Secretary of Labor, Complainant, v. B & L Drywall & Acoustical, Inc., Respondent.	OSHRC Docket No. **03-0152**

Appearances:

Lindsay A. McCleskey, Esq., Danielle L. Jaberg, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas
For Complainant

Mr. Lindy Bud Bostic, President, B & L Drywall & Acoustics, Inc., Conway, Arkansas
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

B & L Drywall & Acoustical, Inc. (B&L),[1] was installing metal studs and drywall on the exterior of a new arts building at Hendrix College, Conway, Arkansas, when the work was inspected by the Occupational Safety and Health Administration (OSHA) on November 12, 2003. OSHA's inspection was the result of a photograph in the local newspaper showing an employee on a scissor lift who appeared to be standing on the basket's top rail without fall protection. Based on the photograph and OSHA's inspection, B&L received serious, repeat, and other-than-serious citations on December 13, 2002. B&L timely contested the citations.

Serious citation no. 1 alleges that B&L violated 29 C.F.R. § 1926.502(d)(15) (item 1a) for utilizing inadequate anchorage to attach personal fall arrest equipment; 29 C.F.R. § 1926.502(d)(16)(ii) (item 1b) for failing to provide the employee a lanyard with a deceleration device; and 29 C.F.R. § 1926.502(d)(16)(iii) (item 1c) for failing to rig the employee's full body harness and lanyard to prevent falling more than 6 feet. The serious citation proposes a grouped penalty of $1,500.

Repeat citation no. 2 alleges that B&L violated 29 C.F.R. § 1926.503(a)(1) (item 1) for

[1]It is noted that Respondent's letterhead identifies the company as "B & L Drywall & Acoustics, Inc."

failing to provide a training program for each employee who might be exposed to a fall hazard. The repeat citation proposes a penalty of $1,800. The repeat classification is based on a serious citation dated May 28, 2002, for violation of § 1926.503(a)(1), which has become a final order.

Other-than-serious citation no. 3 alleges that B&L violated 29 C.F.R. § 1926.453(a)(2) (item 1) for modifying an aerial lift by replacing one portion of the bucket's top rail with a metal strip without obtaining the approval of the manufacturer and 29 C.F.R. § 1926.501(a)(2)(i)[2] (item 2) for not having an adequate midrail on the end of the scissor lift basket. The other-than-serious citation proposes no penalty.

The hearing was held in Little Rock, Arkansas, on June 5, 2003. Coverage and jurisdiction are stipulated (Tr. 9-10). B&L is represented *pro se* by its president Lindy Bud Bostic. The parties filed post-hearing position statements.

B&L denies the alleged violations. The alleged violations are based on the conditions and employee exposure that existed at the time of the newspaper photograph. B&L asserts no affirmative defenses.

For the reasons discussed, serious citation no. 1, item 1c; repeat citation no. 2, item 1; and other-than-serious citation no. 3, item 2, are affirmed. Serious citation no. 1, item 1b, and other-than-serious citation no. 3, item 1, are vacated. Serious citation no. 1, item 1a, was withdrawn by the Secretary at the hearing (Tr. 16, 53).

Background

B&L has been in the business of installing drywall and acoustical ceilings for 16 years, primarily in commercial construction projects. B&L's president is Lindy Bud Bostic and his son, Tobias Bostic, is vice president. B&L employs approximately 60 employees. B&L's office is located in Conway, Arkansas (Tr. 106-107).

In October 2002 B&L contracted to install metal studs and drywall on the exterior and

[2]The citation alleges a violation of § 1926.501(a)(2)(i), which does not exist. The Secretary's motion to amend to allege a violation of § 1926.502(b)(2)(i) is GRANTED. B&L is not prejudiced and the amendment merely corrects a typographical error. Amendments to a complaint, including *sua sponte* amendments, are permissible where the amendment does not alter the essential factual allegations contained in the citation. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1517 (No. 91-373, 1993) (amendment proper because it does not alter citation's factual allegations), *A. L. Baumgarten Construction, Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (*sua sponte* amendment after hearing permitted).

interior of three buildings under construction for a new arts complex at Hendrix College[3] in Conway, Arkansas. The general contractor for the project was Tilk, Inc. Craig Richardson, who had been employed by B&L for 16 years, was the foreman in charge of the work. B&L utilized approximately 6 employees to work on the project. Jamie Jurado, who had been employed by B&L off and on for 5 years, was a laborer (Exh. R-1; Tr. 56, 58-59, 107, 109-111).

