United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
HARBERT-YEARGIN, INC.
Respondent.

OSHRC DOCKET
NO. 94-2950

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 4, 1996. The decision of the Judge will become a final order of the Commission on May 6, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 23, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Date: April 4, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-2950

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SECRETARY OF LABOR, Complainant, v. HARBERT-YEARGIN, INC., Respondent.	OSHRC Docket No. 94-2950

APPEARANCES:

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, *et seq.*), hereafter referred to as the "Act."

Respondent, Harbert-Yeargin, Inc., at all times relevant to this action, maintained a place of business on Buckingham Road, Fort Myers, Florida, where as general contractor, it was responsible for the construction of a cogeneration power plant. The plant was being built to convert municipal solid waste into steam to produce electricity for Lee County, Florida. Harbert-Yeargin was responsible for constructing the foundations, buildings, and most of the structural components. The construction work began in October 1992 and was completed in February 1995 (Tr. 12-13, 210-211).

In June 1994, Compliance Officer Warren Knopf of the Occupational Safety and Health Administration conducted a complaint inspection of the construction site involving another contractor. However, as a result of inspecting the site, Harbert-Yeargin received a serious citation alleging violations of the electrical standards at 29 C.F.R. §§ 1926.403(b)(2), 1926.404(a)(2), 1926.404(b)(1)(iii)(C), 1926.404(b)(1)(iii)(D), 1926.404(b)(1)(iii)(G), 1926.405(a)(2)(ii)(B), and 1926.405(g)(2)(iv), and the scaffolding standards at 29 C.F.R. §§ 1926.451(a)(3), 1926.451(a)(4), 1926.451(e)(1), and 1926.451(e)(10). Penalties totaling $15,375 were proposed for the serious citation. Also, Harbert-Yeargin received an "other-than-serious" citation for violation of § 1926.59(f)(5)(ii). The citations were timely contested. Prior to hearing, Harbert-Yeargin withdrew its notice of contest to the "other-than-serious" citation (Tr. 6).

The hearing as to each item of the serious citation was held in Fort Myers, Florida, on May 2, 1995. Harbert-Yeargin admits that at all relevant times to this proceeding, it was an employer engaged in a business affecting commerce within the meaning of the Act (Tr. 5-6).

CITATION NO 1.

Item 1 - Alleged Violation of § 1926.403(b)(2)

The citation alleges that a "NM 10-2 electrical wire run underground to the building, was laid on the ground not protected, and used for temporary service to the tunnel. Wire was not used as listed or labeled for use by the manufacturer."

Facts

During his inspection, Compliance Officer Knopf observed an NM 10-2 electrical wire, approximately 300 feet in length, used to provide temporary lighting to a tunnel inside the residue building. Originating at a temporary power box, the NM wire ran underground to an area outside the residue building when it surfaced and ran on the ground through an area littered with construction debris. At the residue building, the NM wire crossed a concrete pad, entered the building at its entrance, and ran to the tunnel area (Exhs. C-2, C-3, C-4; Tr. 19-20). Knopf observed Harbert-Yeargin's employees working in the residue building and entering and leaving where the wire was laying (Tr. 21). He testified that the NM wire caused a tripping hazard and, if there were degradation of the wire's outer sheathing, employees could be exposed to electric shock (Tr. 22). Knopf described the NM wire as normally used for permanent indoor wiring. It was not labeled for

hard use or extra hard use, which is appropriate for temporary usage at construction sites (Tr. 20-21, 135). He testified that degradation of the wire's outer sheathing could be caused by dampness in the ground, ultraviolet light from the sun, and bending and flexing from employees walking on it (Tr. 20, 26, 29-31). In checking the NM wire, however, Knopf did not observe any degradation in the sheathing (Tr. 130).

Richard Cooper, safety manager for Harbert-Yeargin during the OSHA inspection, testified that the NM electrical wire was used for approximately two months and discontinued on the day of the inspection when permanent power was connected to the tunnel. He described the NM 10-2 electric wire as having ten-gauge nonmetallic sheathing with two conductors and a ground cable. He testified that NM 10-2 wire is more substantial than an extension cord. However, he conceded that it was generally used for permanent indoor wiring. Based on thirty years of experience, Cooper testified that such wiring was accepted over the country as suitable for temporary wiring for short periods of time (Tr. 240-241). He agreed that NM wire should not be exposed for long periods of time (Tr. 241). He testified that the wire was only 6 inches below the surface in sandy soil and that if the outer sheathing were damaged, the ground fault circuit interrupter (GFCI) would have tripped, preventing physical harm (Tr. 235-236, 238).

Discussion

Section 1926.403(b)(2) provides:

> Listed, labeled, or certified equipment shall be installed and used in accordance with instruction included in the listing, labeling, or certification.

It is uncontroverted that Harbert-Yeargin knew the NM wire was being used and that employees worked and walked in the area of the wire. Also, Harbert-Yeargin acknowledges that it was using the NM wire for temporary power to the tunnel and that NM wire is not listed, labeled or certified for hard or extra hard use. Harbert-Yeargin's safety manager agreed that NM wire is generally used for permanent indoor wiring.

Article 336-3(a) of the National Electric Code (NEC) (Exh. C-12) identifies the permitted usage for type NM wire as:

> Type NM cable shall be permitted for both exposed and concealed work in normally dry location. It shall be permissible to install or fish Type NM cable in air voids in masonry block or tile wall where such walls are not exposed or subject to excessive moisture or dampness. Type NM cable shall not be installed where exposed to corrosive fumes or vapors; nor run in shallow chase in masonry or concrete and covered with plaster or similar finish.

Also, Article 336-10 provides that for exposed work NM wire should closely follow the surface of the building and be protected from physical damage by conduit, pipe, guard strips or other means. Article 336-14 provides that bends in the wire and other handling should not subject the protective coverings of the wire to being injured and no bend shall "have a radius less than five times the diameter of the cable" (Exh. C-12).

