

SECRETARY OF LABOR,

Complainant,

v.

MALU CONSTRUCTION CO., and its successors,

Respondent.

OSHRC DOCKET NO. 98-1980

APPEARANCES:

For the Complainant:

David Q. Jones, Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Thomas H. Scott, CSP, ARM, W.C. Blayney & Associates, Humble, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Malu Construction Co. (Malu), at all times relevant to this action maintained a place of business at 8100 Cypresswood Drive, Spring, Texas, where it was engaged in construction. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Respondent, therefore, is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 12-13, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Malu's Spring, Texas work site. As a result of that inspection, Malu was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Malu brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 28, 1999, a hearing was held in Houston, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Employer/Employee Status

As a threshold matter, Malu maintains that the workers involved in the allegedly violative conduct were not its employees, but were independent contractors responsible for their own compliance with OSHA safety and health regulations.

Facts

Joe Esquivel, Malu's owner, testified that Malu currently has no employees, and that on August 12-13, when the OSHA inspection took place, Malu's only employees were himself, his brother and G.E. Kirby, who worked as a helper, materials coordinator and foreman-in-training at the Spring project (Tr. 8, 12-13, 15, 23, 196, 198). Esquivel stated that Malu entered into an agreement with the general contractor, Hanover, to perform framing work on the Springs project (Tr. 11, 14). Pursuant to its contract, Malu hired five individuals, Armando Flores, Aurelio Juarez, Jose Rodriguez, Thomas Reyes, and Fernando de la Fuente, who were to frame the buildings, and apply exterior sheathing and trim (Tr. 10-12). Esquivel testified that Malu had hired the same workers on other jobs, stating that they "go back a while" (Tr. 30). All of the individuals sign weekly subcontract agreements with Malu, agreeing to supply all their own tools and to pay their own insurance and taxes (Tr. 27; Exh. R-4 through R-8).

Esquivel testified that he did not make any attempt to ascertain what, if any, training the subcontractors had, stating that, as subcontractors, the individuals were responsible for complying with relevant safety requirements and providing their own training (Tr. 16, 218). Nonetheless, Malu retained a safety consultant, W.C. Blayney and Associates, to conduct safety meetings on the site (Tr. 31, 202).

Esquivel testified that Malu's subcontractors could not afford scaffold equipment themselves, and that Malu, therefore, provided steel pumpjacks, aluminum ladders, walk planks, hand rails and other fall protection, though Malu did not install any of the cited scaffolding itself (Tr. 16-18, 21, 203, 217).

Esquivel stated that Malu's sole purpose on the Spring, Texas job site was to oversee and coordinate the framing work performed by workers hired as subcontractors by Malu; Malu performed no physical labor on the site (Tr. 9-11). Esquivel stated that he gave his

subcontractors their job orders, though he denied providing any supervision of their work (Tr. 13, 197). Esquivel stated that Mr. Kirby had no supervisory authority on the site, but was on the job merely as a facilitator (Tr. 13, 24). Esquivel testified that if a problem arose on the job site, the workers were to call him, and he would return to the site to investigate (Tr. 13).

Stan Thiergood, a Compliance Officer (CO) with OSHA, testified that when he arrived on the Spring job site on August 12, he met with Greg Kirby, who identified himself as Malu's superintendent and stated that he was supervising the employees identified by Esquivel as subcontractors (Tr. 38, 40). Thiergood testified that Kirby told him Malu had no subcontractors on the site (Tr. 66). Thiergood testified that while he was at the work site, Kirby told him Malu's workers had erected the scaffold, which is the subject of a number of the citations, and told him that he would have work stopped and proper scaffolding erected before resuming (Tr. 60-62, 70). Thiergood obtained a statement from Aurelio Juarez, in which Juarez identified Malu as his employer (Tr. 51; Exh. C-2).

In addition, Thiergood identified workers Hector Jodrez and Manuel Avaraso (or Alvarojasso) as exposed employees (Tr. 65). Jodrez and Avaraso identified themselves as Malu employees (Tr. 99).

Discussion

The Commission has held that:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Vergona Crane Co., 15 BNA OSHC 1782, 1784, 1991-93 CCH OSHD ¶29,775, p. 40,496-97 (No. 88-1745, 1992). In ascertaining an employee's employer, the Commission has primarily relied upon its determination of who has control over the work environment such that abatement of hazards can be obtained. *See, Abbonizio Contractors Inc.* 16 BNA OSHC 2125, 1994 CCH OSHD ¶30,615 (No. 91-2929, 1994).