On November 11, 2002, an employee at the worksite was photographed by the *Log Cabin Democrat* newspaper standing on a scissor lift approximately 24 feet above the ground installing exterior studs. From the photograph, it appeared that the employee was standing on the top rail of the lift's basket without fall protection (Exh. C-1; Tr. 19-20, 70).

When the photograph was seen by OSHA on November 12, 2002, OSHA safety specialist Michelle Martin was assigned to inspect the worksite.[4] After arriving on site, Martin determined that the contractor who was using the scissor lift in the photograph was B&L and the employee was laborer Jamie Jurado. Martin interviewed Jurado and foreman Richardson. She also inspected the scissor lift. During her inspection, Martin did not observe the scissor lift in operation or see employees exposed to unsafe conditions (Exh. C-3; Tr. 20, 53, 54-55, 58, 75).

As a result of OSHA's inspection, B&L received three citations. B&L completed its work on the arts complex in March 2003 (Tr. 109).

Discussion

The Secretary has the burden of proving a violation.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms,(c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

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[3]The transcript misspells "Hendricks" and is corrected to "Hendrix" College (Exh. C-1).

[4]B&L's argument that OSHA's inspection was at a different location than identified in the newspaper is rejected. Martin initially testified that her inspection was at the University of Central Arkansas (Tr. 55). However, when shown the newspaper photograph, she corrected the location to Hendrix College, which is also in Conway, Arkansas (Tr. 82-83). Martin's inspection photographs of the building appear similar to the building shown in the newspaper (Exh. C-11). Also, the citation notes the location as Front Street, which is the address of Hendrix College (Tr. 83). The court accepts that the newspaper photograph and OSHA's inspection were of the same location, Hendrix College.

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that Part 1926 construction standards apply to B&L's exterior stud and drywall installation work at Hendrix College. Also, B&L does not dispute that laborer Jurado and its scissor lift are shown in the newspaper photograph (Exh. C-1).

The alleged violations are based on conditions and the employee's exposure existing at the time of the newspaper photograph. Martin did not observe the scissor lift in operation or the employee exposed to unsafe conditions on the day of her inspection (Tr. 53, 75).

To establish, in part, the alleged violations, Martin interviewed foreman Richardson and laborer Jurado, who were present at the time of the photograph. Richardson and Jurado did not testify at the hearing. Their unsigned statements to OSHA, however, are given weight pursuant to Rule 801(d)(2), Federal Rules of Evidence (statements by a party's representative and by a party's agent or servant concerning a matter within the scope of employment and made during the existence of the relationship). *See DCS Sanitation Management, Inc. v. OSHRC*, 82 F.3d 812 (8th Cir. 1996). Richardson, as foreman, supervised the worksite (Tr. 109). He has been a foreman for B&L for 18 years (Tr. 110). With regard to Jurado, he gave his statement to OSHA while still employed by B&L and his statement involved his work in the scissor lift and training. Copies of Martin's notes from the interviews were provided to B&L for examination purposes (Tr. 74).

Additionally, it is noted that Martin's inspection file indicates that Jurado's first language is Spanish and she was told that Jurado may have some problem with English (Exh. R-1). She stated that Jurado "spoke Spanish and little English." However, Martin testified that although B&L offered another employee to translate, she was able to communicate with Jurado and he understood what she asked (Tr. 80). Also, B&L made no showing that Jurado was unable to speak or understand English.

