



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.

OSHRC Docket No. 05-0652

SMOOT CONSTRUCTION.,

Respondent.

**APPEARANCES:**

Lee Grabel, Attorney; Charles F. James, Counsel for Appellate Litigation;  
Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor;  
U.S. Department of Labor, Washington, DC

For the Complainant

Jan E. Hensel, Esq., Buckingham, Doolittle & Burroughs, LLP

For the Respondent

**DECISION**

Before: RAILTON, Chairman; and ROGERS, Commissioner.

**BY THE COMMISSION:**

Before the Review Commission is a decision of Administrative Law Judge Ken S. Welsch. Smoot petitioned for review of the judge's findings and conclusions that it seriously violated three Occupational Safety and Health Administration (OSHA) standards. It was cited for not fully planking a scaffold in violation of 29 C.F.R. § 1926.451(b)(1). It was also cited for not using mid rails on the scaffold in violation of 29 C.F.R. § 451(g)(4)(iii). Lastly it was cited for

not fully protecting the side walls of a trench in violation of 29 C.F.R. § 1926.652(a)(1). For the reasons given below we affirm the judge's decision.<sup>1</sup>

### **STATEMENT OF FACTS AND ISSUES**

#### **The Scaffold**

OSHA's CSHO Richard Burns observed Smoot's employees working from a scaffold. They were also constructing formwork for a building under construction. According to Smoot, the scaffold was of a type that is raised as the formwork is raised. Smoot concedes that the scaffold in question was not fully planked as section 1926.451(b)(1) requires, but argues that it was exempt from the full planking requirement because the scaffold was under construction as it raised the formwork.

#### **The Trench**

During the course of his inspection CSHO Burns observed an employee of subcontractor Midwest Reinforcing Contractors ("Midwest") "surfing" down the slope of a trench to retrieve a tool. The CSHO was accompanied on his inspection by Smoot safety director Angelo Giannakos. Mr. Giannakos also observed the actions of the Midwest employee. Smoot's representative immediately issued orders to remove the employee from the trench. Later that day, CSHO Burns observed two other Midwest employees in the same trench. The trench was created two days earlier when Smoot erected formwork along one side wall of the trench. It also created an egress ramp from the trench. The other side wall – the

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<sup>1</sup> While the parties address item 2a, the mid rail item, in their briefs, the Commission did not request briefing on the item. While the Commission has authority to consider any issues raised in a case directed for review, it has the discretion to limit the scope of its review. *See Bay State Ref'g Co.*, 15 BNA OSHC 1471, 1476, 1992 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992). Thus, we will not address these arguments and will leave the judge's disposition of this item undisturbed, but without precedential value. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976).

one used for surfing by the Midwest employee – was sloped in part but not to the degree required by OSHA’s standards.

Smoot claims that it could not have known that premature entries into the trench would be made by Midwest’s employees. Midwest was the ironworker subcontractor for Smoot and was responsible for installing the rebar for the form walls. The Secretary claims that Smoot, as a general contractor, was responsible for the entries by Midwest employees.

## ANALYSIS

### The Scaffold Violation

The language of the exception to compliance with the requirements of the cited scaffold standard provides as follows:

Exception to paragraph (b)(1): The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required.  
29 C.F.R. § 1926.451(b)(1).

We find that the plain language of the regulation supports the interpretation used by the judge and advanced by the Secretary. *See Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, pp. 41,732-33 (No. 89-1555, 1993). The phrase used in the exception relied upon by Smoot, “employees performing scaffold erection or dismantling” is modified by the term “solely.” In our view, the modifier applies only to employees on scaffolding whose sole work activity is the erection or dismantling of the scaffold. Additional work done or performed while the employees are on the scaffold renders the exception inapplicable.<sup>2</sup>

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<sup>2</sup> Additionally, the Preamble of the standard states that full planking is not required “*where no work, other than erecting or dismantling the scaffold, is being done at intermediate levels.*” 61 Fed. Reg. 46026, 46039 (Aug. 30, 1996) (emphasis added).

