

SECRETARY OF LABOR,

Complainant,

v.

JAMES R. HOWELL & CO., D/B/A/

HOWELL CONSTRUCTION

Respondent.

OSHRC Docket No. 99-1348

DECISION

Before: ROGERS, Chairman; and WEISBERG, Commissioner.

BY THE COMMISSION:

We adopt the administrative law judge's findings of fact and conclusions of law; accordingly, we affirm his decision.

/s/ _____

Thomasina V. Rogers
Chairman

/s/ _____

Stuart E. Weisberg
Commissioner

Dated: December 7, 2000

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speed Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

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APPEARANCES:

For the Complainant:

Rachel L. Parsons, Esq., Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

John L. Reiter, Esq., Mark S. Nelson, Esq., Mountain States Employers Council, Inc., Denver, Colorado

Before: Administrative Law Judge: Benjamin R. Loye

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, James R. Howell & Co., d/b/a Howell Construction (Howell), at all times relevant to this action maintained a place of business at the pipe-fitter's hall at 6350 N. Broadway, Denver, Colorado, where it was engaged in remodeling/construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Joint Stipulation (JS-1, JS-2)).

On May 13 - June 18, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Howell's Denver work site. As a result of that inspection, Howell was issued citations alleging violations of the §§1926.1101 *et seq.* of the Act, together with proposed penalties. By filing a timely notice of contest Howell brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On February 29, 2000, a hearing was held in Denver, Colorado. Items 3(c), 3(g), 3(h), 3(I), 5, 6(a), 6(b) of citation 1, and item 2 of citation 2 were withdrawn prior to the hearing (Tr. 7-8). The parties have submitted briefs on the matters remaining at issue and this matter is ready for disposition.

Applicability of §1926.1101 et seq.

Section 1926.1101(b) defines Class I asbestos work as activities involving the removal of TSI (thermal system insulation) and surfacing, ACM asbestos containing material, and PACM (presumed asbestos containing material) (JS-21). Class IV asbestos work means maintenance and custodial activities during which employees contact but do not disturb ACM or PACM and activities to clean up dust, waste and debris resulting from Class I, II, and III activities (JS-22). All thermal system insulation and surfacing material found in buildings constructed no later than 1980 are also Presumed Asbestos Containing Material (PACM) (JS-24). PACM is to be treated as asbestos unless shown to contain less than 1% asbestos by tests conforming to the provisions of §1926.1101(k)(5) (JS-18, JS-19, JS-24).

The building at 6350 N. Broadway, Denver, Colorado, was originally built prior to 1980 (JS-16). The construction/remodeling project at the site was an overall remodeling project which included an upgrade of the mechanical and electrical systems, including removal and replacement of water pipes in the building (JS-17). Respondent Howell was the general contractor at the work site during all relevant times (JS-7, JS-11). Natkin Co. was Howell's subcontractor (JS-9).¹ It is undisputed that Natkin Co. employees Sheila Nelson and Ellis Palmer were involved in Class I and Class IV asbestos work, in that, on April 12-13, 1999 they removed and cleaned up pipe and joint thermal system insulation (TSI) from the mechanical pipes and pipe joints at the job site. It is stipulated that the insulation removed by Nelson and Palmer on April 12-13 was PACM, and so should have been treated as ACM in the absence of testing conforming to §1926.1101(k)(5), rebutting the presumption that such materials contain asbestos (Tr. 59; JS-36, JS-37, JS-38, JS-39).

Howell, however, maintains that the presumption set forth in §1926.1101(b), *i.e.*, that all thermal system insulation installed prior to 1980 contains asbestos, was, in fact, rebutted by the owners of the building, the Pipe Fitters Home Association, pursuant to paragraph(k)(5) of §1926.1101 (Posthearing Brief, p. 4). Howell maintains that it was entitled to rely on that rebuttal.

¹ Howell does not dispute its liability under the Act for violations committed by, and to which its subcontractor's employees were exposed. *See, Universal Construction, Inc. v. OSHRC*, 182 F.3d 726 (10th Cir. 1999)[general contractor is responsible for violation it could reasonably have been expected to abate by reason of its supervisory capacity].

