



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
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SECRETARY OF LABOR,

Complainant,

v.

CARGILL, INC.,

Respondent.

OSHRC Docket No. 90-3191

**DECISION**

Before: FOULKE, Chairman; WISEMAN and MONTROYA, Commissioners.

BY THE COMMISSION:

Cargill, Inc. ("Cargill") operates a facility at Terminal 4, North Lombard, Portland, Oregon, where it is engaged in marine terminal operations. Following an inspection at that facility, the Occupational Safety and Health Administration ("OSHA") issued a citation which alleged in part a repeat violation of 29 C.F.R. § 1917.119(f)(9) for Cargill's failure to "secure" a ladder within the meaning of the standard.<sup>1</sup> Review Commission Administrative Law Judge James H. Barkley found that the ladder was not secured as the standard requires and assessed a penalty of \$100. For the reasons set forth below, we find that the judge did not err in finding that Cargill violated the standard.

<sup>1</sup> The cited standard provides:

**§ 1917.119 Portable ladders.**

....

(f) *Ladder usage.*

....

(9) Ladders shall be fitted with slip-resistant bases and secured at top or bottom to prevent the ladder from slipping.

### I. Background

On October 31, 1990, OSHA Compliance Officer Charles Penrod inspected Cargill's facility at Terminal 4. During his inspection, the compliance officer observed a wooden extension ladder leaning against a metal truck-receiving scale at the northeast end of the distribution floor. The ladder was extended to a length of approximately 14 feet. It stood on a concrete floor and was equipped with slip-resistant bases. The top of the ladder was positioned between an angle iron on its left side and a cable on the right side to which was attached 8000 pounds of test weight. The ladder could not be shifted to the left at all, though it could be moved 7 inches to the right before it contacted another angle iron. The cable impeded the ladder's movement to the right, however.

As a result of the inspection, Cargill was cited for several violations of the Occupational Safety and Health Act ("the Act"), including Repeat Citation No. 2, Item 1, alleging a violation of 29 C.F.R. § 1917.119(f)(9).<sup>2</sup> The Secretary proposed a \$100 penalty for this item. At the hearing, the compliance officer testified that he cited Cargill for the alleged violation because he did not observe anything holding the ladder to the scale. He testified that for the ladder to be "secured" within the meaning of the standard, it should have been either lashed to the surrounding structure with a material such as rope or wire to prevent it from "shifting[,] moving[,] or falling down," or placed in such a position that it could not fall from the scale. The compliance officer testified that the ladder could fall off of the scale and subject an employee climbing it to a 1- to 14-foot fall. He testified that the ladder was used a maximum of once or twice a day by up to three employees.

Cargill's maintenance supervisor, Mark Bonk, who accompanied the compliance officer on his inspection, testified that the floor in the area was not slippery and that when he climbed halfway up the ladder, he did not think the ladder was unsafe and felt that it was

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<sup>2</sup> Repeat Citation No. 2, Item 1 alleges:

29 C.F.R. § 1917.119(f)(9): Ladders were not fitted with slip[-]resistant bases and secured at top or bottom to prevent the ladder from slipping:

(a) The 28-foot wooden extension ladder leaning against the truck receiving scale on the northeast end of the distribution floor was not secured to prevent it from shifting.

secure. According to Bonk, Chuck Landis, the plant electrician, had used the ladder for a few minutes to check a switch at that gate, and Bonk himself also used the ladder briefly to check the switch. Bonk testified that Landis had worked on the switch one to two weeks prior to the inspection, but that the ladder had remained in place since that time. Bonk removed the ladder shortly after the compliance officer observed it. Bonk testified that Cargill does not have a policy of tying off wooden or metal ladders.

The alleged violation was characterized as a repeat violation because Cargill was previously cited in February 1989 for the same violation, although under a different standard, 29 C.F.R. § 1910.25(d)(2)(i).<sup>3</sup> The compliance officer testified that although the prior citation was for a violation of the general industry standards, OSHA had changed its policy. OSHA now cites under the marine terminal standards for facilities such as Cargill's.