It is undisputed that Smoot's employees were also performing formwork in addition to the scaffold erection work. The exception to the requirement of paragraph (b) to fully plank the scaffold does not apply on the facts of this case. Accordingly, we affirm the violation of 29 C.F.R. 1926.451(b)(1).

#### The Trenching Violation

It is undisputed that two days prior to the OSHA inspection Smoot placed formwork into an existing excavation creating a trench that did not comply with the requirements of 29 C.F.R. § 1926.652(a)(1). The formwork created one sidewall of the trench. The other sidewall was partially sloped but not to the degree required for type C soil. Smoot does not rebut the Secretary's allegation of non-compliance. It also does not dispute the fact that Midwest employees were exposed to the violative condition on two occasions during OSHA's inspection. Smoot only contends that it was not responsible for the entries by employees of Midwest. It also argues that it took proper precautions to avoid those entries. Smoot's arguments are not persuasive.

The Commission has long held that the employer who creates a violative or hazardous condition is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard. We find that our decision in *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055, 1993 CCH OSHD ¶¶29,923, p. 40,853 (No. 90-2873, 1992) is dispositive.

In *Flint*, as in this case the contractor created the non-compliant trench. In *Flint*, as in this case, the contractor argued it lacked knowledge of the exposure of a subcontractor's employees. In *Flint*, we held the contractor liable because it created the violative conditions. Similarly, we hold here that Smoot was responsible for creating the non-compliant conditions and is responsible for the violation.

Smoot argues, however, citing and contrasting *Flint*, that it took adequate measures to prevent entry into the non-compliant trench. It is undisputed that during the course of the inspection, Midwest employees entered the trench on at

least two occasions, separated by an hour to an hour and a half. The fact that the second entry occurred, in light of Smoot's full awareness of the first entry, indicates that Smoot's actions to keep Midwest employees out of the trench were inadequate.

Accordingly, we affirm the violation of § 1926.652(a)(1).

Penalty

Smoot does not challenge the characterization of the citations as serious or the assessed penalties. The Secretary withdrew instance a of item 1 on review, however, so we reduce the penalty for item 1 on a *pro rata* basis because there is no significant gravity difference between instances a and b of item 1. Therefore, we assess a penalty of \$750 for item 1 and \$1,875 for item 4.

SO ORDERED.

/s/ \_\_\_\_\_  
W. Scott Railton  
Chairman

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Commissioner

Dated: \_June 9, 2006

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.  
Smoot Construction,  
Respondent.

OSHRC Docket No. **05-0652**

Appearances:

Linda M. Hastings, Esq., U. S. Department of Labor, Office of the Solicitor, Cleveland, Ohio  
For Complainant

Jan E. Hensel, Esq., Buckingham, Doolittle & Burroughs, Columbus, Ohio  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

On March 17, 2005, Occupational Safety and Health Administration (OSHA) compliance officer Richard Burns inspected a construction site supervised by Smoot Construction in Athens, Ohio. On March 30, 2005, the Secretary issued a citation to Smoot alleging serious violations of six construction standards under the Occupational Safety and Health Act of 1970 (Act), regarding an inadequate scaffold and an unsafe excavation. Smoot timely contested the citation and penalties. On May 18, 2005, the Review Commission designated this case for EZ Trial under 29 C.F.R. § 2200.200 of the Act.

Prior to the hearing, the Secretary withdrew items 2b, 3, and 5 of the citation (alleging violations respectively of 29 C.F.R. §§ 1926.502(b)(2), 651(k)(1), and 1053(b)(16)). Items 1, 2a, and 4 (alleging violations respectively of 29 C.F.R. §§ 1926.451(b)(1), 451(g)(4)(iii), and 652(a)(1)) remain at issue. The court heard this case on July 8, 2005, in Columbus, Ohio. The parties submitted post-hearing position statements.