Rebuttal. Paragraph (k)(5) provides:

(5) Criteria to rebut the designation of installed material as PACM (i) At any time, an employer and/or building owner may demonstrate, for purposes of this standard, that PACM does not contain asbestos. . . (ii) An employer or owner may demonstrate that PACM does not contain more than 1% asbestos by the following: (A) Having a completed inspection conducted pursuant to the requirements of AHERA (40 CFR Part 763, sub- part E) which demonstrates that the material is not ACM; or (B) Performing tests of the material containing PACM which demonstrate that no ACM is present in the material. Such tests shall include analysis of bulk samples collected in the manner described in 40 CFR 763.86. The tests, evaluation and sample collection shall be conducted by an accredited inspector or by a CIH. Analysis of samples shall be performed by persons or laboratories with proficiency demonstrated by current successful participation in a nationally recognized testing program such as the National Voluntary Laboratory Accreditation Program (NVLAP) or the National Institute for Standards and Technology (NIST) or the Round Robin for bulk samples administered by the American Industrial Hygiene Association (AIHA) or an equivalent nationally-recognized round robin testing program.

Howell's argument is without merit, in that at no time was the presumption rebutted. The owner's alleged studies were never produced (Tr. 195, 208-215). Testing performed by William Oleskevich of Evergreen Environmental on April 30, 1999, and introduced into the record by Complainant, confirms the presence of asbestos containing materials (ACM) in the pipe joint thermal system insulation (TSI) throughout the building at 6350 N. Broadway (Tr. 34-35; JS-66, JS-67; Exh. C-6, C-7). Howell's contention that the §1926.1101 presumption regarding PACM was rebutted is entirely specious, and must be rejected.

Howell's rebuttal argument is simply an attempt to argue that it was entitled to rely on the erroneous representations of the building owner that the subject TSI had been tested and found to be asbestos free (Posthearing Brief, p. 10)

Reliance. It is stipulated that on April 8, 1999, prior to the start of the renovation project, a meeting was held at the work site at the pipe-fitter's hall (JS-32). The participants in the April 8 construction meeting included: Bruce Buell, superintendent for Howell Construction; Jack Schofield, Sr., President of the Pipefitters Home Association; John Durant, Pipefitters; Ellis Palmer, foreman for Natkin Co.; and Felix, foreman for Absolute Air Co. (JS-8, JS-33). After the conclusion of the April 8 construction meeting, Felix, Ellis Palmer, and Bruce Buell toured the facility. When they looked above the ceiling tiles in the office area they saw insulation on pipe

joints, and Palmer and Felix stated they were concerned about asbestos in the mechanical line insulation covering and joints, and in the expansion joints in the duct work (JS-34). On April 12, 1999 Palmer and Buell asked Jack Schofield whether there was asbestos covering on the mechanical lines. Mr. Schofield stated that the building had been tested, and that there was no asbestos; he told Howell that he would find the report (JS-35). Schofield failed to produce the purported records despite repeated requests from Natkin and Howell (JS-58 through JS-62). On April 30, 1999, Schofield hired William Oleskevich of Evergreen Environmental to have the building tested for the presence of asbestos (JS-63). As noted above, Oleskevich's report confirmed the presence of asbestos (JS-75).

It is undisputed that Pipefitters Home Association did mislead Howell, representing that testing showed that there was no ACM in the TSI on the work site. The Secretary argues, however, that Howell was not entitled to rely on such verbal representations, which were unaccompanied by the kind of objective testing and documentation required under (k)(5). As noted by Complainant, the preamble to the standard states:

. . .in the past employers who were wrongly informed by building owners about the asbestos content of Thermal System Insulation successfully argued in some cases that they had exercised "due diligence." OSHA believes that the protection of employees must not depend on the good faith of their employers whose information sources may be defective. By requiring that TSI and troweled and sprayed materials be handled as if they contained asbestos, employees will be protected from the consequences of their employers relying on erroneous information about the most risky asbestos material. Of course, "due diligence" would also require employers to investigate whether other building materials about which there was information suggesting asbestos contact was in fact asbestos-containing. 59 Fed. Reg. 40964, at 41015 (August 10, 1994)(Exh. C-1).