Therefore, based on the record, the court concludes that the NM 10-2 wire used by Harbert-Yeargin was not listed for the temporary conditions and usage observed by Knopf. It was not listed for damp conditions, exposure to ultraviolet light, or subjected to damage from employees walking on it. The NM wire was not used in accordance with its listing, labeling or certification as required by § 1926.403(b)(2).

The issue, however, raised by Harbert-Yeargin is whether § 1926.403(b)(2) is the appropriate standard. Harbert-Yeargin argues that § 1926.405(a)(2)(ii)(J) is the appropriate specific standard which addresses temporary electrical installations. Section 1926.405(a)(2)(ii)(J) provides that "flexible cords used with temporary and portable lights shall be designed for hard or extra-hard usage" and lists from the NEC various types of cords approved this usage such as ST, SO, or SJ wire. NM wire is not listed.

The court disagrees that § 1926.405(a)(2)(ii)(J) is the appropriate standard. Section § 1926.403(b)(2), which was cited, applies to all electrical equipment and installations, whether temporary or permanent, used on jobsites. It requires the installation and use of electrical equipment to be in accordance with the equipment's listing, labeling, or certification. Section 1926.403(b)(2) addresses the conditions and hazards observed by Knopf. It applies to Harbert-Yeargin's use of the NM wire. Knopf observed the NM wire not only under conditions which would require hard usage or extra hard usage, but he also observed the wire in inappropriate locations, *i.e.*, underground dampness and sunlight. NM wire is not listed for these conditions (Exh. C-12, Table 400-4).

Section 1910.5 provides that a general standard prescribing compliance action is not preempted by a specific standard unless both standards address the same hazard. Here, the hazards are different. Thus, it is concluded that § 1926.403(b)(2) is the applicable standard and is not preempted.

Also, Harbert-Yeargin argues that NM wire could be used at this site based on § 1926.405(a)(2)(I) which provides that " temporary electrical power and lighting wiring methods . . . may be of a class less than would be required for a permanent installation." Harbert-Yeargin's interpretation misreads the standard. The standard does not permit the use of permanent wiring for temporary usage. It permits wiring methods which may be less than required for permanent installations. NM wire, as acknowledged by Harbert-Yeargin, is used for permanent installations. Therefore, § 1926.405(a)(2)(I) does not permit Harbert-Yeargin's use of the NM wire. Further, even if NM wire were accepted by other contractors for temporary wiring as asserted by Cooper, the standard requires Harbert-Yeargin to comply with specific action regardless of industry practice. *See State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159, 1993 CCH OSHD ¶ 30,042, p. 41,225 (Nos. 90-1620& 90-2894, 1993).

As for the classification of the violation, Harbert-Yeargin argues that it should have been classified as "other-than-serious" because the NM wire was used for less than two months; there was no evidence of degradation; and the ground fault circuit interrupter (GFCI) would have prevented any physical harm. In order to establish a serious violation under § 17(k) of the Act, consideration is given to whether (1) there is substantial probability that death or serious physical harm could result from a hazardous condition, and (2) the employer knew or, with the exercise of reasonable diligence, should have known of the presence of the violation. In determining substantial probability, the issue is not whether an accident is likely to occur. Rather, the record must show that an accident is possible and the result of the accident would likely be death or serious physical harm. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024, 1991 CCH OSHD ¶ 29,313, p. 39,358 (No. 86-521, 1991); *Consolidated Freightway Corp.*, 15 BNA OSHC 1317,1324, 1991 CCH OSHD ¶ 29,498 p. 39,801 (No. 89-2253, 1991). The "serious" classification is based on the type of expected injury if an accident occurred. In this case, the record establishes that if degradation did occur from improper usage of the NM wire, employees would be exposed to electric shock which could have caused serious injury or possible death. Cooper agreed that degradation of the outer sheathing was

possible if exposed for longer than a short period of time. A short period was never defined by Cooper. Also, any protection provided by the GFCI depends on whether it is operable (one GFCI in this case was found inoperable) and if it trips immediately. *See A. L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1999, 1994 CCH OSHD ¶ 30,554 p. 42,274 (No 92-1022, 1994). Therefore, the court concludes that the violation of § 1926.403(b)(2) was properly classified as serious.

In assessing a penalty, no credit is given to Harbert-Yeargin for size and history in that it employs over 3,000 employees and in 1993 had been cited for serious violations of the Act (Tr. 36). Credit is given for good faith based on its written safety programs which Knopf considered in compliance with the standards (Tr. 34). Also, the violative condition was immediately abated during the inspection. In considering the gravity, it is noted that there was no record of any accidents involving the NM wire; there was no noticeable degradation of the wire; the wire was in use for two months; and protection was afforded by the GFCI.

Accordingly, a serious violation of §1926.403(b)(2) is affirmed. A penalty of $1,000 is assessed.

Item 2 - Alleged Violation of § 1926.404(a)(2)

The citation provides that "employees using a flexible extension cord, to supply power to a hand grinder, had reverse polarity when tested."

Facts

Knopf testified that in the tipping bay area, he observed three employees using a flexible extension cord to power a hand grinder. The extension cord was plugged into a Power Ranger 10-LX generator (Exh. C-6; Tr. 37). The employees, who identified themselves as employed by Harbert-Yeargin, were grinding metal. They were working on a concrete floor where Knopf observed puddles of water (Tr. 37). In inspecting the extension cord, Knopf noted that the female plug had been replaced and the plug lacked a strain relief (Tr. 37). Knopf tested the cord and found it had reverse polarity (Tr. 38). The cord had orange markings which, according to Harbert-Yeargin's assured equipment grounding program, indicated that the cord had been tested in May 1994 (Tr. 39). Also, the employees using the extension cord identified it as belonging to Harbert-Yeargin. They told Knopf that they had not visually inspected the cord (Tr. 39, 47). Knopf

testified that reverse polarity could result in electric shock to employees, particularly in this situation, since Knopf found a non-functioning GFCI, a lack of strain relief, and there was standing water in the area (Tr. 40-41, 49-50). The extension cord was immediately taken out of service (Tr. 40).

