), which provides:

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

- (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.

In Citation No. 1, Item 4, the Secretary alleges:

Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 C.F.R. 1926.652(c). The employer had not complied with the provisions of 29 C.F.R. 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

- (a) Love Lane Extension - One our about January 24 and January 26, 2006, the controlling employer Martin Construction, Inc. failed to ensure that sub-contractor Souther Plumbing and Electric protected its employees from cave-in hazards, while setting a precast manhole in a trench that was approximately 12 feet deep with near vertical walls.

Although Southern Plumbing had a trench box installed in the excavation on January 26, the area where Scott and the Strickland Brothers employee were working was not protected by any system. The trench box was approximately 29 feet away. The trench walls at that place where the men were working were near vertical and almost 12 feet high. No attempt at sloping or benching had been made. The Secretary has established noncompliance with 29 C.F.R § 1926.652(a)(1) for January 26. The citation description also alleges that on January 24, employees were working in the trench without adequate protection. January 24 was the date Southern Plumbing installed the second doghouse. Phillip Martin testified that he saw the trench that day, and that the trench walls were sloped. The Secretary attempts to use Martin's testimony to prove the trench walls were inadequately sloped on the 24<sup>th</sup>. When questioned about the degree of sloping, Martin stated it was sloped 6 to 8 feet horizontally to 11 feet vertically. The Secretary contends this establishes improper sloping because it does not meet the maximum allowable slope for Type B soil of 1:1.

Martin testified that when he saw the trench on January 24, it was “at a glance” (Tr. 227). He took no measurements, and he qualified his guesses as to the sloping with phrases like “maybe,” “thereabouts,” and “approximately. I’m not sure” (Tr. 225-226). The Secretary adduced no other evidence, photographic or otherwise, giving measurements for the trench walls that day. She has failed to establish noncompliance with the cited standard for January 24.

For the reasons discussed in Item 1, the Secretary has failed to establish Martin Construction knew that employees were not protected by an adequate system in the trench on January 26. The alleged violation of 29 C.F.R. § 1926.652(a)(1) is vacated.

### **Alleged Serious Violation of 29 C.F.R. § 1926.652(d)(2)**

The standard at 29 C.F.R. § 1926.652(d)(2) provides:

Manufactured materials and equipment use for protective systems shall be used and maintained in a manner that is consistent with the recommendations of the manufacturer, and in a manner that will prevent employee exposure to hazards.

In Citation No. 1, Item 5, the Secretary alleges:

Manufactured materials and equipment used for protective systems were not used in a manner that would have prevented employed exposure to hazards:

- (a) Love Lane Extension - On January 26, 2006, controlling employer Martin Construction, Inc. failed to ensure that its sub-contractor Southern Plumbing and Electric protected its employees from cave-in hazards. Southern Plumbing employees installed 20 feet sections of 8 inch diameter sewer line in a trench that was approximately 12 feet deep with near vertical walls. The Efficiency XLDF-820 serial number 128627 trench shield was placed approximately 4 feet below grade and was not sloped at a minimum of 1 to 1 as required by the shield manufacturer for B type soils.

The trench box used in the excavation was 8 feet tall. The trench was 12 feet deep, leaving 4 feet of near vertical walls above the top of the trench box. Appendix B to Subpart P of OSHA’s construction standards requires a trench box to extend at least 18 inches above the top of the vertical side of the trench wall, and the unprotected part of the wall to have a maximum allowable slope of ¾:1. The Secretary has established the failure to use the trench box in a manner that would prevent employee exposure to hazards.

The Secretary failed to establish Martin Construction had actual or constructive knowledge of Southern Plumbing's improper use of the trench box, as discussed under Item 1. The alleged violation of 29 C.F.R. § 1926.652(d)(2) is vacated.

**Alleged Serious Violation of 29 C.F.R § 1926.652(g)(1)(iii)**

The Secretary contends Martin Construction violated 29 C.F.R § 1926.652(g)(1)(iii), which provides:

Employees shall be protected from the hazard of cave-ins when entering or exiting the areas protected by shields.

In Citation No. 1, Item 6, the Secretary alleges:

Employees were not protected from the hazard of cave-ins when entering or exiting the area protected by shields:

- (a) Love Lane Extension - On January 26, 2006, the controlling employer Martin Construction, Inc. failed to ensure that its sub-contractor Southern Plumbing protected its employees from cave-in hazards when accessing the Efficiency XLDF-820 trench shield protective system. Employees traveled a distance of approximately 11 feet at a depth of 12 feet to reach the trench box.

Employees entering and exiting the areas protected by the trench box were exposed to the hazard of a cave-in from near vertical walls that were 12 feet high. The Secretary has established noncompliance with 29 C.F.R. § 1926.652(g)(1)(iii).

As discussed above in relation to Item 1, Martin Construction had no actual or constructive knowledge of Southern Plumbing's noncompliance with this standard. The alleged violation of 29 C.F.R § 1926.652(g)(1)(iii) is vacated.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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

## ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of the Citation is vacated, and no penalty is assessed;
2. Item 2 of the Citation is vacated, and no penalty is assessed;
3. Item 3 of the Citation is vacated, and no penalty is assessed;
4. Item 4 of the Citation is vacated, and no penalty is assessed;
5. Item 5 of the Citation is vacated, and no penalty is assessed;
6. Item 6 of the Citation is vacated, and no penalty is assessed;

/s/  
STEPHEN J. SIMKO, JR.

Date: March 5, 2007