In his decision, the judge found that the restricted lateral movement of the upper end of Cargill's ladder was insufficient to bring it into compliance with the standard. He determined that the plain language of the standard "requires that ladders be secured at either the top or the bottom, in addition to being fitted with slip[-]resistant bases, in order to prevent the base of the ladder from slipping outward." The judge held that in this case, "[t]he fact that the top of the ladder rests between two steel beams that restrict lateral movement does nothing to prevent the base from slipping." In response to Cargill's argument that the condition of the floor was such that the slip-resistant bases on the ladder's feet were sufficient to prevent it from slipping, the judge found that "the standard makes

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<sup>3</sup> The standard provides:

**§ 1910.25 Portable wood ladders.**

(d) *Care and use of ladders*[,]

....

(2) *Use*. The following safety precautions shall be observed in connection with the use of ladders:

(i) Portable rung and cleat ladders shall, where possible, be used at such a pitch that the horizontal distance from the top support to the foot of the ladder is one-quarter of the working length of the ladder (the length along the ladder between the foot and the top support). The ladder shall be so placed as to prevent slipping, or it shall be lashed, or held in position. Ladders shall not be used in a horizontal position as platforms, runways, or scaffolds[.]

no exception for situations where slippage of the ladder's feet is unlikely because of the condition of the floor." The judge assessed a penalty of \$100 for this item.

In its petition for review, Cargill did not contest the penalty amount or the "repeat" characterization of the alleged violation. Cargill requested review solely on the issue of whether the ladder was "secured" within the meaning of the standard.

## II. Issue on Review

**Whether the administrative law judge erred in affirming Repeat Citation No. 2, Item 1, alleging a violation of 29 C.F.R. § 1917.119(f)(9), on the ground that Respondent's ladder was not "secured" within the meaning of the cited standard.**

### *Contentions of the Parties*

On review, Cargill argues that the interpretation of the standard by the compliance officer and the judge "denied Cargill proper notice of what was required of it under the OSH Act." Cargill claims that the plain meaning of the standard does not require a portable ladder to be lashed or blocked in some manner "and to read them into its language deprived Cargill of fair and proper notice of its obligations under the OSH Act." Cargill argues that "[t]he Secretary specifically rejected adding lashing and blocking requirements to 29 C.F.R. § 1917.119(f)(9) when it first promulgated the provision," citing Marine Terminals final rule, 48 Fed. Reg. 30,886, 30,904-05 (1983). Cargill further argues that "if OSHA had wanted lashing or blocking to be part of the standard it would have expressly stated so, as it has done in numerous other standards" such as 29 C.F.R. § 1918.25(f) (Longshoring), § 1926.450(a)(10) (Construction), and § 1915.72(a)(3) (Shipyards). It believes that "[t]he absence of specific language concerning lashing or blocking in section 1917.119(f)(9) indicates that these requirements are not part of that standard."<sup>4</sup>

Cargill claims that Webster's Dictionary defines the term "secure" as "strong, stable, or firm enough to insure safety."<sup>5</sup> Cargill noted that its maintenance supervisor, Mark Bonk, testified that when he climbed halfway up the ladder, he did not think that the ladder was

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<sup>4</sup> Cargill incorrectly asserts that under the judge's decision, Cargill must secure the top and bottom of its portable ladders to comply with the standard. The judge specifically held that the "standard requires that ladders be secured at either the top or the bottom."

<sup>5</sup> Cargill did not specify the edition of the dictionary from which it drew its definition.

unsafe and felt that it was secure. Cargill contends that the Secretary failed to present testimony indicating a concern that the ladder's base was in danger of slipping.<sup>6</sup> Cargill asserts that had the compliance officer touched the ladder, "he would have discovered that the ladder was positioned so that it was 'secure' from movement." Cargill notes that its operations require extensive use of ladders for maintaining and servicing equipment and machinery, and that "often, employees do not have an adequate surrounding structure [to] which a ladder can be tied or lashed."