Cooper, former safety manager, testified that Harbert-Yeargin's electrical safety program involved both GFCIs and an assured equipment grounding program (Exhs. R-1, R-3; Tr. 245). He testified that Harbert-Yeargin conducted complete inspections of cord sets and receptacles monthly (Exh. R-3; Tr. 248). Such an inspection was done in May 1994, immediately prior to the June inspection by Knopf. He stated that the two electricians used an ohm meter to check for reverse polarity (Tr. 248). He estimated there were several hundred (300 to 500) electrical cords at the jobsite (Tr. 248, 389). Based on reviewing Knopf's photograph of the extension cord, Cooper[1] testified that it did not belong to Harbert-Yeargin because of the clear plastic plug. It was too expensive (Exh. C-6; Tr. 243-244, 268, 369).

Discussion

Section 1926.404(a)(2) provides that:

> No grounded conductor shall be attached to any terminal or lead so as to reverse designated polarity.

Based on the record, it is uncontroverted that §1926.404(a)(2) was applicable to the conditions observed by Knopf; the terms of § 1926.404(a)(2) were violated; and employees of Harbert-Yeargin were exposed to the hazard of reverse polarity. Therefore, before a violation is established, the issue of knowledge remains. Harbert-Yeargin argues that the extension cord was not theirs and it did not know, or should have known, of the reverse polarity. It was not in "plain view" (Harbert-Yeargin's Brief, pg. 11).

In establishing knowledge, an employer has a duty to inspect its work area for hazards. Even if Harbert-Yeargin lacks actual knowledge, it can be charged with constructive knowledge of conditions that could be reasonably detected through an inspection of the worksite. Where the employer maintains an appropriate monitoring or inspection program, the burden is on the Secretary

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1 Cooper was not present during the complete walkaround inspection. He became involved in the OSHA inspection because of a confrontation between Knopf and another safety manager (Tr. 230). The confrontation was described as two individuals not acting as mature adults (Tr. 223).

to demonstrate the employer's failure to discover the violative conditions was due to a lack of reasonable diligence. *Milliken & Co.*, 14 BNA OSHC 2079, 2083, 1991-93 CCH OSHD ¶ 29,243, pp. 39,177-78 (No. 84-767, 1991), *aff'd*, 947 F.2d 1483 (11th Cir. 1991).

The record in this case reflects that Harbert-Yeargin failed to make a reasonable effort to anticipate the particular hazards to which its employees were exposed in the course of their scheduled work. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No 76-5089, 1980); *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221, 1991-93 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991). A reasonable effort would have detected the reverse polarity even if not in plain view.

A visual observation of the extension cord would have detected the replaced female plug and the lack of strain relief. Such defects or alterations to the extension cord were plainly visible. Although Harbert-Yeargin's inspection of cord sets and receptacles was done monthly,[2] § 1926.404(b)(1)(iii) requires cords to be visually inspected before each day's use, after any repairs, and after any incident which could reasonably be suspected to have caused damage. Also, Harbert-Yeargin's assured equipment grounding program instructed employees to visually inspect each cord set before each days' use for external defects. If found defective, employees were instructed not to use the cord until repaired (Exh. R-1, pg. 2 of 7). In this case, employees using the extension cord told Knopf that they were unfamiliar with Harbert-Yeargin's inspection requirements. They admitted to not inspecting the cord. If the cord had been inspected, the lack of strain relief and a new plug would have been detected. The extension cord would have been taken out of service for repairs and testing. Testing would have found the reverse polarity. By not visually inspecting this extension cord for obvious defects and alterations, there was no testing for reverse polarity. Therefore, the court concludes that reasonable diligence, as provided in its written program, would have detected the reverse polarity and Harbert-Yeargin's constructive knowledge of the violative condition is established.

The question of ownership of the extension cord is irrelevant and not supported by the record. Harbert-Yeargin has a duty to protect its employees. Its employees were using the cord. Also,

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[2] Section 1926.404(b)(1)(iii)(F) requires inspections "at intervals not to exceed 3 months."

Cooper testified that company rules did not prohibit employees from using extension cords belonging to other contractors (Tr. 370). Therefore, Harbert-Yeargin was responsible for the use of the extension cord and the protection of its employees. Further, the record does not establish that the cord did not belong to Harbert-Yeargin. Cooper's testimony as to ownership of the cord was speculative and based on receiving a photograph taken by Knopf. The cord was marked with Harbert-Yeargin's orange inspection code. Also, the employees on site identified it as belonging to Harbert-Yeargin (Tr. 39).

Thus, the record in this case establishes a violation of § 1926.404(a)(2). Also, it was properly classified as serious. The three employees using the extension cord to run the grinder were exposed to a shock hazard which could have caused serious injury or death.

In assessing a penalty, consideration is given to Harbert-Yeargin's size, good faith and history as previously discussed. The cord was immediately taken out of service. Also, consideration is given to the fact that Harbert-Yeargin had two full-time electricians on site; there were 300 to 500 cords; and it utilized both GFCIs and an assured equipment grounding conductor program. As for gravity, there is no evidence as to how long the employees were using the extension cord. However, the three employees using the cord showed a lack of knowledge of Harbert-Yeargin's assured grounding equipment program and its requirement to inspect before use.

Accordingly, a serious violation of § 1926.404(a)(2) is established. A penalty of $500 is assessed.

Item 3a - Alleged Violation of § 1926.404(b)(1)(iii)(C)

The citation alleges that the "employer did not implement the inspection of cord sets that were not part of the building. The Power Ranger 10-LX generator which did not have working GFCIs and the cord set plugged into the generator had been missing a strain relief and showed reverse polarity had not been tested, visually inspected or taken out of service."

Facts

This is the same extension cord and Power Ranger discussed in item 2 above in the tipping bay where three of Harbert-Yeargin's employees were observed using a hand grinder.

