

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

Secretary of Labor,

Complainant,

v.

Valcourt Building Services of Georgia, LLC,

Respondent.

OSHRC Docket No. **12-0921**

Appearances:

Schean G. Belton, Esquire, Brian D. Mauk, Esquire, U.S. Department of Labor
Office of the Solicitor, Nashville, Tennessee
For Complainant

Jonathan L. Snare, Esquire, Alana F. Genderson, Esquire, Morgan, Lewis & Bockius, LLP
Washington, D.C.
Leslie J. Pujo, Esquire, LaPlaca Pujo, LC, Rockville, Maryland
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Valcourt Building Services of Georgia, LLC (Valcourt) operates a franchised window cleaning business. On September 30, 2011, MG Window Cleaners, LC (MG), a Valcourt franchisee, was cleaning the exterior windows on the Wells Fargo Tower in Birmingham, Alabama when the work was inspected by two compliance officers with the Occupational Safety and Health Administration (OSHA). As a result of the inspection, OSHA issued Valcourt a two-item serious citation on March 22, 2012. Valcourt timely contested the citation.

Item 1 of the citation alleges Valcourt violated § 5(a)(1) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 654(a)(1), for failing to protect employees from falls because the safety line and the primary working line were attached to the same anchorage point. Item 2 of the citation alleges a violation of 29 C.F.R. § 1910.28(j)(4) for failing to protect employees from

falls because the safety line was not designed to safely suspend the worker in case of a fall. The citation proposes a penalty of \$4,900.00 for each alleged violation.

The hearing was held in Birmingham, Alabama on December 11, 2012, and in Atlanta, Georgia on December 21, 2012 and February 1, 2013. The parties have stipulated to jurisdiction and coverage (Tr. 9). The parties filed post-hearing briefs on May 10, 2013.

Valcourt denies that it was the employer or responsible for the alleged violations because MG, its franchisee, was in charge of the project. If found to be the employer, Valcourt claims its franchisee's work activities complied with the OSHA requirements that were allegedly violated. Also, Valcourt argues that OSHA's issuance of the citation did not comply with §§ 9(c) and 10(a) of the Act, 29 U.S.C. § 658(c) and § 659(a).¹

For the reasons discussed, the alleged violations are vacated and no penalty is assessed.

The Inspection

Valcourt, a franchise division of Valcourt Building Services, LC, operates a franchise window washing company from its office in Kennesaw, Georgia.² Valcourt employs six employees in its office and has four franchisees that perform the window washing and related activities in the Southeast. Valcourt claims to have distinctive business and operating methods applicable to the franchise window cleaning businesses using the Valcourt name and a federal registered trademark. One of Valcourt's franchisees is MG, which was formed around 2002 (Tr. 300-305, 313-315, 330-331, 478-480, 502, 541, 645-646, 657, 665, 759-760).

On January 28, 2008, Valcourt and MG entered into a Renewal Franchise Agreement (Agreement) which was to expire on January 31, 2013. The Agreement, which outlines the basic franchise obligations, granted MG the right to operate a building cleaning business using Valcourt's methods and trademark. As part of the Agreement, the franchisee agreed to comply with Valcourt's *Safety, Training and Administrative Manual* (Manual). The Manual contains detailed minimum standards for operation, safety and customer service. All franchisees, including MG, also enter into an Operating Agreement that provides the framework for the franchisee's corporate structure (Exhs. R-9 through R-12; Tr. 309-314).

¹ Valcourt moved for summary judgment prior to and at the hearing, asserting the citation should be dismissed as its issuance violated §§ 9(c) and 10(a) of the Act; the motion also included Valcourt's contention that it was not the employer of the workers at the site (Tr. 9-11, 851-854). The motion was denied at the end of the hearing (Tr. 854).

² Valcourt Building Services, LC, has five operating companies, including Valcourt, that are window cleaning franchisors. The five companies are located in the Southeast and the Mid-Atlantic. The Valcourt Building Services business was begun in 1986, with franchise operations starting in 1997 (Exh. C-17; Tr. 638, 641-644, 756, 764).