The Secretary notes that in *Webster's Third International Dictionary*, p. 2053 (3d ed. 1961), there are twelve definitions for the word "secure," and that the word in the standard appears as a verb, which in *Webster's* is defined as "to make fast: tie down." He notes that the same explanation appears as the second definition in *Webster's New Collegiate Dictionary* at p. 1045 (5th ed. 1977).

The Secretary argues that the cable hanging on the right side of the ladder was not in itself enough to prevent the ladder's slipping to the right, but would only slow down any such movement. He notes the judge's finding that "[t]he fact that the top of the ladder rests between two steel beams that restrict lateral movement does nothing to prevent the base from slipping." He claims that "[t]he instant standard very simply requires that portable ladders used in marine terminals be stabilized at one end or the other so that they cannot slip or move unexpectedly, exposing employees to falls."

The Secretary agrees that under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the plain meaning of a statute controls the interpretation, but he contends that the contemporaneous explanation of a term may be consulted where the terms are ambiguous. The Secretary argues that he "modified the language of the proposed standard by deleting specific references to lashing or blocking in order to make the standard more performance-oriented" and that "[a]s the preamble makes clear, the use of a 'ground attendant' to hold the ladder is a permissible alternative if lashing or blocking 'cannot be

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<sup>6</sup> The compliance officer testified that he did not recall seeing anything that would secure that ladder to keep it from falling. He testified that the ladder could fall off the scale, exposing the person climbing it to a 1- to 14-foot fall.

effectively performed,’” citing Marine Terminals final rule, 48 Fed. Reg. at 30,904-05.<sup>7</sup> He argues that “[n]othing in the standard or the preamble, however, suggests that anything less than fully securing a ladder against movement will suffice.” The Secretary argues that “[i]n modifying the language of the proposed requirement, the Secretary did not reject the concept that portable ladders must be lashed or blocked to render them secure, but simply added an additional method by which an employer could assure stability.” The Secretary argues that interpreting the term “secured” to mean stabilized is not unique to this standard and notes that “Cargill’s acknowledged familiarity with the meaning of the term ‘secured’ from similar standards applicable to other industries, particularly when added to its own prior citation for violation of the general industry standard, wholly undermines [Cargill’s] attempt to argue that the standard was so vague as to leave Cargill to simply guess at its meaning.”

In its reply brief, Cargill argues that its subjective knowledge or familiarity with OSHA regulations is completely irrelevant to whether Cargill could be held to have violated the standard because it has not lashed or blocked a portable ladder. Cargill argues that a “reasonable person test” is the proper test used to determine whether an OSHA regulation is too vague to properly apprise employers of its requirements and cites *Brennan v. OSHRC*, 505 F.2d 869, 872-73 (10th Cir. 1974). Cargill argues that given the Secretary’s assertion in his brief that the specific requirements for lashing and blocking were omitted from the final version of the standard in order to make the standard more performance-oriented, “it is even more confounding that Compliance Officer Penrod issued the citation simply because he observed that the ladder was not tied, lashed or blocked.”

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<sup>7</sup> The pertinent text is as follows:

Paragraph (f)(9), as proposed[,] provided that ladders be fitted with slip[-]resistant bases and be lashed, blocked or otherwise secured at top or bottom to prevent the ladder from slipping [46 Fed. Reg. 4245 (1981)]. A commenter, though, pointed out that there were many situations where lashing or blocking is either impossible or impractical, and advocated that in those instances, OSHA required that a ladder with a slip-resistant base be used in conjunction with a ground attendant . . . . The Agency has modified the provision to permit the employer to use this practice where [lashing] or blocking cannot be effectively performed. This suggestion was initially [listed] as an alternative provision [47 Fed. Reg. 14,730-31 (1982)].

*Analysis*

To prove a violation of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *aff'd in part*, 681 F.2d 69 (1st Cir. 1982). Of these four elements, the only issue in dispute is whether there was a failure to comply with the cited standard.