## **ISSUES**

The Secretary contends Smoot violated the remaining three cited standards. The issues are:

(1) Item 1–Did Smoot violate § 1926.451(b)(1) by failing to fully deck or plank scaffold platforms?

(2) Item 2a–Did Smoot violate § 1926.451(g)(4)(iii) by failing to install structural members between the top edge of a guardrail and a platform?

(3) Item 4– Did Smoot violate § 1926.652(a)(1) by failing to use an adequate protective system to prevent a cave-in in an excavation?

Smoot argues its employees were erecting the scaffold at the time of the inspection, so the cited scaffolding standards do not apply. Smoot also argues a subcontractor assumed responsibility for the safety of the excavation. Smoot withdrew its affirmative defenses of greater hazard and infeasibility during the hearing (Tr. 64).

## **FINDINGS OF FACT**

The Secretary established the following facts by a preponderance of the evidence.

In March 2005, Smoot, as prime contractor, supervised its own employees and several subcontractors constructing a new student union building for Ohio University in Athens, Ohio. Smoot’s crew, along with the crews of other subcontractors, performed form work on the project (Tr. 140). The student union building site covers five acres. Smoot project superintendent Rodney Nelson described the building as a parking garage “about one football field wide and three football fields long,” with “a six-story building sitting on top of that” (Tr. 87).

Smoot and its subcontractors had completed approximately one-quarter of the project’s construction when compliance officer Burns arrived at the site on March 17, 2005. Burns’s inspection was a programmed inspection based on the University of Tennessee’s Dodge Report, which generates a random list of companies to be inspected each month (Tr. 11-12). Burns arrived at approximately 9:30 a.m., and, at Smoot’s request, waited for one hour until Smoot safety superintendent Angelo Giannakos arrived at the site. Burns then held an opening conference with Giannakos and project superintendent Nelson. Burns conducted employee interviews and photographed various areas of the site, including scaffolding in the southeast stairwell and an

excavation next to the building. He held a closing conference with Giannakos and Nelson around 4:30 that afternoon (Tr. 12-13).

### **PRINCIPLES OF LAW**

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

*Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

The Secretary alleges Smoot violated the following construction standards:

#### Item 1—§ 1926.451(b)(1)

Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guarded supports as follows:

(i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

(ii) Where the employer makes the demonstration provided for in paragraph (b)(1)(i) of this section, the platform shall be planked or decked as fully as possible and the remaining open space between the platform and the uprights shall not exceed 9½ inches (24.1 cm).

Exception to paragraph (b)(1): The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required.

#### Item 2a— § 1926.451(a)(4)(iii)

When midrails, screens, mesh, intermediate vertical members, solid panels, or equivalent structural members are used, they shall be installed between the top edge of the guardrail system and the scaffold platform.

#### Item 4—§ 1926.652(a)(1)

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

The Secretary alleges the violations committed by Smoot were serious. Under § 17(k) of the Act, a violation is serious “if there is a substantial probability that death or serious physical harm could result from” the violation.

[T]he Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather [s]he must show that “an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.” *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD P29,500, p. 39,813 (No. 86-351, 1991)[.]

*Flintco, Inc.*, 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

## ANALYSIS

### Item 1: Alleged Serious Violation of § 1926.451(b)(1)

Item 1 alleges two instances of Smoot violating this standard:

- a. In the southeast stairwell where carpenters worked on carpenters scaffold, the scaffold was not fully planked and there was a nine and a half inches opening to the back of the scaffold.
- b. In the south stairwell where carpenters built forms on the carpenter scaffold, there was [an] approximately two foot opening in the planking.<sup>1</sup>

#### 1. Application of Standard

\_\_\_\_\_ Section 1926.450(a), the scope and application section of Subpart L (Scaffolds) of the construction standards, provides Subpart L “applies to all scaffolds used in workplaces covered by this part.” Section 1926.450(b) defines “scaffold” as “any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage) used for supporting employees or materials or both.” The cited standard applies to the scaffold at issue.