On September 26, 2011, Valcourt offered MG a work order to wash the windows of the Wells Fargo Tower in Birmingham, Alabama. Wells Fargo specified that scaffolding owned by the building had not been maintained and could not be used. It requested that the work be performed using rope descent equipment. MG accepted the work order and the Wells Fargo specifications (Exhs. R-19 through R-22; Tr. 483-496).

A crew of MG members (each worker of a franchisee has ownership in the franchise) began cleaning the windows on the Wells Fargo Tower on September 26, 2011. In doing the work, MG controlled how the job was performed, including the times of work, the method to clean the windows, and how to stage and set up the equipment. For example, on September 26, 2011, MG worked only about a half day because of the weather (Tr. 304, 315-318, 334-337, 457, 463, 485-486, 495, 506, 535-537, 542-543, 647-650).

On the fifth day, September 30, 2011, the four MG members were continuing the window cleaning work at the Wells Fargo site. A Valcourt service manager was visiting the site that day as part of Valcourt's ongoing responsibilities to inspect franchisees' worksites for compliance with Valcourt standards, including safety issues and customer satisfaction. This was the only visit that Valcourt had performed of MG's work at the site. The service manager had been employed by Valcourt for five months, and while Valcourt had trained him before he began his duties, he had had no prior experience in window washing (Tr. 59-60, 336, 495-499, 520).

While the Valcourt service manager was on site, two OSHA compliance officers (CO) initiated an inspection of the window washing based on a telephone complaint that had been made to the OSHA office in Birmingham. Upon arriving at the Wells Fargo site, two employees were observed on the west side of the tower working from rope descent devices which did not have a rope grab. Also, the lanyards the workers were using were not attached to the backs of their harnesses; but were attached to the front.

After taking several photographs, the COs met with the Wells Fargo Tower's building manager and the Valcourt service manager. The Valcourt service manager stated he was in charge of the job site. On the roof, the COs saw that for each worker, the safety line and the work line of the rope descent system were secured together with one carabiner to the same concrete vertical column of the building. Later, during the opening conference, the service manager told the COs the company name was Valcourt. After calling Valcourt to obtain further information, however, the service manager stated that that the window washers were not

Valcourt employees, but were subcontractors, with a different company, and that Valcourt was not responsible for them. The COs then met with a supervisor of MG who was on site. The MG supervisor gave the COs a Valcourt business card. The MG workers on the site spoke only Spanish, which the primary CO could not speak. The other CO who was along to learn how to conduct a window washing inspection, spoke Spanish and interviewed the MG workers at the site. He also interviewed two MG members, at some point after the day of the inspection (Exhs. C-1 through C-7, C-12; Tr. 41-65, 69-76, 85-91, 222-230, 234-241).

As a result of the inspection, the alleged violations were issued.

DISCUSSION

The Issuance and Service of the Citation

The parties have stipulated the OSHA inspection occurred on September 30, 2011. The record shows that the closing conference with Valcourt's general manager was held in early February of 2012 to discuss the hazards observed and to advise him a citation would be issued (Tr. 110). The general manager asked when Valcourt would receive the citation and was advised that it would be in "a couple of weeks." The general manager stated that Valcourt would contest the citation. The general manager called the primary CO two weeks later and asked him where the citation was; the CO indicated that he did not know (Tr. 117-118).

The parties have also stipulated the citation was issued and mailed to Valcourt by certified mail on March 22, 2012. Due to a clerical error in the street address, the citation was returned to the OSHA area office on April 2, 2012. OSHA re-sent the citation by United Parcel Service (UPS) on April 3, 2012, to the correct address. Valcourt received it the next day, on April 4, 2012 (Tr. 20-21).

Section 9(c) of the Act provides that:

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Section 10(a) of the Act provides that:

If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17....