The evidence establishes that under the common law of agency, and for purposes of the Act, Malu was the “employer” of the workers it hired as “subcontractors.”

Greg Kirby, Malu’s representative on the Spring site, believed that the subcontract laborers were employees of Malu. The worker CO Thiergood interviewed told the CO that Malu was his employer. All the workers had a history of employment with Malu. The workers did not provide skilled labor; the job description on Aurelio Juarez’s subcontract agreement reads “put up handrails, trash clean-up.” Malu provided both safety training and equipment for the workers at the Spring project.

Malu directed the framing work; Esquivel admits that this was Malu’s sole function at the project. Malu, therefore, was in a position to exercise control over the exposed workers’ environment. During the OSHA inspection Malu’s Greg Kirby represented that he had such control, offering to stop work until the cited violations were corrected.

The evidence was considered in its totality, based on Commission precedent. On the whole, the evidence demonstrates that Malu was the employer of its subcontract laborers for purposes of the Act. It is stressed that Malu should be commended for retaining a safety consultant to help it carry out its duties as an employer under the Act, and that Malu’s employment of such consultant, standing alone, was not dispositive of this issue.

Alleged Violations

Citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) Job site, for hazards such as but not limited to unsafe scaffold used for carpentry work, open sided floors and protruding nails.

Discussion

The cited standard requires employers to:

. . .instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Esquivel testified, without contradiction, that Malu retained a safety consultant, W.C. Blayney and Associates, to conduct safety meetings for laborers on the job site (Tr. 31, 202).

Complainant introduced no evidence pertaining to the content of Malu's training program; CO Thiergood admitted that Malu produced documentation of weekly safety meetings (Tr. 182). Complainant relies solely on the presence of the cited violations to support its allegations. The existence of violations, in itself, does not establish that instruction was not provided, and is insufficient to support a training citation.

Item 1 is vacated.

Citation 1, item 2

The citation alleges:

29 CFR 1926.25(a): During the course of construction, form or scrap lumber with protruding nails was not kept clear.

(a) North and east side of job site, where scrap lumber had rusty nails protruding.

Facts

Thiergood testified that used lumber with protruding nails was thrown out windows by Malu employees, and left laying about the job site in areas where employees were walking, though Thiergood could not identify the employee exposed to the hazard (Tr. 51, 54, 55-56, 146-47; Exh. C-3, C-4). Esquivel testified that trash is typically not thrown into the dumpsters until good lumber has been separated out for salvage (Tr. 203-04).

Discussion

The cited standard requires that:

During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

Malu admits that it is its regular practice to leave debris in the work area until it can be separated for salvage. The evidence establishes that Malu created the cited hazard, and that workers on the site were exposed to the hazard. However, the exposed employee was not identified as a Malu employee.

In the Fifth Circuit, where this case arises, the Court of Appeals has held that the Act creates a duty only between employers and their own employees. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981). Under the law of this circuit there can be no violation of the Act where its own employees are not affected by its non-compliance with a standard.

Because there was no evidence that Malu's own employees, as that term has been defined by the Commission, were exposed to the cited condition, this item must be vacated.

Citation 1, items 3 through 10.

Facts

During his investigation of the job site CO Thiergood observed and photographed a scaffold approximately 15 feet high, jury-rigged out of two aluminum ladders joined together and laid flat. The ladders were supported by pumpjacks mounted to a single set of lumber uprights (Tr. 59; Exh. R-1). CO Thiergood testified that he saw the scaffold swaying, and concluded that it would not support the weight that would be imposed on it (Tr. 58). The scaffold had neither toe boards nor guard rails (Tr. 60-61). Thiergood testified that a qualified person would not have designed and/or erected the cited scaffold. Any qualified person would have recognized the cited scaffold's deficiencies, and disallowed its use (Tr. 45, 64). Plywood walkboards were laid on the rungs; the walk boards were not continuous, however, leaving gaps, through which laborers might step (Tr. 45, 71; Exh. R-2). In addition, Thiergood testified that there was no ladder or other safe means of access provided to the ladder/scaffold (Tr. 45, 60, 75, 78).