#### 2. Noncompliance with Terms of the Standard

Burns photographed the 9½ inch opening at the back of the exterior scaffold in the southeast stairwell (Exhs. C-2 and C-3) and the 2-foot opening in the planking on the interior platform (Exhs. C-4 and C-5). Smoot does not dispute the existence of the openings in the platforms of the scaffolds.

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<sup>1</sup> Item 1 distinguishes the two scaffolds at issue in this case as being in the southeast stairwell and the south stairwell. At the hearing, the parties referred to both scaffolds as being in the southeast stairwell, but distinguished one as being an exterior scaffold (instance (a)) and the other as being an interior scaffold (instance (b)) (Tr. 82-83).

Smoot contends the exception to paragraph (b)(1) applies in this case because Smoot's employees were in the process of erecting the scaffolds cited in instances (a) and (b).

Burns observed Smoot carpenter foreman Larry Danielson and other employees standing on the exterior scaffold performing form work for the stairwell (Tr. 17-18). Danielson explained at the hearing that the scaffolding and form work proceed simultaneously (Tr. 161): "[T]he scaffold goes up as the wall goes up." Burns also observed Smoot employee Darwin May performing form work while standing on the interior scaffold with the 2-foot opening in the planking. He interviewed May, who told Burns he did not know why the board had been pulled out, exposing the opening (Tr. 25).

In its post-hearing statement, Smoot acknowledges its employees were performing form work while standing on the cited scaffolds (Smoot's statement, p. 7): "[Erecting a scaffold] is a fluid process: the form wall is erected, the scaffold is set; the second panel of the form is added and the scaffold is then raised to the next level."<sup>2</sup> Danielson testified the scaffold, though incomplete, was safe for his carpenter crew to stand on while performing form work (Tr. 162-163): "I feel it was completed enough for the carpenters to do their work that they had to do on that side of the wall."

Smoot's employees performed form work while erecting the scaffold. The exception to paragraph (b)(1) states "the requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used . . . solely by employees performing erection or dismantling." Smoot does not argue that its employees were using the platforms *solely* to erect the scaffold. The company argues its employees used the platforms to erect the scaffold, while at the same time performing form work. The dual nature of the employees' work removes the exception to paragraph (b)(1) for Smoot.

Smoot points out § 1926.451(b)(1) allows for spaces between the platform and the uprights to exceed 1 inch "where the employer can demonstrate that a wider space is necessary." Nelson testified his crew needed a wider space on the platform in order to drop the "plumb bobs down in there to do the alignment and plumb it up" (Tr. 104). Danielson also mentioned the plumb bobs, but Smoot adduced no evidence of the frequency or duration of dropping the plumb bobs. There is no

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On direct examination, Nelson denied form work was done until the scaffold was completed: "There is not a whole lot that can happen to [the form wall] until this form is completely done" (Tr. 100). On cross-examination however, Nelson was asked if form work was being done simultaneously with the erection of the scaffold. He replied, "Yes" (Tr. 124).

indication Smoot required continuing gaps in the scaffold platforms while its employees stood on them to perform form work. Danielson stated the plumb bobs measured 3 to 4 inches long and 2 inches in diameter (Tr. 168). He offered no explanation why Smoot required gaps of 9½ inches and 2 feet in the platforms to accommodate the plumb bobs.

Smoot adduced evidence demonstrating its employees received safety training in scaffolding and the applicable scaffolding standards. The company's foreman, however, revealed a willingness to ignore the standards when he disagreed with their efficacy. Smoot's counsel asked Danielson if it was necessary to have a gap in the scaffold platform. Danielson replied, "I've always felt that the two-plank wide was enough plank for us to work off of. I didn't feel there was really a fall hazard there" (Tr. 163).

Nelson testified the scaffold planks measured 9½ inches wide, and only two planks would fit across the width of the scaffold brackets (Tr. 105-106). Smoot abated the hazard on the southeast stairwell scaffold while Burns was still on site by placing a third plank across the gap. Nelson stated the plank did not fit flush with the other planks and created a tripping hazard (Tr. 104-105).