In addition, OSHA's Field Operations Manual (FOM), which contains the agency's internal procedures, states that "a citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the citation is actually signed, dated and served by certified mail as provided by § 10(a) of the Act." *See* FOM, Chapter 5, ¶ XI.A.³

Section 9(c) recognizes that the instance of noncompliance and employee access to the unsafe condition providing the basis for the alleged violation must occur within six months of the issuance of the citation. *Central of Georgia R.R. Co.*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977). The purpose of the six-month limitation is "to ensure that claims are prosecuted while the events are still fresh, and witnesses and evidence can be obtained." *Safeway Store No. 914*, 16 BNA OSHC 1504, 1509 (No. 91-373, 1993) (citation omitted).

Based on the September 30, 2011 date of the OSHA inspection, the sixth-month period in this case ended March 30, 2012. Valcourt argues the statute of limitations was violated as it did not actually receive the citation until April 4, 2012. The court finds there was no violation of the sixth-month statute of limitations. The citation was issued as required by § 9(c) on March 22, 2012, within the six-month limitation. The citation was returned on April 2, 2012, due to the incorrect address, and OSHA re-sent it by UPS on April 3, 2012. Valcourt received the citation on April 4, 2012. The fact the citation was not received by Valcourt until after the six-month period did not prejudice Valcourt. As noted above, Valcourt was aware that a citation would be issued, and it even called OSHA to inquire about when it would be issued.

Valcourt also argues the citation was served improperly and that the failure to send it by certified mail violated §10(a) of the Act. However, as the Secretary points out, the Commission stated in *Gen. Dynamics Corp.*, 15 BNA OSHC 2122 (No. 87-1195, 1993), as follows:

[I]f an employer receives actual notice of a citation, it is immaterial to the exercise of the Commission's jurisdiction that the manner in which the citation was sent was not technically perfect.

Id. at 2126 (quoting *P&Z Co., Inc.*, 7 BNA OSHC 1589, 1591 (No. 14822, 1979)). The Commission also stated that in *P&Z*, it had agreed with other cases that had held that "use of registered mail is not required if the person notified actually receives the document without prejudicial delay." *Gen. Dynamics*, 15 BNA OSHC at 2126 (quoting *P&Z*, 7 BNA OSHC at 1591). The Commission additionally quoted from a Supreme Court decision, as follows:

³ The FOM is available on OSHA's website.

We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act. *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (footnote and additional case citation omitted).

Gen. Dynamics, 15 BNA OSHC at 2126.

In view of the foregoing, Valcourt's statute of limitation argument is rejected.

Valcourt as the Employer

As the franchisor, Valcourt argues that it did not control the work of MG, a separate entity. It claims that it was not the employer of the workers at the site except for its service manager, who was not exposed to any hazards. It also notes that the alleged exposed workers were members of MG, its franchisee. Valcourt acknowledges that its franchise agreement gives it a significant degree of control or assistance over its franchisees pursuant to Federal Trade Commission guidelines. Also, the operating agreement Valcourt requires its franchisees to enter into, provides the framework for the franchisee's corporate structure. Valcourt contends, however, that the relationship between it and its franchisees is not that of employer-employee. The control of a franchisor does not consist of routine, daily supervision and management of the franchisee's business, but rather is contained in contractual quality and operational requirements necessary to the integrity of the franchisor's trade or service mark. The franchisee is an independent business often distant from the franchisor, and it is not subject to day-to-day supervision by the franchisor. The franchisee makes license fee payments to Valcourt for the use of the Valcourt name, system and trademark. The franchisee receives the benefit of the Valcourt system, which includes quality control standards such as customer service and safety guidelines. But, unlike an employer, the franchisor does not control the implementation of these measures or the day-to-day operations of the franchisee. Valcourt points out that its own employees do not clean windows; it is in the franchising business, not the window washing business (Valcourt's Brief, pp. 7-13).