Alleged Violations

SERIOUS CITATION NO. 1

Item 1b - Alleged violation of § 1926.502(d)(16)(ii)

The citation alleges that B&L failed to equip an employee's fall arrest system with a deceleration device[5] when the employee was exposed to a fall of approximately 11 feet. Section 1926.502(d)(16)(ii) provides:

> Personal fall arrest systems, when stopping a fall, shall:
>
> (ii) limit maximum arresting force on an employee to 1,800 pounds (8 kN) when used with a body harness.

Based on her interview with employee Jurado, safety specialist Martin found that at the time of the newspaper photograph, Jurado was wearing a full body harness with a 6-foot lanyard (Exh. C-2, Tr. 22, 52). He told her that he was standing on the top rail of the lift's bucket with one foot on the top rail and the other foot on the building's beam (Exh. C-1; Tr. 25). He was approximately 24 feet above ground level (Tr. 70). Jurado described that the lanyard was connected to the harness in the middle of his back and was attached to the building's 1 inch steel diagonal cross brace at approximately Jurado's thigh level (Tr. 24, 26-27). Martin testified that the lanyard would slide down the bottom of the diagonal cross brace if he had fallen from the bucket's top rail (Exh. C-1; Tr. 27-28). Martin estimated that Jurado was exposed to a potential free fall distance of 11 feet (length of 6 foot lanyard plus 5 feet, which is the estimated distance between the lanyard's connection in the middle of Jurado's back to the bottom of the cross brace) (Tr. 27). Martin testified that Jurado was approximately 5 feet 6 inches tall and weighed approximately 150 pounds (Tr. 79-80). Although he had been using the lift all day, Martin understood that Jurado was standing on the top rail for 5 minutes (Tr. 61, 70-71).

Assistant Area Director David Bates testified that the purpose of a deceleration device is to limit the arresting force that an employee is subjected to because of a sudden stop. To limit the arresting force, Bates testified that an employer needs to limit the length of the lanyard or use a deceleration device on the lanyard (Tr. 128-129). If the distance was limited to less than 6 feet, Bates opined that "OSHA would possibly not have required the deceleration device" (Tr. 131). However, to be sure the force is less than 1,800 pounds, Bates testified that he would need to know the weight of the employee and the length of the fall (Tr. 130).

Appendix C to § 1926.502 advises employers that:

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[5]A "deceleration device" is "any mechanism . . . which serves to dissipate a substantial amount of energy during a fall arrest or otherwise limit the energy imposed on an employee during fall arrest." Section 1926.500(b).

> A few extra feet of free fall can significantly increase the arresting force on the employee, possibly to the point of causing injury. Because of this, the free fall distance should be kept at a minimum. And as required by the standard, in no case greater than 6 feet (1.8m). To help assure this, the tie-off attachment point to the lifeline or anchor should be located at or above the connection point of the fall arrest equipment to belt or harness.

Although the record establishes that the potential free fall distance exceeded 6 feet, the record fails to establish a violation. There is no showing as to the potential arresting force on Jurado in a free fall. The Secretary offered no method to calculate the maximum arresting force. Other than the size and weight of Jurado, which are estimates by Miller, there is no showing of how to convert feet into pounds and no consideration of other factors, such as type of lanyard.[6] The standard requires a showing that the maximum arresting force is limited to 1,800 pounds.

In her post-hearing brief, the Secretary attempts to shift the burden of proof to the employer to show that the maximum arresting force would not exceed 1,800 pounds. The Secretary issued the citation and it is the Secretary's burden to show that the maximum arresting force would exceed 1,800 pounds. The alleged violation is vacated.

Item 1c - Alleged violation of § 1926.502(d)(16)(iii)

The citation alleges that B&L failed to ensure the lanyard used to secure the employee's full body harness was not rigged to prevent a free fall of less than 6 feet. Section 1926.502(d)(16)(iii) provides:

> Personal fall arrest systems, when stopping a fall, shall:
>
> (iii) be rigged such that an employee can neither free fall more than 6 feet (1.8 m), nor contact any lower level.

Based on the newspaper photograph and Jurado's interview, Martin determined that the 6-foot lanyard was attached to the 1 inch diagonal cross brace at approximately Jurado's thigh level. This connection was below Jurado's shoulder level where the lanyard was connected to his body harness (Exh. C-1). Also, Martin opined that if Jurado fell, the lanyard would slide down to the bottom of the diagonal cross brace. Thus, Jurado was exposed to a potential free fall of 11 feet (Tr. 27-28).