\_\_\_\_\_The Secretary has established Smoot failed to comply with the terms of § 1926.451(b)(1). Smoot has failed to meet the requirements of the exception to paragraph (b)(1) because its employees were not engaged solely in erecting the scaffold; they were also performing form work at the same time. Smoot also failed to show that a space wider than 1 inch was necessary. The element of noncompliance is established.

### 3. Employee Access to Hazardous Conditions

Burns observed Danielson and another Smoot employee standing on the defective exterior scaffold platform. He observed May standing on the defective interior scaffold platform. Smoot exposed these three employees to the hazard of stepping into the gaps and tripping or falling from the scaffolds.

### 4. Employer Knowledge

As carpenter foreman, Danielson supervised the other Smoot employees. He supervised the building of the scaffolds. Project superintendent Nelson inspected the site on a daily basis. The scaffolds were in plain view of anyone on the construction site. The scaffolds had been up for at

least two days (Tr. 20, 22). The court imputes the knowledge of these two supervisory employees to Smoot.

The Secretary has established Smoot violated § 1926.451(b)(1). If an accident occurred and an employee stepped into or tripped over one of the gaps, the resulting injury would likely be a broken leg or fractured ankle (Tr. 22). Smoot committed a serious violation.

**Item 2a: Alleged Serious Violation of § 1926.451(a)(4)(iii)**

Item 2a alleges: “In the southeast stairwell where forms were built, midrails were not installed on the scaffold.” Burns photographed a Smoot employee standing on the interior scaffold that had no midrails installed (Exh. C-6).

1. Application of Standard

Smoot contends § 1926.451(g)(4)(iii) does not apply to the condition cited. The company argues, as is did under item 1, that the scaffold was not completed. Smoot insists it was in the process of erecting the scaffold at the time of Burns’s inspection. The company argues employee May was installing midrails on the scaffold when Burns photographed him. Because the scaffold was under construction, Smoot contends, the more specific standard at § 1926.451(g)(2) should apply.<sup>3</sup>

The Secretary case rests on Burns’s testimony regarding his interview with May. Burns testified May told him he was building forms while on the scaffold the day of the inspection (Tr. 60). Burns denies May said anything about installing midrails on the scaffold (Tr. 61). Burns stated May told him he had been working on the scaffold for three days and had not gotten around to installing the midrails yet (Tr. 63).

Smoot’s position and the testimony of its own witnesses was contradictory on this point. Smoot concedes in its post-hearing statement its employees built scaffolds and performed form work

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<sup>3</sup> Section 1926.451(g)(2) provides:

Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard

at the same time. Nelson stated he heard May tell Burns, “We’re in the process of completing the handrails” during Burns’s interview (Tr. 110). Danielson testified he told Burns he had two employees on the scaffold installing midrails, even though May stated he was working alone (Tr. 166). Burns took notes of his conversations with Smoot’s employees. Danielson acknowledged he read and signed the statement taken down by Burns, but denied he told Burns he did not know why the midrails had not been installed on the scaffold after two days, as Burns wrote in his notes (Tr. 169).

May’s testimony did little to bolster Smoot’s case. Smoot’s counsel asked May what he was doing the day of Burns’s inspection. May replied, “I was in the process of finishing this scaffold from where I left off the day before. . . . I was finishing the handrail and the railing on the –the side rail, I call it– and I was going over it for safety to make sure I had everything complete” (Tr. 174). But then Smoot’s counsel asked May what he told Burns “about what was going on on the scaffold” (Tr. 175). May stated, “I told him that–he asked what I was doing, what we was building. I said *we’re forming a wall*, and then he asked had I had safety training, and I told him just what I told you; through Smoot” (Tr. 175). Smoot’s counsel questioned May on the disparity in his testimony (Tr. 176):

Q. I think you said something to Mr. Burns about you were putting up the form wall. Did you just say that, or did I mishear you? I’m sorry.

May: No, no, I put up the scaffold.