Discussion

Section 1926.404(b)(1)(iii)(C) provides:

> Each cord set, attachment cap, plug and receptacle of cord sets, and any equipment connected by cord and plug, except cord sets and receptacles which are fixed and not exposed to damage, shall be visually inspected before each day's use for external defects, such as deformed or missing pins or insulation damage, and for indications of possible internal damage. Equipment found damaged or defective shall not be used until repaired.

As discussed previously, Harbert-Yeargin's employees are required to inspect cords before each day's use. In addition to GFCIs, Harbert-Yeargin maintained an assured equipment grounding conductor program at this site. Under such a program, the standard provides for visual inspection of electrical equipment to detect external defects or damage prior to each day's use. If found defective, the equipment is to be taken out of service and not used until repaired. Similarly, Harbert-Yeargin's assured grounding program in effect at the site provides that "the employees shall be instructed that each cord set, and any equipment connected by cord and plug . . . shall be visually inspected by the user before each day's use for external defects . . . . Equipment found damaged or defective will not be used until repaired" (Exh. R-1, pg. 2 of 7).

Visual inspection would have detected the lack of strain relief and the replaced female plug. However, the three Harbert-Yeargin employees using the grinder told Knopf they had not inspected the cord set and that they did not understand the visual inspection requirements of Harbert-Yeargin's assured grounding program (Tr. 47-49, 143-144). Also, Knopf testified that the electrician stated that tests on cords were not being done (Tr. 59). Thus, the Secretary has established a violation of § 1926.404(b)(1)(iii)(C). However, Harbert-Yeargin asserts, as affirmative defenses, employee misconduct and the multi-employer defense. The court concludes that the record does not establish either defense in this case.

In order to establish employee misconduct, Harbert-Yeargin must show that:

> The action of its employee represented a departure from a work rule that the employer has uniformly and effectively communicated and enforced.

Mosser Construction Co., 15 BNA OSHC 1408, 1414, 1991 CCH OSHD ¶ 29,546, p. 39,905 (No. 89-1027, 1991). However, Harbert-Yeargin presented no evidence that employees were trained

to perform visual inspections of electrical equipment. Cooper's testimony was general in nature and not substantiated. The safety meeting records do not reflect this training nor was any documentation offered as required by Harbert-Yeargin's assured grounding program. The employees' safety handbook for electrical safety does not provide for visual inspections (Exhs. R-2, C-13). According to Cooper, the safety handbook was reviewed with new employees (Tr. 257-258). Also, the evidence fails to show that visual inspections of electrical equipment, as required by § 1926.404(b)(1)(iii)(C) and its own assured grounding program, were communicated and enforced. There was no evidence offered by Harbert-Yeargin which refuted the statements made by the three employees to Knopf that they were unfamiliar with the inspection requirements of Harbert-Yeargin's assured grounding program. Such statements are given weight in accordance with Rule 801(d)(2) of the Federal Rules of Evidence. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981). Thus, employee misconduct is not shown.

Likewise, Harbert-Yeargin's multi-employer defense is not shown based on the record. To prove the multi-employer worksite defense, Harbert-Yeargin must prove by a preponderance of the evidence that it:

(1) did not create the hazardous condition;

(2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard; and

(3) took reasonable alternative steps to protect its employees or did not have and could not have had with the exercise of reasonable diligence notice that the violative condition was hazardous.

Capform, Inc., 16 BNA OSHC 2040, 2041, 1994 CCH OSHD ¶ 30,589, p. 42,355 (No 91-1613, 1994). In this case, even if the extension cord did not belong to Harbert-Yeargin as stated by Cooper[3], the record shows that Harbert-Yeargin controlled the cord. Its employees were permitted to use extension cords belonging to other contractors (Tr. 376). The employees were using the extension cord to operate a grinder used to accomplish Harbert-Yeargin's job. Also, there was no

[3] The three employees thought the cord belonged to Harbert-Yeargin (Tr. 39).

showing of any reasonable alternative steps taken to protect its employees or that it could not have known of the violative condition. Therefore, a multi-employer defense is rejected.

By failing to inspect the extension cord and exposing employees to an electrical hazard, a serious violation is established. In determining an appropriate penalty, consideration is given to the credit factors previously discussed, the exposure of three employees, and the multiple deficiencies found with the extension cord (inoperable GFCI, lack of strain relief, reverse polarity).

Accordingly, a serious violation of § 1926.404(b)(1)(iii)(C) is affirmed. A penalty of $500 is assessed.

Item 3b - Alleged Violation of § 1926.404(b)(1)(iii)(D)

Also, in the tipping bay, Harbert-Yeargin is cited because the "employer did not implement the testing of receptacles which were not part of the permanent building wiring. The receptacle on the Power Ranger 10-LX, which had a GFCI on each, did not operate to protect the employee."

Facts

This citation involves the same Power Ranger which provided electrical power to operate the hand grinder used by the three employees discussed in items 2 and 3a above. When Knopf checked the GFCI, he found it inoperable (Tr. 45). He showed the employees how to check the GFCI (Tr. 49).

Discussion

Section 1926.404(b)(1)(iii)(D) provides:

> The following tests shall be performed on all cord sets, receptacles which are not a part of the permanent wiring of the building or structure, and cord- and plug-connected equipment required to be grounded:
>
> (1) All equipment grounding conductors shall be tested for continuity and shall be electrically continuous.
>
> (2) Each receptacle and attachment cap or plug shall be tested for correct attachment of the equipment grounding conductor. The equipment grounding conductor shall be connected to its proper terminal.