It is clear from the preamble that in enacting §1926.1101 the Secretary intended employers to operate under the presumption set forth in the standard, *i.e.* that TSI and PACM contain asbestos. Such materials must be handled as if they contain asbestos, unless and/or until the testing required by paragraph (k)(5) is undertaken. OSHA confirmed this interpretation in a September 5, 1996 Interpretation and Compliance Letter, in which it clearly stated that *both* an owner and outside contractor may be cited for violations of the asbestos standard if the owner fails

to notify the contractor of the presence and location of asbestos, and the contractor subsequently fails to comply with specific work practices required by the standard (Exh. C-11, p. 2).

As the cited standard was drafted, and as it has been interpreted by the Secretary, due diligence requires nothing less than that the employer either perform the required testing or ascertain that such testing was performed, in the prescribed manner. This Howell failed to do.

Moreover, Howell's failure to obtain written assurances that the building had been certified asbestos free was contrary to Howell's own practices. Randy Jackson, Howell's project manager (Tr. 187), testified that Howell does not do asbestos work, and so normally asks the owner of any property they bid on to perform all necessary testing, and to provide Howell with a copy of the results, or to provide a hygienist that Howell can work with to get the testing done (Tr. 192). Jackson admitted that it is Howell's responsibility to coordinate the work on the site with the owner and its subcontractors (Tr. 196-97). Jackson stated that normally, Howell would obtain the testing data before work proceeds (Tr. 196). In this case, however, though Howell never saw the alleged report (Tr. 195), it allowed it's subcontractor Natkin to begin work (Tr. 208-13, 221-23).

Because Howell failed to use due diligence in ascertaining that the 6350 N. Broadway work site was free of ACM, it was required to comply the provisions of §1926.1101 *et seq.*, and may be cited for violations arising from its failure to do so.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.1101(e)(1): All Class I, II and III asbestos work was not conducted within regulated areas:

- (a) The general contractor did not ensure that Class I and II asbestos work involving the cutting and removal of TSI, sprayed-on material and floor tile was conducted within a regulated area.

The Violation

Sheila Nelson, a pipe-fitter with Natkin Company, testified that on April 12-14, 1999, she and Ellis Palmer removed insulation and joint compound off of pipes in the drafting classroom,

the apprenticeship hallway, the blue and the green classrooms, the assembly hall, and part of the kitchen in the Pipe-fitters Hall at 6350 N. Broadway (Tr. 56-59, 66, 70).

Howell stipulates that the insulation removal performed by Nelson and Palmer on April 12 and 13 was not conducted within a regulated area. The violation is, therefore, established.

Penalty

This judge notes that the Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712, (No. 76-4765, 1981). The violations cited in this matter are distinct, in that the asbestos standard requires a number of different remedial measures once the presence of ACM, PACM and/or TSI is detected. This case, however, arises out of a single action, *i.e.*, Respondent's failure to verify the Pipefitter's Home Association's representation that the work site was free of asbestos. It resulted in a single hazard, *i.e.*, the release of airborne asbestos fibers to which employees were exposed.

Howell's assertion that it did not normally perform asbestos removal is uncontradicted. Had Howell been in possession of accurate information; it would have stopped the job; it would not have undertaken asbestos abatement. In initiating this action the Secretary does not seek to educate Howell in proper asbestos abatement. The Secretary's only goal is to deter Howell from relying on undocumented representations of testing in future.