Thiergood testified that both Paul West, Hanover's superintendent, and Greg Kirby told him that Malu erected the cited scaffold (Tr. 70, 79, 192, 202). Kirby told the CO that his crew used the scaffold to install siding (Tr. 73). Kirby admitted that he was aware of the condition of the scaffold; he was not, however, familiar with OSHA scaffolding requirements (Tr. 60, 64, 73, 80).

CO Thiergood listed the exposed employees as Juarez, Kirby, Jodrez and Alvarojasso (Tr. 65). Thiergood stated that Jodrez and Alvarojasso (or Avaraso) identified themselves as Malu employees (Tr. 99).

Discussion

Malu does not seriously dispute the allegations, except to point out that the cited scaffold is not a "pole" scaffold as noted in the citations. Malu asks that the citations be dismissed based on the Secretary's failure to properly identify the nature of the scaffold. Malu's position is without merit. 29 CFR 1926.451 **General requirements.** applies to scaffolding in general. Requirements specific to different types of scaffolding are set forth at §1926.452 **Additional requirements applicable to specific types of scaffolds.**

In addition, Malu argues that the Secretary failed to identify exposed employees. The evidence, however, establishes that Malu erected the cited scaffold to install siding. CO Thiergood identified workers on the site who admitted they worked for Malu, and who were exposed to the hazard.

Except as noted below, the citations are established.

Citation 1, item 3 alleges:

29 CFR 1926.451(a)(1): The scaffold was not cable (sic) of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted on to it.

(a) North side of building, pole scaffold using an extension ladder with plywood planks for planking support.

The cited standard provides:

. . . each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it.

Penalty

CO Thiergood testified, without contradiction, that in his opinion the jury-rigged scaffold could not support 4 times its intended load, as required by the cited standard. The violations are correctly classified as "serious," in that a fall from 15 feet due to scaffold collapse could result in severe bodily harm and/or death (Tr. 63, 70). Malu is a very small employer, with approximately six employees on site (Exh. C-1). Malu had never been inspected before, and so had no prior citations (Tr. 19). CO Thiergood testified that he deemed Malu's written safety program inadequate. No credit was given for good faith.

A penalty of \$2,500.00 was proposed for each of the items cited at Citation 1, items 3 through 8 addressing the deficient scaffolding. Each of these items is affirmed in the latter part of this decision. Though under its internal procedures OSHA has the discretion to group related violations, in this case the Secretary chose to propose a separate penalty for each violation. The penalties are indisputably cumulative in nature; the total proposed penalty for items 3 through 8 amounts to \$15,000.00.

Besides being cumulative in nature, the record establishes that Malu is a small employer, and has not received any prior citations. Moreover, Malu did have a written safety program, though the CO believed the program was inadequate.

The trial judge is faced with the dilemma of determining an appropriate penalty after considering the facts and weighing the statutory penalty criteria contained in the Act, *i.e.*, the size of the employer, the employer's good faith and history of previous violations, and the gravity of the violation, including (1) the number of employees exposed to the risk of injury; (2) the

duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. and. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972); *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981). The CO testified that he considered those factors, and arrived at the proposed sum properly utilizing the formulas set forth in OSHA's Field Inspection Reference Manual (FIRM). However, having given due consideration to the statutory factors and the evidence of record, especially the cumulative nature of the violations, I conclude that the CO's use of the FIRM matrix in calculating the proposed penalties leads to an excessive assessment. The Commission has found that where separately cited items are subsumed in a single overall violation for which the employer has also been cited, and where compliance with that standard would have abated all the violations the Commission may, in some cases, properly group the items for penalty purposes. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712, (No. 76-4765, 1981); *Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1986-87 CCH OSHD ¶27,829, (No. 84-696, 1987). Here, the CO testified that a scaffold that had been designed by and constructed under the supervision of a competent/qualified person (*see*, items 4 and 7) would not have contained the deficiencies cited by Thiergood (*See*, items 3, 5, 6 and 8). Because the cited deficiencies were all constituent elements of a properly constructed scaffold, and because the Secretary's failure to group the cited items results in an inequitably high penalty, I find that the proposed penalty is excessive. I find that a total penalty of \$6,000.00, or \$1,000.00 per item is appropriate.¹

A penalty of \$1,000.00 will be assessed for this item.

Citation 1, item 4 alleges:

29 CFR 1926.451(a)(6): Scaffold was designed by a qualified person and not constructed and loaded in according with that design.

(a) North side of job site, Pole scaffold used for carpentry work.