Under an employer's assured equipment grounding program, § 1926.404(b)(1)(iii)(D) requires testing of the receptacles on the Power Ranger (Exh. C-7). There is no question that the

receptacles were not a part of the building's permanent wiring. However, the receptacle in this case was a GFCI which is not covered by an employer's assured equipment grounding program. The GFCI is an alternative grounding program under § 1926.404 (b)(1)(ii). To require testing of the GFCI under the standards applicable to an assured equipment grounding program would mix the requirements of two alternative programs. An employer would not recognize any benefit in having a GFCI program if it was also required to comply with standards applicable to an assured equipment grounding program. Section 1926.404(b)(1)(iii)(D) is inapplicable to the condition of the GFCI. Further, even if the cited standard is applicable, there is no requirement for daily testing. Section 1926.404(b)(1)(iii) requires visual inspection before each day's use. Testing is required before first use and at intervals not to exceed three months. The Secretary's evidence fails to establish that the GFCI was not tested. There was no showing as to how long the GFCI was inoperable.

Therefore, the alleged violation of § 1926.404(b)(1)(iii)(D) is vacated.

Item 3c - Alleged Violation of § 1926.404(b)(1)(iii)(G)

Harbert-Yeargin is cited at the same area for "cord sets and receptacles in use by employees under the Assured Grounding Program were not recorded and available to the Secretary's Representative when defective cord sets, (strain relief missing, reverse polarity) and non-working GFCIs (on the Power Ranger generator 10-LX) were in use."

Facts

This violation was cited based on the condition of the extension cord used by three employees operating the hand grinder as previously discussed. Knopf found that the extension cord was lacking a strain relief, had reverse polarity, and was connected to an inoperable GFCI.

Discussion

Section 1926.404(b)(l)(iii)(G) provides that:

> Tests performed as required in this paragraph shall be recorded. This test record shall identify each receptacle, cord set, and cord- and plug- connected equipment that passed the test and shall indicate the last date it was tested or the interval for which it was tested. This record shall be kept by means of logs, color coding, or other effective means and shall be maintained until replaced by a more current record. The record shall be made available on the jobsite for inspection by the Assistant Secretary and any affected employee.

The deficiencies found by Knopf are not evidence that tests were not being performed and recorded as required by § 1926.404(b)(1)(iii)G). In this case, Harbert-Yeargin recorded its tests by color coding as permitted by the standard. The extension cord was marked with orange tape which was Harbert-Yeargin's May 1994 color code. Harbert-Yeargin's assured program used color coding which showed the testing for proper grounding with colored tape designated for that month. The program satisfies the requirements of § 1926.404(b)(1)(iii). A copy of the program and test records were available to Knopf (Exh. R-1, R-3).

Accordingly, the alleged violation of § 1926.404(b)(1)(iii)(G) is vacated.

Item 4 - Alleged Violation § 1926.405(a)(2)(ii)(B)

The citation alleges that "NM 10-2 electrical wire was laid on the ground in waste materials, employees walking on it and was subject to damage. Wire was not supported every 10 feet when it entered the building."

Facts

The NM 10-2 electrical wire was used to provide temporary power to the tunnel as discussed in item 1 above. There is no dispute that the NM wire was laying on the ground in a debris area and over a cement floor at the entrance to the residue building (Exhs. C-2, C-3, C-4, C-8). In the residue building, it also traveled along an expanse of blank wall (Tr. 384). Employees were observed walking in the area of the NM wire. It was exposed to employees walking on it or being damaged by construction material and equipment. The NM wire was not protected in any manner from possible damage or fastened at intervals.

Discussion

Section 1926.405(a)(2)(ii)(B) provides in part:

> Runs of open conductors shall be located where the conductors will not be subject to physical damage, and the conductors shall be fastened at intervals not exceeding 10 feet (3.05 m).

The record establishes a violation of § 1926.405(a)(2)(ii)(B). Harbert-Yeargin does not dispute that the NM wire was exposed to physical damage or that the wire was not fastened at least every 10 feet. However, Harbert-Yeargin asserts infeasibility as an affirmative defense.

To establish infeasibility, Harbert-Yeargin must show that:

1. Literal compliance with the terms of the standard was infeasible under the existing circumstances; and

2. An alternative protective measure was used or there was no feasible alternative measure.

State Sheet Metal Co., 16 BNA OSHC 1155, 1160, 1993 CCH OSHD ¶ 30,042, p. 41,226 (No. 90-1620, 1993). Infeasibility is shown if implementation would have been technologically or economically infeasible, or necessary work operations would have been technologically or economically infeasible after its implementation. *V.I.P. Structures,* 16 BNA OSHC 1873, 1994 CCH OSHD ¶ 30, 185 (No. 91-1167, 1994). However, employers are expected to exercise some creativity in seeking to achieve compliance. *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1993 CCH OSHD ¶ 30,225 (No. 90-1349, 1993). The fact compliance is difficult or expensive is insufficient grounds for failing to comply with the requirements of the standard. *Hughes Brothers, Inc.*, 6 BNA OSHC 1830, 1978 CCH OSHD ¶ 22,909 (No. 12523, 1978). Also, "reasonable" alternative requires limited compliance even if exact compliance is not possible. *Cleveland Consolidated, Inc v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. 1981).

In this case, the record fails to establish that the NM wire could not have been protected from physical damage and fastened at least every 10 feet. Knopf testified that staples or wire hangers could have been used to support the wire (Tr. 64). Harbert-Yeargin concedes that supports could have been installed or holes drilled for staples or hangers (Harbert-Yeargin's Brief, pg. 22). However, it argues that it would have to repair any holes in the walls. Such an excuse is not sufficient to avoid compliance. Cooper, safety manager, conceded that the holes could be repaired (Tr. 386, 388). This might require some delay and additional cost, but nothing was shown that it would be economically infeasible.

Based on Harbert-Yeargin's knowledge of the condition in that it installed the NM wire, and the nature of injury if an accident occurred, the violation is properly classified as "serious." In addition to the credit factors previously discussed, the gravity for penalty purposes is considered low. The wire was in place for only two months and showed no signs of visible damage. Also,

Harbert-Yeargin used both GFCIs and an assured grounding program. Further, this is the second citation involving the same NM wire.

Accordingly, a serious violation of § 1926.405(a)(2)(ii)(B) is affirmed. A penalty of $500 is assessed.