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[6]As noted in Appendix C to Subpart M, during the arresting of a fall, "a lanyard will experience a length of stretching or elongation." These distances should be available and "must be added to the free fall distance."

The record establishes without dispute that Jurado's fall arrest system was not rigged to limit the free fall to less than 6 feet. Section 1926.500(b) defines "free fall distance" as "the vertical displacement of the fall arrest attachment point on the employee's body belt or body harness between onset of the fall and just before the system begins to apply force to arrest the fall." Jurado was standing on the top rail of the scissor lift's bucket and his 6-foot lanyard was attached to his body harness on one end and on the other end to a diagonal brace at or below his thigh level. Therefore, if Jurado fell from the top rail, his fall would exceed 6 feet.

In addition to noncompliance with the terms of § 1926.502(d)(16)(iii) and employee exposure, the record establishes B&L's constructive knowledge of the violative condition. In order to show employer knowledge, the Secretary must show that the employer knew or, with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). When a supervisory employee has actual or constructive knowledge of the violative conditions, his knowledge is imputed to the employer and the Secretary satisfies his burden of proving knowledge. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (91-862, 1993).

In this case, Craig Richardson was B&L's foreman in charge of the worksite (Tr. 109). He has been a foreman for B&L for 18 years (Tr. 110). He supervised 6 employees on the job (Tr. 109). Richardson was on site at the time of the newspaper photograph (Tr. 39). He gave Jurado the lanyard (Tr. 24). At the time of the photograph, Jurado was 24 feet above the ground, standing in plain view, performing a job for B&L. Richardson knew or should have known of the improper rigging of the lanyard. His knowledge is imputed to B&L. B&L acknowledges that it is the foreman's job to inspect the job site (Tr. 124).

Also, the violation of § 1926.502(d)(16)(iii) is properly classified as serious. Under § 17(k) of the Occupational Safety and Health Act (Act), a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition and the employer knew or should have known with the exercise of reasonable diligence of the presence of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur, but rather, whether the result would likely be death

or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

There is no dispute in this case that a fall in excess of 6 feet and the sudden stop by a lanyard could cause serious injury. When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335 (No. 15983, 1978). Also, as discussed, foreman Richardson's knowledge of the violative condition is imputed to B&L.

A serious violation of § 1926.502(d)(16)(iii) is established.

REPEAT CITATION NO. 2

Item 1 - Alleged violation of § 1926.503(a)(1)

The citation alleges that employees were not instructed to recognize hazardous conditions such as proper guarding requirements for the scissor lift bucket, proper types of lanyards, and appropriate attachment points for fall arrest systems. Section 1926.503(a)(1) provides:

> The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

Laborer Jurado told Martin that he had not received any training on fall hazards, including information about attaching fall arrest systems, proper types of lanyards, and guarding requirements for scissor lifts (Tr. 38). Martin asked B&L for documentation showing training (Tr. 38-39, 78-79). The only documentation provided was the company's general safety policies (Exh. C-12: Tr. 123).

B&L president Bostic testified that every employee is required to read and sign the company's general safety policies (Exh. C-12: Tr. 112). B&L acknowledges, however, that its safety policies do not include a discussion on proper fall protection, proper lanyards, the use of fall protection equipment, and proper anchorage (Tr. 121-122). Also, B&L did not know whether Jurado had signed the safety policies (Tr. 59, 117). Further, it is noted that the general safety policies are not in Spanish, although B&L has several Spanish speaking employees (Tr. 120). The written safety policies are general safety guidelines and do not specifically relate to fall protection hazards (Exh. C-12). Nowhere contained in the policy are lanyards and aerial lifts

even mentioned (Tr. 121-122).