Moreover, the Secretary does not suggest that Howell acted in bad faith in this matter. Remediation was undertaken before the May 13, 1999 OSHA inspection. It is stipulated that work on the removal of TSI was stopped on April 15 (JS-57). Jack Schofield hired Evergreen Environmental to test the work site for asbestos on April 30, 1999 (JS-63). Work was stopped on May 5, and an asbestos abatement contractor, Asbestos Free Insulation Contracting, Inc. (AFIC), was hired to remove the asbestos-containing insulation from the pipes and to clean up the remaining debris from the insulation removed by Nelson and Palmer (JS-69, JS-70). Construction and remodeling work proceeded only after clearances of each area were provided by Evergreen Environmental and AFIC (JS-71).

Taking into account the relevant facts, I find that the proven violations should be combined for purposes of assessing an appropriate penalty, as discussed below.

Serious citation 1, item 2 alleges:

29 CFR 1926.1101(f)(1): Each employer who had a workplace or work operation where exposure monitoring was required under this section did not perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may have been exposed:

(a) The general contractor did not conduct air monitoring to determine employee exposure to airborne asbestos for employees performing Class I and II removal and Class IV activities throughout the building.

(b) The general contractor did not conduct air monitoring to determine employee exposure to airborne asbestos for employees working adjacent to areas where Class I and II removal activities were being conducted.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 96).

Serious citation 1, item 3a alleges:

29 CFR 1926.1101(g)(1)(i): Vacuum cleaners equipped with HEPA filters to collect all debris and dust containing ACM and PACM were not used for Class I and II asbestos work:

(a) The general contractor did not ensure that Class I and II asbestos work was conducted using a HEPA filter equipped vacuum.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 97).

Serious citation 1, Item 3b alleges:

29 CFR 1926.1101(g)(1)(ii): Wet methods, or wetting agents, to control employee exposure during asbestos handling, mixing, removal, cutting, application, and cleanup were not used for Class I and II asbestos work:

(a) The general contractor permitted Class I asbestos work to be conducted without the use of wet methods.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 97).

Serious citation 1, item 3d alleges:

29 CFR 1926.1101(g)(3): Prohibited work practices were used for work related to Class I asbestos:

(a) The general contractor permitted dry sweeping to be used to clean up dust and debris containing ACM following removal of Class I asbestos.

(b) The general contractor permitted the use of high speed abrasive disc saws which were not equipped with point of cut ventilation during the removal of Class II asbestos floor tile and tar.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 97).

Serious citation 1 item 3e alleges:

29 CFR 1926.1101(g)(4): The employer did not use the engineering controls and work practices and procedures required for Class I asbestos work:

(a) The general contractor did not require the use of engineering controls while removing TSI and sprayed and troweled on materials. Class I work requires the use of the following engineering controls and work practices:

(i) A competent person must supervise all Class I work;

(ii) Critical barriers or another isolation method to prevent the airborne migration of asbestos;

(iii) Isolation of HVAC systems using a double layer of 6 mil plastic;

(iv) Impermeable dropcloths for surfaces beneath all removal activity;

(v) Cover all objects with impermeable dropcloths or plastic sheeting;

(vi) Ventilation to move contaminated air away from the breathing zone of employees toward a HEPA filtration or collection device.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 96).

Serious citation 1 item 3f alleges:

29 CFR 1926.1101(g)(5): In addition to the general Class I requirements, the employer did not use one of the specific control methods required for Class I asbestos work:

(a) The general contractor did not require the use of a specific engineering control during the removal of TSI and/or sprayed and troweled on materials. Specific engineering control method options include:

(i) Negative Pressure Enclosure system;

(ii) Glove bag system;

(iii) Negative Pressure glove bag system;

(iv) Negative Pressure glove box system;

(v) Water spray process system;

(vi) A small walk-in enclosure which accommodates no more than two persons (mini enclosure) may be used if the disturbance or removal can be completely contained by the enclosure with the following specifications and work practices.

The Violations

Howell stipulates that it was aware of the cited conditions, and that the cited standards were not complied with (Tr. 97).

Serious citation 1 item 3j alleges:

29 CFR 1926.1101(g)(10)(ii): Employers of employees who clean up waste and debris in, and employers in control of, areas where friable thermal system insulation or surfacing material was accessible, did not assume that such waste and debris contained asbestos:

(a) Employees performing waste and debris cleanup in areas where friable TSI or surfacing material was accessible due to uncontrolled removal of this material, were not instructed to assume that the debris contained asbestos.