Item 5 - Alleged Violation of § 1926.405(g)(2)(iv)

The citation alleges that "employees were using a 4.5 inch sander/grinder which was supplied power through a flexible cord. Female plug end of flexible cord was pulled away, exposing inner conductors and placing a strain on the screw terminals of conductors."

Facts

In inspecting the extension cord used by three employees to operate the hand grinder discussed in items 2 and 3 above, Knopf observed that the female plug end was pulled away, exposing inner conductors. There was no strain relief.

Harbert-Yeargin presented no evidence disputing the conditions observed by Knopf.

Discussion

Section 1926.405(g)(2)(iv) provides that:

> Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminals screws.

It is uncontroverted that § 1926.405(g)(2)(iv) applies to the conditions cited; the terms of the standard were violated; and employees of Harbert-Yeargin were exposed to the hazard created by the lack of strain relief. Also, based on visibility, Harbert-Yeargin had constructive knowledge of the condition of the extension cord. Thus, a violation of § 1926.405(g)(2)(iv) is established.

While not disputing the violation, Harbert-Yeargin questions the classification as "serious" (Harbert-Yeargin's Brief, pg. 23). However, the record shows the lack of strain relief was in plain view. It should have been detected during the inspection of the extension cord before use. *See Bland Constr. Co.*, 15 BNA OSHC 1031, 1032, 1991-93 CCH OSHD ¶ 29,325, p. 39,392 (No. 87-992, 1991). Also, in determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather whether the result would likely be death or serious physical harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157,

1989 CCH OSHD ¶ 28,501, p. 37,772 (No. 87-1238, 1989). Based on the record, the lack of strain relief exposed the employees to possible shock hazard which could cause serious injury.

In addition to the size, history and good faith credit factors previously discussed, the court consideres for gravity purposes that there were three employees exposed to the condition and they were standing on a wet cement floor. Also, the extension cord showed reverse polarity and an inoperable GFCI. The condition was readily visible. However, the same extension cord is the subject of a number of other violations of the standards for which separate penalties have been assessed.

Accordingly, a serious violation of § 1926.405(g)(2)(iv) is affirmed. A penalty of $500 is assessed.

Item 6 - Alleged Violation of § 1926.451(a)(3)

The citation alleges that in the boiler room, the "elevation 28 - 30 feet high tubular welded scaffold was erected that exceeded 4 times minimum width which a competent person would have known and cross bracing was used on the 23 feet scaffold instead of guardrails."

Facts

Knopf observed two mobile tubular welded scaffolds in the boiler room, one 23 feet in height and the other 30 feet in height. Both scaffolds were 5 feet wide at the base (Exhs. C-10, C-11; Tr. 87-88). There were no outriggers or guy wires securing the scaffolds (Tr. 90). Also, he observed an employee climbing the 23-foot scaffold. The employee was immediately brought down before reaching the platform (Tr. 89). He observed no other employees on the scaffolds. On the 23-foot scaffold, there was crossbracing on one side of the platform instead of a guardrail (Exh. C-10; Tr. 97-98). Because of the height of the scaffolds, Knopf considered there was a hazard of the scaffold tipping over (Tr. 92). Employees in the area told Knopf they had used the two scaffolds prior to the inspection (Tr. 91). Also, Knopf observed nothing to prevent the use of the scaffolds (Tr. 94, 108).

Knopf discussed the scaffolds with the employee who erected them. He believed the employee was named Sanchez (Tr. 112). The employee told Knopf he had learned to build scaffolds on the job and that he "builds them as the supervisor requests me to do so" (Tr. 116-117). Knopf testified that this employee did not think there was a problem with the two scaffolds (Tr. 119).

Based on the defects observed in the scaffolds, Knopf concluded the scaffolds were not erected by a "competent person."

Cooper testified that Valentine Chavez, and not Sanchez, was the employee introduced to Knopf (Tr. 294). Chavez was in charge of supervising the erection of scaffolds at the jobsite (Tr. 287-288). Cooper opined that Knopf had a problem understanding Chavez's Spanish accent (Tr. 292). According to the record, Chavez completed four years of college in Mexico and had over six years' prior experience in erecting scaffolding (Exh. R-5; Tr. 292). Also, Cooper testified that Harbert-Yeargin used a scaffolding tag procedure - "red tag" means scaffold incomplete and if fall protection necessary; and a "green tag" means scaffold is authorized for release to employees (Exhs. R-11, R-12; Tr. 308-309). If there is no tag, the scaffold should not be used (Tr. 308).

Discussion

Section 1926.451(a)(3) provides that:

> No scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons.

The standard requires the use of "competent persons" in erecting scaffolds. Section 1926.32, which has general application, defines "competent person" as:

> One who is capable of identifying existing and predictable hazards in the surroundings or working condition which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Based on the record, Chavez's application shows experience and education in erecting scaffolds. Chavez was responsible for erecting the scaffold at this site. The Secretary's evidence fails to show that Chavez was not a "competent person" within the meaning of § 1926.451(a)(3). The Secretary's reliance on the defects observed by Knopf does not necessarily show that the erector was incompetent. The definition of "competent person" is one who is capable of identifying existing and predictable hazards. Chavez has not been shown to be incapable of identifying existing and predictable hazards. *See Volker Stevin Construction, Inc.,* 14 BNA OSHC 1881, 1987-90 CCH OSHD ¶ 29,138 (No. 89-1253, 1990). Even if the scaffold were erected with defects, the defects do not per se establish Chavez was not capable of erecting a proper scaffold. A person can be capable

of identifying existing and predictable hazards and still fail to erect a proper scaffold by reason of many other factors. Knopf's statement that Chavez could not identify the defects is not given weight. Knopf incorrectly identified the person responsible for erecting the scaffolding. This indicates a possible language or communication problem between Knopf and Chavez.

Thus, the alleged violation of § 1926.451(a)(3) is vacated.