Cargill claims that the standard is so vague that it had to guess at its meaning. In determining whether a standard is vague, the words of the standard are to be viewed in context, not in isolation, and the purported vagueness of the standard is not judged from the face of the standard but is determined in light of the application of the standard to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991). However, the due process clause does not impose drafting requirements of mathematical precision or impossible specificity. *Id.*


Section 1917.119(f)(9) clearly requires that a ladder used in a marine terminal facility must be fitted with slip-resistant bases and be secured at either the top or bottom to prevent it from slipping. We agree with Cargill that the plain meaning of the standard does not require that a ladder must either be lashed or blocked to be secured. For example, a ladder may also be secured by having a ground attendant hold it.


Here, the ladder was not secured at the bottom. The top of the ladder could not be moved to the left but it could move seven inches to the right. Based on this failure to secure the ladder, the compliance officer testified that it could slip and cause an employee to fall up to 14 feet. Cargill contends that the ladder was fitted with slip-resistant bases and was on a concrete surface. It further relies on the testimony of its maintenance supervisor who felt that the ladder was secure. However, neither of these factors rebut the compliance officer's testimony that the ladder could slip because it was not secured. Slip-resistant bases are also required by the standard but their use does not secure the ladder against slipping. Although we do not question the opinion of Cargill's supervisor that he felt the ladder was

secure, that testimony does not establish compliance with the standard, which requires that the ladder be *secured* to keep it from slipping. Therefore, because Cargill did not rebut the compliance officer's testimony that the ladder could slip, we find no basis for concluding that the judge erred in his finding that the ladder was not secured to prevent it from slipping, as required by the standard, and that Cargill failed to comply with the standard.

**III. Order**

Accordingly, we find that the administrative law judge did not err in affirming Repeat Citation No. 2, Item 1, alleging a violation of 29 C.F.R. § 1917.119(f)(9). Since the parties did not contest the penalty amount, we assess a penalty of \$100.

  
Edwin G. Foulke, Jr.  
Chairman

  
Donald G. Wiseman  
Commissioner

  
Velma Montoya  
Commissioner

Dated: January 27, 1993



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

CARGILL, INC.,

Respondent.

OSHRC DOCKET  
NO. 90-3191

APPEARANCES:

For the Complainant:

Cathy L. Barnes, Esq., Office of the Solicitor,  
U. S. Department of Labor, Seattle, Washington

For the Respondent:

Jeffrey Baker, Esq., Portland, Oregon

DECISION AND ORDER

Barkley, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq., hereafter referred to as the Act).

Respondent, Cargill, Inc., at all times relevant to this action, maintained a place of business at Terminal 4, North Lombard, Portland, Oregon, where it was engaged in marine terminal operations (Answer ¶1). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Answer ¶2).

Following an October 31, 1991, inspection by an Occupational Safety and Health Administration (OSHA) Compliance Officer (CO), respondent was issued citations and penalties pursuant to the Act (Tr. 10). By filing a timely notice of contest respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 4, 1991 a hearing was held in Portland, Oregon on the contested violations. The Secretary withdrew Serious Citation 1, items 1 and 2(b), and Other than Serious Citation 3, item 4 (Tr. 4). Respondent withdrew its contest to Serious Citation 1, item 2(a), but continued to contest the proposed penalty of \$400.00 for that violation (Tr. 6).

Remaining at issue are Repeat Citation 2, item 1, alleging violation of 29 CFR §1917.119(f)(9); Other than Serious Citation 3, item 6, alleging a violation of 29 CFR §1917.120(b)(3), and the appropriate penalty for respondent's violation of §1917.151(h)(1) described in Serious Citation 1, item 2(a).

#### Alleged Violations

Serious citation 1, item 2 alleges:

29 CFR 1917.151(h)(1): Rotating parts located 7 feet or less above working surfaces were not guarded to prevent employee contact with moving parts.

(a) Guards have not been provided on the two open shafts for the two motors for the truck dust load out system, exposing employees to the rotating shafts.

The cited standard provides:

(h) Rotating parts, drives and connections. (1) Rotating parts, such as gears and pulleys, that are located 7 feet (2.1 m) or less above working surfaces shall be guarded to prevent employee contact with moving parts.

Repeat citation 2, item 1 alleges:

29 CFR 1917.119(f)(9): Ladders were not fitted with slip resistant bases and secured at top or bottom to prevent the ladder from slipping:

(a) The 28-foot wooden extension ladder leaning against the truck receiving scale on the northeast end of the distribution floor was not secured to prevent it from shifting.