On cross-examination, May’s testimony again became confused (Tr. 179):

Q. And, did you tell [Burns] that you had been working on the forms?

May: Yes. When he came to me, he wanted to know what we were doing, and I told him we were forming up a wall to pour concrete. So, he said, “How long have you been doing this?”

I said, “We started yesterday, and we’re going to finish it up today.”

Q. Building the forms?

May: Building the scaffold. The forms are built–the forms are already up before the scaffold comes out. We stand on the walls, and then we put our scaffold up after the walls are up.

May knew the company's position is Smoot was in the process of installing midrails when Burns observed him. Yet twice when asked what he was doing at that time, May stated he was doing form work before correcting himself.

Burns also photographed a bucket on the scaffold on which May was working (Exhs. C-7 and C-8). The bucket contained parts for form work and not for scaffolding (Tr. 79).

Contrary to Smoot's assertion, it was not still in the process of erecting the scaffold before performing any work from it. Smoot may have intended to install midrails at some point, but the record establishes May had done form work from the scaffold without the midrail in place. The cited section of the standard applies to the scaffold.

2. Noncompliance with Terms of the Standard

The applicability discussion above resolves this element as well. Smoot did not equip its scaffold with a midrail as required by § 1926.451(g)(iii). The scaffold was 11 feet above a concrete floor (Tr. 31). Smoot failed to comply with the terms of the standard.

3. Employee Access to Hazardous Condition

Smoot's failure to install a midrail exposed May to an 11-foot fall onto a concrete floor.

4. Employer Knowledge

Danielson and Nelson both knew May was working on the scaffold and that it was not equipped with a midrail. The court imputes the knowledge of the supervisory personnel to Smoot.

The Secretary has established Smoot violated § 1926.451(g)(iii). A fall from 11 feet onto a concrete floor could result in a serious injury (Tr. 32-33). The Secretary properly classified item 2a as serious.

**Item 4: Alleged Serious Violation of § 1926.652(a)(1)**

Item 4 alleges, "On the site the general contractor did not ensure the employer (Midwest Reinforcing) provided a protective system for employees tying [sic] rebar in the nine foot trench from a struck-by/cave-in hazard."<sup>4</sup>

Luburgh, Inc., a subcontractor, had excavated an area 800 feet long and 300 feet wide (Tr. 111). The original shape of the excavation was like a "very large bathtub" (Tr. 112). When

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<sup>4</sup> At the hearing, the subcontractor was also referred to as "Midwest Erectors" and "Midwest Fabrication."

Smoot built the form wall two days before Burns's inspection, it created a trench. Prior to the day of Burns's inspection, no employees had worked in the trench area (Tr. 113).

Midwest's employees were on site to install the rebar forms. A crane operator lifted rebar forms into the trench. Midwest employees would then enter the trench to tie the rebar to the forms so they could be poured (Tr. 35).

While Burns and Giannokos were on the roof of the student union building, they observed an employee from Midwest slide down the wall of the excavation to retrieve a tool. Burns told Giannokos the employee should not be in there. Giannokos agreed and told Nelson "to get ahold of somebody to get the guy out of the trench and tell him not to climb the sides of the wall" (Exhs. C-10 and C-11; Tr. 35-36).

Later that day Burns observed two Midwest employees in the trench tying rebar to the forms (Tr. 37). Burns determined, and Smoot agreed, the soil in the trench was Type C soil (Tr. 38). Burns measured the trench as 9 feet deep and 8½ feet wide at the top in the area where Midwest's employees were working (Tr. 38-39). The width at the bottom of the trench measured 3 feet (Tr. 40).

#### 1. Application of Standard

Section 1926.652(a)(1) is part of Subpart P (Excavations). Section 1926.650(a) provides Subpart P "applies to all open excavations made in the earth's surface. Excavations are defined to include trenches." There is no dispute § 1926.652(a)(1) applies to the trench cited in this case.