Item 7 - Alleged Violation of § 1926.451(a)(4)

In the #2 boiler, the citation alleges that "an employee, on a metal scaffold, that was only planked 19.5 inches wide and was at a height of 55 inches above the ground, was welding and not protected by guardrails on either open end or behind the employee."

Facts

At the bottom of the #2 boiler, Knopf observed a Harbert-Yeargin welder working from a metal scaffold. The scaffold planking was 55 inches above the floor. The wooden planking on which the welder was standing was 19.5 inches wide. It was not fully planked (Exh. C-9; Tr. 75). There were no guardrails. The welder was working above her head. According to Knopf, the welder could have fallen to her left in a 17-inch opening between the scaffold and another structure or she could have fallen off either end of the scaffold (Tr. 77-80). An obstruction prevented any guardrail on the right (Tr. 82). However, nothing prevented the scaffold from being fully planked so that guardrails would not be required (Tr. 83-85). Knopf opined that the likely injuries from a fall from the scaffold were fractures, contusions, broken bones, and sprains (Tr. 82).

Harbert-Yeargin notes that the welder was wearing a lanyard (Exh. C-9, Tr. 157). Although not attached, Cooper speculated that the welder had forgotten to tie off (Tr. 354, 358). Harbert-Yeargin's safety manual and employee safety handbook require employees exposed to a fall hazard to wear a safety belt (Exh. R-6, R-7; Tr. 295). The welder signed an acknowledgement upon receiving the safety handbook when she was hired (Exh. R-8, Tr. 295).

Jeffrey Kowal, resident construction manager for Ogden Projects, Inc, testified that during his walkarounds of the project, he observed the scaffold prior to the OSHA inspection. He saw welders on the scaffold not tied off with safety belts (Tr. 217). However, because of the height of the scaffold, he did not think a safety belt was necessary or that it was unsafe (Tr. 219-220).

Discussion

Section 1926.451(a)(4) requires:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor .... Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

It is uncontroverted that the scaffold violated the standard; the welder was exposed to a fall of more than four feet; and Harbert-Yeargin should have known of the violative condition. In defense, Harbert-Yeargin asserts employee misconduct and infeasibility. However, the record fails to establish either affirmative defense.

In attempting to show employee misconduct, Harbert-Yeargin points to its work rule which requires safety belts when working on unguarded platforms above 4 feet (Exh. R-7). New employees are informed of the safety rules. The welder in this case signed that she had read the rules when hired (Exh. R-8). According to Cooper, the safety belt rule was repeatedly discussed at the weekly toolbox safety meetings (Exh. R-9; Tr. 302-305). Also, Cooper testified to regular inspections of the jobsite and the company discipline procedure (Tr. 215, 219, 296-297).

However, the record shows that Harbert-Yeargin's safety rules are confusing. In its corporate policy manual, which contains the work rules enforced by supervisors, the safety belt rule requires tying off at heights above 6 feet instead of 4 feet (Exh. R-6). Also, based on Kowal's testimony, it was not just one welder observed not using a safety belt. Kowal observed other welders not tied off immediately prior to the inspection. Therefore, there appears to be no uniformly communicated or enforced work rule.

Similarly, as to infeasibility, the record establishes that the scaffold was under a vibrator chute which descended diagonally over the scaffold, forming an acute angle. This prevented a guardrail on the left side of the scaffold (Exh. C-9). However, a guardrail could have been installed on the other sides. Although it would not fully comply with the terms of the standard, Harbert-Yeargin nevertheless was required to comply to the extent that compliance is feasible. *Walker Towing Corp., Paducah River Service,* 14 BNA OSHC 2072, 2075, 1991-93 CCH OSHD ¶ 29,239,

p. 39,159 (No. 87-1359, 1991). Additionally, Harbert-Yeargin failed to utilize feasible alternative measures such as fully planking the scaffold.

The violation was serious in that the welder's injury would most likely have been contusions or abrasions if she had fallen. Also Harbert-Yeargin should have known of the violative condition in that it was in plain view. In determining an appropriate penalty, the record shows one employee exposed to a fall of 55 inches to a cement floor. Also, the employee was working in a precarious position overhead, increasing the likelihood of an accident.

Accordingly, a serious violation of § 1926.451(a)(4) is affirmed. A penalty of $1,000 is assessed.

Item 8 - Alleged Violation of § 1926.451(e)(1)

Harbert-Yeargin was cited because the height of two free-standing manually propelled scaffolds, 23 feet and 30 feet high, with a minimum base of 5 feet wide, exceeded four times the minimum base.

Facts

The two scaffolds were discussed in item 6 above. Knopf testified that the base of each scaffold measured 5 feet wide. Based on the minimum base dimension, Knopf concluded that the height of the scaffold should have been limited to 20 feet (Exh. C-10; Tr. 88). There were no outriggers or guy wires attached to the scaffolds (Tr. 90). He observed an employee climbing one of the scaffolds who was removed upon Knopf's request (Tr. 89). Also, employees told him that they had used the two scaffolds prior to the inspection (Tr. 91).

Cooper testified that Harbert-Yeargin utilized a tagging procedure for scaffolds. A green tag meant the scaffold was complete and a red tag showed the scaffold was incomplete (Exh. R-10; Tr. 308). The scaffolds observed by Knopf were not tagged which, according to Cooper, meant the scaffold could not be used (Tr. 167, 308). He testified that the scaffold was being erected and not completed for use.

Kowal, resident construction manager for Ogden Projects, Inc., testified he had not seen employees on the scaffold prior to the OSHA inspection (Tr. 213). However, he recalled seeing the two scaffolds for two to three days prior to the inspection. He did not see anyone erecting them (Tr. 213). He believed the scaffolds were in use (Tr. 213). He did note that Harbert-Yeargin was

responsible for installing the overhead fire sprinkler system (Tr. 214). This would have required the use of scaffolds to be installed.

Discussion

Section 1926.451(e)(l) provides that:

> When free-standing mobile scaffold towers are used, the height shall not exceed four times the minimum base dimension.