The Violation

Howell stipulated that Bruce Buell was aware that employees of Howell, including himself, cleaned up dust and debris in the auditorium after Nelson and Palmer removed thermal system insulation in that area. The dust and debris was not treated as ACM or PACM. (JS-56). The violation is established.

Serious citation 1 item 4 alleges:

29 CFR 1926.1101(h)(1): Respirators were not selected and used as required for asbestos work:

- (a) The general contractor did not require the use of respirators for employees of subcontractors removing Class I asbestos.
- (b) The general contractor did not require the use of respirators for employees of subcontractors removing Class H asbestos when a negative exposure assessment had not been produced.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 98).

Serious citation 1 item 7a alleges:

29 CFR 1926.1101(k)(1): Building owners did not identify TSI, sprayed or troweled on surfacing materials, and asphalt flooring materials as ACM or PACM without criteria to rebut that designation:

- (a) The general contractor did not treat TSI and asphalt flooring material being removed as ACM and/or PAKK The general contractor could not produce criteria to rebut that designation.

The Violation

The cited standard provides, *inter alia*, that:

. . .Employers and building owners shall identify TSI and sprayed or troweled on surfacing materials in buildings as asbestos-containing, unless they determine in compliance with paragraph (k)(5) of this section that the material is not asbestos containing.

The extent to which an employer may rely on the representations of the building owner to establish compliance with paragraph (k)(5) is the crux of the matter here, and has been addressed fully above. As noted there, the standard establishes a presumption that can only be rebutted with demonstrable evidence of the required testing. Howell failed to ascertain that the presumption had, in fact, been rebutted, and so was bound by the presumption.

Howell does not dispute that it failed to treat TSI on the site as asbestos containing material. The violation has been established.

Serious citation 1 Item 7b alleges:

29 CFR 1926.1101(k)(3)(i): The employer did not determine the presence, location, and quantity of ACM and/or PACM at the work site before work subject to the asbestos standard was begun:

- (a) The general contractor did not determine the presence, location, and quantity of ACM and PACM.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 99).

Serious citation 1 item 7c alleges:

29 CFR 1926.1101(k)(3)(ii): Employers of employees who performed asbestos work did not notify the following persons of the presence, location and quantity of ACM and/or PACM at the work site:

(A) Owners of building/facility

(B) Employees who will perform asbestos work and employers of employees who work and/or will be working in adjacent areas.

- (a) The general contractor did not inform employees of the location and quantity of asbestos in or adjacent to their work area.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 99).

Serious citation 1 item 7d alleges:

29 CFR 1926.1101(k)(9)(i): The employer did not institute a training program for all employees who performed Class I through IV asbestos operations:

- (a) The general contractor did not ensure that training was provided to employees performing Class I and H asbestos work in the auditorium, training center, and S. hallway.
- (b) The general contractor did not ensure that employees working adjacent to areas of asbestos work were provided with training, where exposure to asbestos in excess of a PEL was likely.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 99).

Serious citation 1 item 8 alleges:

29 CFR 1926.1101(l)(2): The employer did not ensure that asbestos waste, scrap, debris, bags, containers, equipment, and contaminated clothing consigned for disposal shall be collected and disposed of in sealed, labeled, impermeable bags or other closed, labeled, impermeable containers:

(a) The general contractor did not assure the proper disposal of asbestos waste, bags, and equipment during the removal of Class I asbestos.

The Violation

Howell stipulates that it was aware of the cited conditions, and that the cited standard was not complied with (Tr. 99).

Other than serious citation 2 item 1 alleges:

29 CFR 1926.1101(n)(5): The employer did not maintain the data to demonstrate that PACM was not asbestos-containing material:

(a) The general contractor did not maintain reports containing data to demonstrate that Class I and II asbestos material did not contain asbestos.