Only an "employer" may be cited for a violation of the Act. *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783 (No. 88-1745, 1992). It is the Secretary's burden to prove jurisdiction by demonstrating that the cited entity was the employer under the Act. *Taj Mahal Contracting*,

20 BNA OSHC 2020, 2023 (No. 03-1088, 2004). Where this determination must be made, the Commission has used either the “economic realities” test or the *Darden* “common law agency” or “right of control” test.⁴ *Don Davis*, 19 BNA OSHC 1477, 1480 (No. 96-1378, 2001) (citations omitted). Both of these tests involve essentially similar factors. *Id.*

Under the *Darden* test, the court must analyze “the hiring party’s right to control the manner and means by which the product is accomplished.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 326, 323-24 (1992). Such analysis must include control over the workers and not just the results of their work. *Don Davis*, 19 BNA OSHC at 1482. Thus, one who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set his pay or work hours cannot be said to control the worker. *Id.*

Under the economic realities test, the factors to consider include who pays the employees, who directs and controls them, who provides the safety training and instructions, and who the employees consider to be their employer. *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703 (No. 14801, 1978); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158 (No. 87-214, 1989). *See also Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012, 1992), *aff’d*, 20 F.3d 938 (9th Cir. 1994).

The Secretary contends the relationship between Valcourt and MG should be analyzed pursuant to the economic realities test.⁵ He urges the analysis should not be applied in a mechanical manner; rather, “it should be viewed collectively and in broad terms of whether the workers were economically dependent upon Valcourt or truly in business for themselves.” In this regard, the Secretary notes that Valcourt, not MG, negotiates the service contracts, that Valcourt is the sole source of business income for MG, and that all of MG’s business income is generated by payments from Valcourt for the work MG completes (Secretary’s Brief, pp. 5-6). However, the Secretary’s argument that the MG workers were employees of Valcourt appears to be based in large part on what occurred the day of the inspection (Secretary’s Brief, pp. 3-8).

⁴ As Valcourt points out, the Eleventh Circuit, where this case arose, also utilizes these tests. *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (Valcourt’s Brief, p. 17).

⁵ In his brief, the Secretary cites to a single unpublished decision to support his position that under the economic realities test, the window washers were employees of Valcourt. *See Solis v. Cascom, Inc.*, Slip Copy, 2011 WL 10501391, S.D. Ohio, Sept. 21, 2011 (No. 3:09-CV-257). The Secretary notes, however, that he also relies on his arguments in this regard as set out in his response to Valcourt’s Motion for Summary Judgment (Secretary’s Brief, pp. 5-6).

The record shows that after arriving at the site, the COs met with the Valcourt service manager, who told them he was in charge of the site. He also accompanied the COs during the walk-around inspection. According to the primary CO, the service manager was also directing the window washers in their work. After the walk-around, the COs held an opening conference with the service manager, who told them that the company name was Valcourt. However, after he then called Valcourt for some additional information, he told the COs the window washers were not Valcourt employees. They were subcontractors who belonged to a different company, and Valcourt was not responsible for them. The service manager also tried to explain the franchisor-franchisee situation. At that point, one of the MG members at the site was summoned. The MG member gave the COs a Valcourt business card which had the member's name on it and showed his title as "supervisor." The MG member spoke only Spanish, which the primary CO did not speak. The other CO, a native Spanish speaker, spoke to the MG member and learned that his company was MG and that he was the MG supervisor at the site. The COs returned to the roof with the service manager and the MG supervisor. According to the primary CO, the service manager directed the workers to pack up and go, which they did. The second CO did not remember the service manager telling the window washers to leave. As he recalled it, the MG supervisor told the window washers to gather up their equipment and go.⁶ During the inspection, the second CO spoke to the other MG workers at the site, none of whom spoke English. At some point after the inspection, the second CO spoke by telephone to two MG members. Also during the inspection, the service manager told the primary CO that he had taken a damaged rope out of service and was returning it to the warehouse where it would be repaired or destroyed (Tr. 55-60, 65-67, 85-93, 122, 208-210, 214, 228-230, 234-237).