B&L also claims that Huggs and Hall Rental Equipment representatives came to the B&L offices and provided training on scissor lifts and fall protection to supervisors (Tr. 101, 136). The supervisors were responsible for instructing the employees (Tr. 123). However, this was approximately 4 years ago (Tr. 132, 136). Laborers and regular employees did not attend meetings, and there is no showing that supervisors provided them training (Tr. 122). Bostic was not present throughout the Huggs and Hall presentation and offered no testimony regarding the specific information provided. His testimony was general in nature (Tr. 113-114).

The record establishes a violation of the training requirements. Laborer Jurado, who has worked with B&L off and on for 5 years, could not remember any fall protection training. Jurado was unable to identify fall protection hazards and the proper use of a fall arrest system (Tr. 38, 78-79). There is no showing that there were any B&L safety meetings on the Hendrix project (Tr. 79).

Martin's inspection notes indicate that B&L employees on site are required to attend weekly safety meetings by the general contractor. Also, the notes indicate that employees were required to comply with Tilk's safety rules and procedures (Exh. R-1; Tr. 82). B&L made no showing that Tilk's safety meetings were held and if Tilk's safety rules involved training on worksite fall hazards, fall arrest systems, and the use and maintenance of fall protection equipment. A copy of Tilk's safety rules are not in evidence.

The record also establishes that the violation of § 1926.503(a)(1) was properly classified as repeat. A violation is considered a repeat violation under § 17(a) if, at the time of the alleged repeat violation, there is a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity by showing that both violations are of the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

A review of the prior citation issued to B&L in May 2002 establishes that the same standard at § 1926.503(a)(1) was violated under similar conditions (Exh. C-9). OSHA safety engineer Richard Watson, who conducted the prior inspection, testified that the B&L foreman in the previous citation admitted that he had not trained employees in fall protection and that there was no documentation showing any training (Tr. 95). Watson also testified that his observations

of the site showed employees exposed to various fall hazards (window openings, wall openings, floor openings) without appropriate fall protection (Tr. 95). He observed many lifts at the site (Tr. 100). The citation was informally settled by B&L (Exh. C-13; Tr. 96). The settlement did not vacate or modify the violation of § 1926.503(a)(1), and it became a final order on June 17, 2002 (Exh. C-13; Tr. 97).

OTHER-THAN-SERIOUS CITATION NO. 3

Item 1 - Alleged Violation of § 1926.453(a)(2)

The citation alleges that a 2-inch wide metal strip attached to the end of the scissor lift basket was not reviewed by the lift manufacturer to ensure that the modification would not effect the safe operation of the lift. Section 1926.453(a)(2) provides:

> Aerial lifts may be "field modified" for uses other than those intended by the manufacturer provided the modification has been certified in writing by the manufacturer or by other equivalent entity, such as a nationally recognized testing laboratory, to be in conformity with all applicable provisions of ANSI A92.2-1969 and this section and to be at least as safe as equipment was before modification.

In examining the scissor lift used by Jurado, Martin found that a metal strip was anchored across the rear of the basket (Exhs. C-4, C-5; Tr. 31, 34, 63). The metal strip replaced a top rail (Tr. 31). The lift had been used on the job site for approximately 4 days (Tr. 30, 35). Foreman Richardson told Martin that he had requested Bostic to have someone inspect the lift prior to the OSHA inspection (Tr. 31). Richardson speculated that the top rail had been damaged during transportation (Tr. 31, 35). Although not in use during the OSHA inspection, Martin inspected the lift basket. She requested but was not provided documentation showing that the metal strip had been approved by the manufacturer (Tr. 35). Martin did not contact the manufacturer (Tr. 64). She opined that the metal strip was adequately secured as a top rail (Tr. 66-67). She did not believe that the metal strip caused the lift to be unsafe (Tr. 46).

Although not argued by the parties, OSHA does not consider scissor lifts as aerial lifts regulated under § 1926.453. *See OSHA Standard Interpretation dated August 1, 2000* [7] (scissor

[7]This letter revokes and supersedes a statement in CPL 2-1.23 issued January 7, 1997, titled "Inspection Procedures for Enforcing Subpart L, Scaffolds Used in Construction - 29 CFR 1926.450-454," which stated that "scissor lifts are addressed by § 1926.453." OSHA now considers that an erroneous statement.

lifts are not aerial lifts). While there are no specific provisions addressing scissor lifts, OSHA does consider a scissor lift to meet the general definition of a scaffold under § 1926.451; therefore, an employer must comply with other applicable provisions of Subpart L when using a scissor lift.