The cited standard provides:

¹ Since the employer-employee relationship has been resolved, it is to be hoped that Malu will, in the future, better address the problem of employee safety in his construction operation. The guidelines set forth herein, and any questions in the future, should be addressed to the local OSHA area office.

Scaffolds shall be designed by a qualified person and shall be constructed and loaded in accordance with that design. Non-mandatory Appendix A to this subpart contains examples of criteria that will enable an employer to comply with paragraph (a) of this section.

Penalty

CO Thiergood testified, that the only Malu supervisory personnel on site, Greg Kirby, was unfamiliar with OSHA scaffolding regulations. Thiergood testified, without contradiction, that the cited scaffold failed to comply with OSHA guidelines, and could not have been designed by a qualified person.

The violations are correctly classified as "serious," in that the collapse of an improperly constructed scaffold could result in severe bodily harm and/or death (Tr. 63, 70).

As discussed above, a penalty of \$1,000.00 will be assessed for this item.

Item 5 alleges:

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffold were not fully planked or decked between the front uprights and with the guard rail supports.

(a) North side of building, pole scaffold used for carpentry work.

The cited standard provides:

Each platform on all working levels or scaffolds shall be fully planked or decked between the front uprights and the guardrail supports. . . .

Penalty

The evidence establishes that the cited scaffold was not fully planked. CO Thiergood testified that an employee stepping through the unplanked section could suffer serious fractures or broken legs (Tr. 72-73). The violations are correctly classified as "serious"

As discussed above, a penalty of \$1,000.00 will be assessed for this item.

Item 6 alleges:

29 CFR 1926.451(e)(1): Safe means of access was not provided for each employee working on scaffolds.

(a) North side of building, Pole scaffold used for carpentry work.

The cited standard provides:

When scaffold platforms are more than 2 feet (0.6m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

Penalty

The evidence establishes that there was no means of access to the cited scaffold. CO Thiergood testified that without a ladder, or other means of access, an employee mounting or dismounting a scaffold could fall, sustaining serious injury (Tr. 76). The violations are correctly classified as "serious,"

As discussed above, a penalty of \$1,000.00 will be assessed for this item.

Item 7 alleges:

29 CFR 1926.451(f)(7): The scaffold was not erected, moved, dismantled, or altered under the supervision of a competent person.

(a) North side of job site, pole scaffold used for Carpentry work.

The cited standard provides:

Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

Penalty

CO Thiergood testified, that the only Malu supervisory personnel on site, Greg Kirby, was unfamiliar with OSHA scaffolding regulations and was not "competent."

The violations are correctly classified as "serious," in that the collapse of an improperly constructed scaffold could result in severe bodily harm and/or death (Tr. 81-82).

As discussed above, a penalty of \$1,000.00 will be assessed for this item.

Item 8 alleges:

29 CFR 1926.451(g)(1): Employees on scaffold more than 10 feet (3.1m) above a lower level were not protected from falling to that level.

(a) North side of job site, pole scaffold used for carpentry work.

The cited standard provides:

Each employee on a scaffold more than 10 feet (3.1m) above a lower level shall be protected from falling to that lower level. . . .

Penalty

The evidence establishes that no guardrails or other fall protection were in use on the cited scaffold. The violations are correctly classified as "serious," in that a fall from 15 feet due to missing guard rails could result in severe bodily harm and/or death (Tr. 63, 70, 73, 82).

As discussed above, a penalty of \$1,000.00 will be assessed for this item.

Item 9 alleges:

29 CFR 1926.451(h)(2)(ii): Where there was a danger of tools, materials, or equipment falling from a scaffold and striking employees below, a toeboard was not erected along the edge of platforms more than 10 feet (3.1m) above levels sufficient to protect employees below.

(a) North side of job site, pole scaffold used for carpentry work.

The cited section provides:

A toeboard shall be erected along the edge of platforms more than 10 feet (3.1 m) above lower levels for a distance sufficient to protect employees below. . . .

Discussion

CO Thiergood classified the cited item as "serious," in that a tool falling from a scaffold without toeboards could cause head injuries and/or fractures (Tr. 89).

There is no evidence in the record, however, that Malu employees ever worked in the area under the scaffold. In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Carpenter Contracting Corp.* 11 BNA OSHC 2027, 1984 CCH OSHD ¶29,950 (No. 81-838, 1984).