Once the Valcourt service manager stated he was in charge of the site, the record indicates the primary CO was convinced the window washers were employees of Valcourt. He persisted in this belief despite what the service manager told him after his call to Valcourt and despite learning about MG and MG's supervisor at the site. The evidence shows the service manager had only been with Valcourt for five months and that for three of those months he had been in training (Tr. 498-499). It would appear that due to the short time he had been with Valcourt, he did not understand the relationship between Valcourt and its franchisees. The

⁶ Both COs indicated they did not hear the Valcourt service manager speak Spanish at the site (Tr. 208, 242).

service manager had no prior experience in window washing, and he had never cleaned a window with rope descent equipment (Tr. 498-499).⁷ The CO's belief that the service manager was directing the window washers was likely influenced by the manager's initial statement that he was in charge. That the manager was actually directing the work seems unlikely due to the fact that he did not speak Spanish (Tr. 499, 504). It is also unlikely based on his lack of experience in window washing; for example, he did not know how to set up an anchorage point, while the MG workers, who have years of experience, plainly have that knowledge (Tr. 502-504). The CO's testimony that it was the service manager who told the workers to pack up and go was contrary to the second CO's recall that it was the MG supervisor who so instructed the workers (Tr. 236).

The primary CO also believed the service manager had been at the site for two days, while the record shows the manager's September 30, 2011 visit was his only visit to the site. The MG members, on the other hand, had been at the site since September 26, 2011 (Exh R-22; Tr. 105, 495-498).⁸ Further, the CO assumed the tools and equipment at the site belonged to Valcourt, as the service manager took a rope out of service (Tr. 214, 218). The evidence shows, however, that MG uses its own equipment on its jobs but rents specialty equipment, like the 800-foot ropes utilized at the subject site, as it is impractical to purchase expensive equipment that will be rarely used. In addition, while MG rented the 800-foot ropes from Valcourt, it could have rented them elsewhere, as long as it did so from an approved supplier (Tr. 504-506, 513-515).⁹ Given that the rope at issue belonged to Valcourt, and that one purpose of the service manager's visit was to ensure compliance with Valcourt's safety standards, the manager's removing the damaged rope from service was clearly within his expected duties (Tr. 336, 496-498, 504-505, 520).¹⁰

⁷ An order dated May 3, 2013, corrected the transcript, which indicated the service manager had cleaned windows using rope descent equipment (Tr. 499).

⁸ Due to the number of jobs done by franchisees, Valcourt is not able to visit all jobsites (Tr. 497, 670).

⁹ Valcourt provides a six-month "starter kit" of equipment to each new franchisee, as part of the initial franchise fee; thereafter, the franchisee decides what equipment to buy from approved vendors (Tr. 335, 461-462, 506, 511-515).

¹⁰ If a service manager perceives a hazard relating to a franchisee's work or equipment, he takes the issue up with the franchisee's managing member, who decides what to do; if an interpreter is required, Valcourt has an operations manager in its office who is fluent in Spanish and English (Tr. 499-501, 520-522, 549).

The record establishes that MG directed and controlled the work at the Wells Fargo jobsite. In regard to who the MG members considered to be their employer, there is no evidence that the MG workers at the site told OSHA that Valcourt was their employer. To the contrary, after the second CO spoke to the MG supervisor, the primary CO wrote MG's name on the business card the supervisor had given him (Exh. C-5; Tr. 57, 60, 228-230, 234-235). Further, when the second CO later called one of the MG workers who had been at the site and questioned him, the worker's only response was "ask Lorenzo" (Tr. 237-240).¹¹ The second CO learned that "Lorenzo," who had not been at the subject site, was the managing member of MG. When the second CO called him and questioned him, "Lorenzo" stated that he worked for MG (Tr. 238-242, 245-247). In view of this evidence, the MG workers considered MG their employer.

As to who paid the MG members, the record shows that each franchisee, including MG, has a managing member who is responsible for everything involving the franchise. This includes deciding what members to send to a site, how to perform the work, and making sure the work is done properly and safely. The managing member is also responsible for the franchise's finances and makes all decisions in that regard. He decides the ownership interest of each member and the amounts to pay the members (Tr. 524, 534-237, 577-578, 603, 630-632, 647-654).

The evidence establishes that MG, like many small companies, has an accounting firm that takes care of matters like paying bills, providing income statements, preparing tax returns, and paying member wages or disbursements.¹² Under the franchise agreement, Valcourt collects the fees from its clients for which MG has done work and sends the percentage due on each contract, less the license fee, to MG's accounting firm. The firm puts all such funds into MG's bank account, which Valcourt has no access to. MG's managing member meets weekly with the firm to review all bills to be paid, including vehicle and worker compensation insurance and any equipment payments. The firm prepares checks for the managing member's signature and sends out the payments (Tr. 572-573, 577-578, 583-590, 603, 606, 619, 629-630).

The managing member decides what wages will be paid to its members, and Valcourt is not involved in any such decisions. MG pays its workers based on criteria related to work done, such as the number of windows cleaned or the hours worked at a site. During the weekly

¹¹ The questions asked included: who the worker worked for, how he got paid, and who he would call if there were a problem on a jobsite (Tr. 239-240).

¹² While Valcourt has a list of approved accountants, the franchisee itself decides which accounting firm to utilize. The firm MG uses does no work for Valcourt and owes it no fiduciary responsibility (Tr. 569-576, 603).

meetings with the accountant, the managing member specifies the dollar amounts to be paid to the members. The accounting firm also withholds taxes on behalf of MG and its workers, and the percentage to withhold is decided by the managing member (Tr. 524, 531, 584-586, 630-632, 653-654). In view of the record, MG is the entity that paid its workers.

With respect to safety training, when individuals first purchase a franchise, Valcourt provides them with initial training; the materials are in both English and Spanish, and they include written materials, videos and DVDs, and tests (Tr. 415-416, 663-665). In this case, MG was formed in 2002, so initial training is not an issue. MG is responsible, however, for providing ongoing safety training to its members. It does this by requiring any new worker upon hire, and all other workers on an annual basis, to view a series of Valcourt-created safety videos, each of which has a written test that must be taken. Valcourt requires each franchisee to report that the training has been conducted by sending in the completed test results. MG also provides on-the-job training to new members, which is done by pairing the new member with an experienced one for a period of time. MG audits safety by having its members conduct safety inspections of its sites, and MG managers also check for safety hazards at sites. Valcourt is not responsible for safety at its franchisees' sites, other than when its service managers visit sites for compliance with, among other things, Valcourt's minimum safety standards (Tr. 329-330, 333-334, 425, 463-464, 517-520, 665-668). Based on this record, MG is the entity responsible for safety at its sites and for providing workers with safety training.

The final factor to determine, under either *Darden* or the economic realities test, is which entity had the power to hire, fire and discipline the MG members. *See, e.g., Don Davis*, 19 BNA OSHC at 1482; *Loomis Cabinet Co.*, 15 BNA OSHC at 1637. The evidence shows that when MG wants to hire or fire a worker, it does so without any involvement of Valcourt. The managing member may consult with the other members, or take a vote of the membership, before hiring or firing someone; however, Valcourt generally does not learn of these actions until after the fact, when MG, like all of Valcourt's franchisees, sends in a form to memorialize the event. Similarly, MG, and not Valcourt, makes all decisions regarding any changes in ownership of its company. Finally, MG is the entity that disciplines its members, and Valcourt has no authority in that regard. Valcourt can fine a franchisee like MG for infractions of its rules, but it cannot fine any individual member of a franchisee (Exh. R-10; Tr. 338-339, 422-425, 468-469,

521-525, 536-537, 547-548, 650-651, 659-663, 668-670). In view of the record, MG is the entity with the power to hire, fire and discipline its members.

For the reasons set out above, the Secretary has not met his burden of proving jurisdiction in this matter, that is, that Valcourt, the cited entity, was the employer of the MG workers at the jobsite. The alleged violations are therefore vacated, and no penalties are assessed.

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 ORDERED:

1. Item 1 of Citation 1, alleging a serious violation of § 5(a)(1) of the Act, is vacated.
2. Item 2 of Citation 1, alleging a serious violation of 29 C.F.R. § 1910.28(j)(4), is vacated.

/s/

KEN S. WELSCH
Judge

Dated: August 5, 2013
Atlanta, Georgia