Further, the standard permits a lift to be "field modified" for uses other than those intended by the manufacturer, provided the manufacturer or a nationally recognized testing laboratory certifies that the modification complies with the OSHA and ANSI standards and the lift is at least as safe as before modification. The metal strip replaced a portion of the top rail on the rear of the basket. Although there is no evidence that the manufacturer certified the change, the metal strip was not a modification "for uses other than those intended by the manufacturer." It replaced a top rail which was apparently removed during transportation (Tr. 35, 62-63).

Also, the metal strip was not shown to be unsafe or not the equivalent to an adequate top rail (Tr. 46, 66). It was securely bolted to the exiting frame on both sides (Exhs. C-4, C-6; Tr. 66). Martin acknowledges that the metal strip did not affect the safe operation of the lift (Tr. 67).

The violation is vacated.

Item 2 - Alleged violation of § 1926.502(b)(2)(i)

The citation alleges that the latch used to secure the chain midrail at the end of the scissor lift basket was broken. Section 1926.502(b)(2)(i) provides:

> Midrails, when used, shall be installed at a height midway between the top edge of the guardrail system and the walking/working level.

In examining the scissor lift, Martin observed a chain with a broken latch across the rear of the scissor lift basket (Exh. C-7; Tr. 36-37). The broken latch prevented the chain from being secured (Tr. 37). The chain was used as a midrail (Tr. 37). Martin opined that an employee could fall through the opening if he was bending down to retrieve a tool (Tr. 37). The lift had been on site for 4 days (Tr. 30, 35). Although not in use during the OSHA inspection, the lift had been used by Jurado practically all day on November 11, 2002 (Tr. 29, 31, 61). B&L did not dispute the observations of Martin.

An other-than-serious violation of § 1926.502(b)(2)(i) is established. The chain could not be secured because of the broken latch. There was no midrail. However, Martin opined that the employee in the lift's basket was not exposed to an immediate hazard because the employee

generally works from the front of the basket (Tr. 46).

Penalty Consideration for Citation No. 2

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

B&L employs approximately 65 employees (Tr. 107). There were 6 employees on the Hendrix College project (Tr. 56, 109). As a medium size employer, B&L is entitled to credit for size. However, no credit is given for history or good faith. B&L received a citation in May 2002 which also included a violation of the training requirements (Exhs. C-9, C-13; Tr. 42).

A penalty of $700 is reasonable for serious Citation no. 1, item 1c, violation of § 1926.502(d)(16)(iii). One employee was exposed for approximately 5 minutes. The employee was wearing a proper fall arrest system consisting of a full body harness and 6-foot lanyard. Although improperly rigged, the lanyard was attached to a diagonal brace.

A penalty of $1,800 is reasonable for repeat Citation no. 2, item 1, violation of § 1926.503(a)(1). The record shows that at least one employee was not trained in fall protection and equipment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Serious Citation no. 1, item 1a, violation of § 1926.502(d)(15), is withdrawn by the Secretary.

2. Serious Citation no. 1, item 1b, violation of § 1926.502(d)(16)(ii), is vacated and no penalty is assessed..

3. Serious Citation no. 1, item 1c, violation of § 1926.502(d)(16)(iii), is affirmed and a penalty of $700 is assessed.

4. Repeat Citation no. 2, item 1, violation of § 1926.503(a)(1), is affirmed and a

penalty of $1,800 is assessed.

5. Other-than-Serious Citation no 4, item 1, violation of § 1926.453(a)(2), is vacated and no penalty is assessed.

6. Other-than-Serious Citation no. 4, item 2, violation of § 1926.502(b)(2)(i), is affirmed and no penalty is assessed.

/s/ Ken W. Welsch
KEN S. WELSCH
Judge

Date: August 11, 2003