The cited standard provides:

(9) Ladders shall be fitted with slip resistant bases and secured at top or bottom to prevent the ladder from slipping.

Other than serious citation 3, item 6 alleges:

29 CFR 1917.120(b)(3): Fixed stairs having four or more risers did not have stair railings or handrails complying with 29 CFR 1916.112(c)(1):

(a) The crossover stairs, 5 steps each, on the basement belts have not been provided with handrails. This includes the 3 belts with 2 crossover stairs on each belt for a total of 6 crossover stairs.

The cited standard provides:

(b) New installations.

\* \* \*

(3) Fixed stairs having four or more risers shall have stair railings or handrails complying with §1917.112(c)(1).

Penalty Assessment for Violation of 1917.151(h)(1)

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. Long Manufacturing Co. v. OSHRC, 554 F.2d 902 (8th Cir. 1977). In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations.

The gravity of the offense is the principle factor to be considered. Nacirema Operating Co., 1 BNA OSHC 1001, (No. 4, 1972).

Cargill is a large employer, with 60,000 employees nationwide (Tr. 12). The CO testified that he had cited Cargill's Oregon sites for approximately 14 violations in the past (Tr. 13, 40), but noted that Cargill had a good safety program and responded quickly to abate the violation (Tr. 14). Employees were exposed to the rotating shafts and couplings of respondent's dust loadout platform during the operation of the loading platform as well as during daily maintenance procedures, i.e. grease and oil fittings (Tr. 11). The CO testified that maintenance personnel could catch pieces of their clothing in the moving machinery and be drawn into the equipment, sustaining fractures and possibly amputation (Tr. 12).

This Judge finds that the proposed penalty is appropriate. \$400.00 will be assessed.

Alleged Violation of §1917.119(f)(9)

During the inspection the CO noted a 32 foot wooden extension ladder leaning against a metal truck receiving scale at the north-east end of the distribution floor (Tr. 15, 64). The ladder had skid pads on its feet and stood on a concrete floor (Tr. 30, 61). The ladder was not secured at either the top or the bottom (Tr. 15-16, 55). The CO made no attempt to climb or move the ladder and could not say whether it was actually stable in its position (Tr. 27, 31).

Mark Bonk, Cargill's Maintenance Supervisor (Tr. 51), testified that on the day of the inspection, the extension ladder was placed against a piece of angle iron on the left, and seven inches from a second piece of iron on the right (Tr. 58-59; Ex. R-1 through R-4). A cable attached to 8,000 pounds of test weights was located on the right side of the ladder (Tr. 60). Bonk stated that the ladder, in that position, could not be shifted to the left at all. Bonk could shift the ladder seven inches to the right, but stated that its movement was slowed by the cable (Tr. 60, 72).

Bonk testified that the floor in the area was not slippery, and felt that the ladder was secure in its position on the day of the inspection (Tr. 55, 62).

Bonk testified that the ladder had been used in the cited position for only a few minutes by the plant electrician, Chuck Landis, to check the limit switch at that gate (Tr. 62-64, 74). Bonk stated that Landis had worked on the switch a week to two weeks prior to the inspection, but that the ladder had remained in place since that time (Tr. 75).

#### Discussion

Respondent contends that it was in compliance with the cited standard because, 1) its ladder was placed so that only minimal lateral movement was possible at the top of the ladder and, 2) the condition of the floor was such that the skid resistant pads on the ladder's feet were sufficient to prevent it from slipping.

The restricted lateral movement of the upper end of Cargill's ladder is insufficient to bring it into compliance with

§1917.119(f)(9). The plain language of the cited standard requires that ladders be secured at either the top or the bottom, in addition to being fitted with slip resistant bases, in order to prevent the base of the ladder from slipping outward. The fact that the top of the ladder rests between two steel beams that restrict lateral movement does nothing to prevent the base from slipping. With respect to respondent's second argument, the standard requires slip resistance bases and a secured top or bottom in all cases; the standard makes no exception for situations where slippage of the ladder's feet is unlikely because of the condition of the floor.