It is uncontroverted that the 23-foot and 30-foot scaffolds with a base of 5 feet were higher than four times the minimum base dimension. Also, the record shows the scaffolds belonged to Harbert-Yeargin. In dispute, Harbert-Yeargin asserts that § 1926.451(e)(1) is not the applicable standard and there was no employee exposure. Also, Harbert-Yeargin asserts that if a violation is determined, there was employee misconduct.

Instead of § 1926.451(e)(1), Harbert-Yeargin maintains that § 1926.453(a)(3)(I) provides a more comprehensive safety guidance for "manually-propelled mobile ladder stands and scaffolds (towers)." However, the two standards provide the identical requirements. Both standards apply to manually propelled mobile scaffolds and limit the height of the scaffold to four times the minimum base dimension. Since the two standards are specific, address the same hazard and require the same terms for compliance, § 1926.451(e)(1) has not been shown inapplicable.

As for employee exposure, the Secretary argues that the two scaffolds were available for use. However, the employees who said they had worked on the scaffold were not identified. If used prior to the inspection, there was no showing that the scaffolds were erected the same as observed by Knopf or what the employees were doing. Therefore, little weight is given to the hearsay statements. However, during the inspection, one employee was observed climbing one of the scaffolds (Exh. C-10). In that the employee was climbing the scaffold which was not otherwise secured from tipping over, a violation of § 1926.451(e)(1) is shown.

Although Harbert-Yeargin utilized a tagging program, the record shows the employee was climbing a scaffold that did not have a tag (Exh. R-10). Under its program, "no person shall work from a scaffold that has not been appropriately tagged. The only exception shall be for crews whose responsibility it is to erect and dismantle scaffolds, and then only when working a specified scaffold" (Exh. R-10). Therefore, the employee was not specifically prevented from climbing the scaffold by

the work rule. Cooper testified they were erecting the scaffold. Thus, there is insufficient evidence to support an employee misconduct defense.

The record establishes the violation was serious in that the scaffold was observed in place for at least three days, and it was Knopf who directed Harbert-Yeargin to bring the employee down from the scaffold (Tr. 89). Also, the employee was subject to a fall hazard onto a concrete floor. In addition to the credit factors previously discussed, there was at least one employee exposed to the hazard of a scaffold tipping over. However, the employee's exposure was of a short duration.

Accordingly, a violation of § 1926.451(e)(1) is affirmed. A penalty of $500 is assessed.

Item 9 - Alleged Violation of § 1926.451(e)(10)

Finally, the citation alleges that "a mobile tubular welded scaffold was using crossbracing in place of guardrails on a 23-foot high scaffold."

Facts

Knopf testified that on one side of the 23-foot scaffold platform there was crossbracing instead of standard guardrails and toeboards (Exh. C-10; Tr. 97). The other three sides had standard guardrails. Knopf testified that crossbracing cannot take the place of guardrails because it did not provide 42 inches across the top (Tr. 189). An employee was observed climbing onto the scaffold, but he was removed from the scaffold before reaching the platform (Tr. 101). No employee was observed on the platform. Also Kowal did not see the scaffold being used for work.

Cooper testified the scaffold was under erection at the time and that a guardrail would prevent the positioning of the vertical bucks used to build the scaffold (Tr. 363, 365). He testified that while erecting the scaffold, Harbert-Yeargin required employees to tie off (Tr. 362).

Discussion

Section 1926.451(e)(10) provides:

> Guardrails made of lumber . . ., approximately 42 inches high, with a midrail . . ., and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

It is uncontroverted that the scaffold had crossbracing on one side instead of a guardrail. Also, Harbert-Yeargin knew of the condition based on its erection of the scaffold. However, the record fails to establish employee exposure to the condition cited. Knopf did not observe any

employees at the area of the crossbracing. The employee observed climbing the scaffold was immediately brought down. There was no showing what the employee observed climbing the scaffold, what he intended to do on the scaffold, or that he was not going to be tied off by a safety belt. As to the other employees who said they had worked on the scaffold prior to the inspection; little weight is given to their statements in that they were not identified; their statements were too general in nature; and there was no showing that any employee actually worked on the 23-foot scaffold platform exposed to a fall hazard from the crossbracing on one side of the platform.

Accordingly, the alleged violation of § 1926.451(e)(10) is vacated.

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. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

SERIOUS CITATION NO. 1 -

1. Item 1, § 1926.403(b)(2), is affirmed as a serious violation with a penalty of $1,000 assessed.
2. Item 2, § 1926.404(a)(2), is affirmed as a serious violation with a penalty of $500 assessed.
3. Item 3a, § 1926.404(b)(1)(iii)(C), is affirmed as a serious violation with a penalty of $500 assessed.
4. Item 3b, § 1926.404(b)(1)(iii)(D), is vacated.
5. Item 3c, §1926.404(b)(1)(iii)(G), is vacated.
6. Item 4, § 1926.405(a)(2)(ii)(B), is affirmed as a serious violation with a penalty of $500 assessed.
7. Item 5, § 1926.405(g)(2)(iv), is affirmed as a serious violation with a penalty of $500 assessed.

8. Item 6, § 1926.451(a)(3), is vacated.

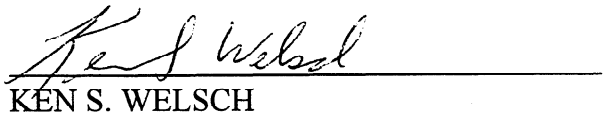
9. Item 7, § 1926.451(a)(4), is affirmed as a serious violation with a penalty of $1,000 assessed.

10. Item 8, § 1926.451(e)(1), is affirmed as a serious violation with a penalty of $500 assessed.

11. Item 9, § 1926.451(e)(10), is vacated.

OTHER THAN SERIOUS CITATION NO. 2 -

1. Item 1, § 1926.59(f)(5)(ii), is not considered in this decision since Harbert-Yeargin withdrew its notice of contest.



KEN S. WELSCH
Judge

Date: March 25, 1996