#### 2. Noncompliance with Terms of the Standard

The chosen protective system to protect employees from cave-ins on the site was sloping. A properly sloped trench wall excavated 9 feet deep in Type C soil would be 13 or 14 feet wide at the top. The trench wall at issue fell at least 4½ feet short of compliance (Tr. 40).

Smoot does not dispute any of Burns's measurements or his conclusion the trench was unsafe. It argues, however, that it was not the company's responsibility to ensure the trench was adequately sloped and otherwise safe. Smoot contends Midwest had assumed responsibility for complying with OSHA's excavation standards. Smoot asserts its contract with Midwest shifted all responsibility for compliance with the standards to Midwest.

The Review Commission has held that a general contractor is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations

due to its supervisory authority and control over the worksite. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 90-0851, 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).

Smoot maintained strong control over the subcontractors on the project. Smoot's standard subcontract required subcontractors to "immediately correct any unsafe action or condition, specifically brought to his attention by Smoot. If this is not done, the unsafe condition may be corrected by Smoot and backcharged appropriately" (Exh. C-1).

Giannakos and Nelson ordered Midwest to get its employee out of the excavation. To abate the hazard, Giannakos ordered a Smoot employee to use a backhoe to properly slope the excavation (Tr. 204). Nelson walked the site every day and was in a position to detect violative conditions. He stated if anybody observed a safety infraction committed by a subcontractor, "They come directly to me" (Tr. 93).

The court determines Smoot could reasonably be expected to prevent or detect and abate violations. The company maintained a constant presence on the site, and dictated the progression of the work and the manner in which it was done. Smoot is held responsible for noncompliance with the terms of the standard.

### 3. Employee Access to Hazardous Condition

Burns observed a total of three employees in the trench the day of his inspection. They were exposed to the hazard of a cave-in.

### \_\_\_\_\_ 4. Employer Knowledge

Smoot argues it had no actual knowledge the excavation was improperly sloped, nor could it have known about it with the exercise of reasonable diligence. No employees had been in the excavation until the day of the inspection. Giannakos stated the excavation looked safe to him (Tr. 191).

Reasonable diligence on the part of Smoot would have made the company aware the excavation was unsafe. No employees had entered the excavation until March 17, but the wall that created the excavation had only been built two days before. Giannakos stated he did not know employees would enter the excavation, but he conceded he knew "[ a]t some point, someone would

have to go in there” (Tr. 204). Giannakos had observed a Midwest employee in the excavation earlier on the day of the inspection. Nelson testified that, as project superintendent, his job was “to organize all the subcontractors and work the schedule with the prime contractors” (Tr. 87). He had to have known Midwest’s entry into the excavation was imminent.

Nelson testified he viewed the trench area from the street but did not perceive a problem with its slope. He stated, “It looked to me like it was very, very stable and close to or at the degree it should be” (Tr. 121). Considering the trench’s width fell 4½ feet short of “the degree it should be,” Nelson’s assessment does not support a finding of reasonable diligence.

The Secretary has established Smoot had constructive knowledge the excavation was improperly sloped.

The Secretary has established a violation of § 1926.652(a). An employee in a trench during a cave-in would likely be crushed to death. The violation is serious.

#### **PENALTY DETERMINATION**

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Smoot employed over 250 employees. The Secretary had not cited Smoot for OSHA violations within the three years previous to Burns’s inspection. Smoot demonstrated good faith with its written safety program and its safety training program for employees (Tr. 28-29).

The gravity of items 1 and 2, the scaffolding violations, is moderate. The hazards created were not likely to produce severe injuries. The gaps in the scaffold platforms presented tripping hazards. The scaffold lacking a midrail was equipped with a toprail, which afforded some protection. The court determines the appropriate penalty for item 1 is \$1,500.00, and for item 2a is \$500.00.

The gravity of item 4 is more severe. Three employees were in a 9-foot trench. The wall of the trench was well above their heads. A cave-in (a not unlikely occurrence in Type C soil) would bury them. The penalty for item 4 is \$1,875.00.

#### **FINDINGS OF FACT AND**