The Violation

The cited section provides:

Where the building owner and employer have relied on data to demonstrate that PACM is not asbestos-containing, such data shall be maintained for as long as they are relied upon to rebut the presumption.

The cited standard is inapplicable to the facts in this case. Howell did not rely on data, but on the verbal representations of the building's owner that PACM found therein was not asbestos containing. Such reliance is not permitted, which is why Howell received "serious" citation 1. Citation 2 is inconsistent with the Secretary's theory of this case, and with the stipulated facts, and so is dismissed.

Penalty

Nelson testified that she used an X-acto knife to cut through the insulation and then break it apart to remove it from the pipe (Tr. 60). Nelson testified she cut the insulation and let it drop to the ground, to be cleaned up later (Tr. 61). Nelson stated that the insulation was friable and would break apart like chalk when disturbed (Tr. 61). Nelson testified that her hair and clothes were covered with dust all the time she was working (Tr. 62). Nelson did not use any kind of mask until the third day, when some particle masks were made available (Tr. 64).

CO Champney testified that she observed four additional employees in the areas where removal was taking place (Tr. 89). OSHA Compliance Officer (CO) Megan Champney testified that employees exposed to airborne asbestos fibers may suffer serious physical harm, in that they

may contract asbestosis and/or mesothelioma (Tr. 89). Asbestosis is a lung disease that reduces the elasticity of the lungs; mesothelioma is a form of lung cancer (Tr. 93).

Champney believed the violation was of moderate gravity, and calculated a gravity based penalty of \$2,500.00 (Tr. 90). Howell has approximately 70 employees; Champney calculated a 40% reduction in the penalty based on the size of the employer (Tr. 91). Champney also gave Howell a 15% reduction for good faith (Tr. 91), and a 10% reduction for history (Tr. 92).

The record establishes that two employees were exposed to heavy concentrations of airborne asbestos (Tr. 60-64); the possible harm to those employees is severe, though the likelihood of contracting either mesothelioma and/or asbestosis is low (Tr. 90).

A single penalty of \$2,500.00 is appropriate, and will be assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 CFR 1926.1101(e)(1) is AFFIRMED.
2. Serious citation 1, item 1, alleging violation of 29 CFR 1926.1101(f)(1) is AFFIRMED.
3. Serious citation 1, item 3a, alleging violation of 29 CFR 1926.1101(g)(1)(i) is AFFIRMED.
4. Serious citation 1, item 3b, alleging violation of 29 CFR 1926.1101(g)(1)(ii) is AFFIRMED.
5. Serious citation 1, item 3d, alleging violation of 29 CFR 1926.1101(g)(3) is AFFIRMED.
6. Serious citation 1, item 3e, alleging violation of 29 CFR 1926.1101(g)(4) is AFFIRMED.
7. Serious citation 1, item 3f, alleging violation of 29 CFR 1926.1101(g)(5) is AFFIRMED.
8. Serious citation 1, item 3j, alleging violation of 29 CFR 1926.1101(g)(10)(ii) is AFFIRMED.
9. Serious citation 1, item 4, alleging violation of 29 CFR 1926.1101(h)(1) is AFFIRMED.
10. Serious citation 1, item 7a, alleging violation of 29 CFR 1926.1101(k)(1) is AFFIRMED.
11. Serious citation 1, item 7b, alleging violation of 29 CFR 1926.1101(k)(3)(i) is AFFIRMED.
12. Serious citation 1, item 7c, alleging violation of 29 CFR 1926.1101(k)(3)(ii) is AFFIRMED.

13. Serious citation 1, item 7d, alleging violation of 29 CFR 1926.1101(k)(9)(i) is AFFIRMED.
14. Serious citation 1, item 8, alleging violation of 29 CFR 1926.1101(l)(2) is AFFIRMED.
15. Other than serious citation 2, item 1, alleging violation of 29 CFR 1926.1101(n)(5) is VACATED.
16. A combined penalty of \$2,500.00 is ASSESSED.

/s/

Benjamin R. Loye
Judge, OSHRC

Dated: May 26, 2000