Respondent admits that at least one employee, the plant electrician was exposed to the hazard posed by the ladder.

The record establishes that Cargill violated §1917.119(f)(9).

OSHA's CO testified that in 1989, Cargill was cited under the general industry standard, §1910.25(d)(2)(i), for failing to secure a ladder (Tr. 20, Ex. C-1). The 1989 violation and the violation at bar are clearly "substantially similar," therefore, the violation is properly characterized as a "repeat" violation. Potlatch Corporation, 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

The CO testified that a fall from the ladder could result in physical harm, but did not assess the severity of possible harm because of the improbability of an accident actually occurring (Tr. 18, 95). Taking his testimony, and the other relevant factors into consideration, this Judge finds that the proposed penalty of \$100.00 is appropriate.

### Alleged Violation of §1917.120(b)(3)

In Cargill's basement stairs were affixed to respondent's conveyor belts as crossover stairs (Tr. 65, 69). The stairs had been in place since at least 1979 (Tr. 87). At least four of the stairs had four risers or more. (Tr. 22, 66; Ex. R-5, R-6). The conveyor is 41 inches off the ground (Tr. 67). There were no handrails near the stairs (Tr. 23).

Bonk testified that employees using the crossover stairs could not stand upright because of hydraulic lines and electrical conduits passing over the conveyor belt (Tr. 68).

### Discussion

Respondent contends that all of subpart (b) applies only to fixed stairs installed after October 3, 1983 and the stairs subject to the citation were installed prior to that date and therefore, not subject to the standard. Complainant argues that cut-off date applies only to the requirements of paragraph (b)(1), but not the remaining paragraphs under subpart (b).

Section 1917.120(b) specifically states the scope of the cited standard, i.e. "New installations." Subsection (b)(1) contains riser size and loading specifications applicable to "[f]ixed stairs installed after October 3, 1983." Subsections (b)(2) through (b)(5) also contain construction specifications for fixed stairs, specifying landing and handrail dimensions, and providing discrete requirements for stairs in restricted areas. The latter subsections do not refer to a particular installation

date; however, they, like (b)(1), fall under the subtitle "New installations."

The Commission has held that "[a]lthough titles and topic headings are merely tools of statutory interpretation which cannot limit the plain meaning of the text, they clearly do indicate or characterize the subject matter of the standard." Everglades Sugar Refinery, Inc., 7 BNA OSHC 1410, 1412 (No. 76-2643, 1979) (citations omitted).

Because of the similarity of sections (b)(1) through (5), all of which contain construction specifications, and because of their placement under the same topic heading without specifying different ranges of application, this Judge finds that all subsections under paragraph (b) were intended to apply only to fixed stairs installed after October 3, 1983, the date provided in subsection (b)(1). See, Austin Building Company, 8 BNA OSHC 2150, 2153 fn. 7 (No. 77-3878, 1980). Accordingly, respondent's stairs having been installed prior to October 3, 1983 are not subject to the standard.

#### Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above.

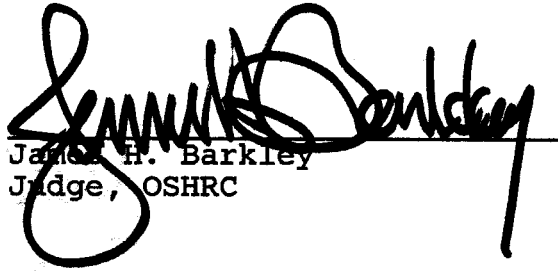
#### Order

1. For violation of Serious citation 1, item 2 alleging violation of 29 CFR §1917.151(h)(1), a penalty of \$400.00 is ASSESSED.



2. Repeat violation 2, item 1, alleging violation of 29 CFR §1917.119(f)(9) is AFFIRMED, and a penalty of \$100.00 is ASSESSED.

3. Other than serious citation 3, item 6, alleging violation of 29 CFR §1917.120(b)(3) is DISMISSED.



James H. Barkley  
Judge, OSHRC

Dated: October 9, 1991