The Secretary failed to establish employee exposure to the cited hazard, and this item will be vacated.

Item 10 alleges:

29 CFR 1926.452(a)(2): Crossbracing was not installed between the inner and outer sets of poles of double pole scaffolds.

(a) North side of job site, pole scaffold used for carpentry work.

The cited standard provides:

Crossbracing shall be installed between the inner and outer sets of poles on double pole scaffolds.

Discussion

Respondent argues that the cited scaffold was not a double pole scaffold, and that the cited standard is, therefore, inapplicable. This judge agrees. The cited scaffold was supported by only a single pole, and, though also deficient as a single pole scaffold, was not cited under that standard. Citation 1, item 10 is vacated.

Citation 1, Item 11

Item 11 alleges:

29 CFR 1926.501(b)(14) Each employee engaged in construction activities near wall opening 6 feet or more above lower levels were not protected by guardrail systems, safety net systems, or personal fall arrest system.

(a) Job site, North side of building.

The cited standard provides:

Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.

Facts

Theirgood testified that he observed Malu employees working on unguarded open-sided second floor balconies, and were exposed to a fall hazard in excess of ten feet (Tr. 98-99, 175). Hanover's superintendent admitted Hanover was responsible for installing guardrailing on the second floor balconies (Tr. 87, 97).

Discussion

A subcontractor whose employees are exposed to a hazard under the control of another employer may defend against a citation by showing, by a preponderance of the evidence that: 1.) It did not create the violative condition; 2.) It did not control the violative condition such that it could not realistically have abated the condition in the manner required by the standard; and 3.) made reasonable alternative efforts to protect its employees from the violative condition. *Lee Roy Westbrook Construction Company, Inc.*, 13 BNA OSHC 2104, 1989 CCH OSHD ¶28,465 (No. 85-601, 1989).

Malu made no showing either that it could not have abated the violative condition, or that it made any attempt to provide alternative protection for its employees. The violation is established.

Penalty

A penalty of \$2,500.00 was proposed for this item. CO Thiergood testified, without contradiction that a fall from a 10 foot balcony could lead to serious injury including serious

fractures and/or death (Tr. 99). Taking into account the relevant factors, as discussed above, I find that a penalty of \$1,000.00 is appropriate and will be assessed.

Citation 1, item 12

Item 12 alleges:

29 CFR 1926.1053(b)(4): Ladders were used for purposes other than the purposes for which they were designed.

(a) North side of job site, an extension ladder used as a work platform on pole scaffold.

The cited standard provides:

Ladders shall be used only for the purpose for which they were designed.

Penalty

The violations are correctly classified as "serious," in that a fall from 15 feet due to scaffold collapse could result in severe bodily harm and/or death (Tr.101). The use of the ladder as scaffolding has been addressed under items 4 and 7; it is clear that no competent person would have designed or constructed a pole scaffold, using an aluminum ladder as a work platform. Because citing the misuse of the ladder separately results in an inequitable accumulation of penalties, and taking into account the other relevant factors discussed above, a penalty of \$1,000.00 will be assessed for this item.

Other than Serious Citation 2, item 1 alleges:

29 CFR 1904.7: OSHA Form(s) and 200 were not available for inspection and copying:

(a) Main office at 2903 King Rd., Kingwood, Tx.

Penalty

No penalty was proposed for this item.

ORDER

1. Citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.
2. Citation 1, item 2, alleging violation of §1926.25(a) is VACATED.
3. Citation 1, item 3, alleging violation of §1926.451(a)(1) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
4. Citation 1, item 4, alleging violation of §1926.451(a)(6) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
5. Citation 1, item 5, alleging violation of §1926.451(b)(1) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.

6. Citation 1, item 6, alleging violation of §1926.451(e)(1) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
7. Citation 1, item 7, alleging violation of §1926.451(f)(7) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
8. Citation 1, item 8, alleging violation of §1926.451(g)(1) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
9. Citation 1, item 9 alleging violation of §1926.451(h)(2)(ii) is VACATED.
10. Citation 1, item 10, alleging violation of §1926.452(a)(2) is VACATED.
11. Citation 1, item 11, alleging violation of §1926.501(b)(14) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
12. Citation 1, item 12, alleging violation of §1926.1053(b)(4) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
13. Citation 2, item 1, alleging violation of §1904.7 is AFFIRMED without penalty.

Stanley M. Schwartz
Judge, OSHRC

Dated: