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SECRETARY OF LABOR, Complainant, v. BAKER CONCRETE CONSTRUCTION COMPANY, Respondent.	:	OSHRC Docket No. 93-606

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

29 C.F.R. § 1926.451(a)(13) is a scaffolding standard that straightforwardly states: "An access ladder or equivalent safe access shall be provided." At issue in this case is whether certain pronouncements by the Occupational Safety and Health Administration ("OSHA") interpreting § 1926.451(a)(13) deprived Baker of adequate notice of what the standard required during assembly and disassembly of scaffolding. Judge Benjamin R. Loye found that OSHA's interpretations essentially instructed employers to continue to provide ladders or equivalent safe access to the extent feasible. Because Baker did not raise or argue the infeasibility defense, the judge affirmed the Secretary's citation under § 1926.451(a)(13) for Baker's failure to comply with the standard.[1] For the following reasons, we reverse the judge's decision and vacate the Secretary's citation.

[1]The judge mentioned but did not need to address the Secretary's alternative charges that Baker violated § 5(a)(1) or 29 C.F.R. § 1926.1051(a). Section 1926.1051(a) states: "A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided."

In 1983 OSHA responded to another employer's request for interpretation of § 1926.451(a)(13) with the statement that "ladder access at all times for employees assembling or disassembling scaffold components" is "not practical or intended."[2] In 1986 OSHA issued a notice of proposed rulemaking ("NPRM") entitled "Safety Standards for Scaffolds Used in the Construction Industry" that indicated that OSHA's ladder access standards "should not apply to employees performing scaffold erection and dismantling operations because such rules often are not feasible until a scaffold has been erected and properly braced."[3] Then in 1992, in an internal memorandum regarding training, OSHA seemed to confirm the inapplicability or unenforceability of § 1926.451(a)(13) by stating that

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[2]In full, the 1983 interpretation stated:

> 1. It is not practical or intended that employers provide ladder access at all times for employees assembling or dismantling scaffold components; however, other safe access must be provided.
>
> 2. End frames are acceptable for access if the rungs are designed by the scaffold manufacturer as an access ladder, and they are arranged in such a way that they form a continuous series of steps from the scaffold top to its bottom. Maximum spacing between rungs shall not exceed 16 ½ inches.
>
> 3. Portable wood or metal ladders used to provide safe access must comply with 29 CFR 1926.458(a)(3) and (4).
>
> 4. The fixed ladder standards do not apply to scaffolds.
>
> 5. The ladder standards do not apply to scaffold structures when they are built into the scaffold components.

[3]The full sentence in this NPRM, 51 Fed. Reg. 42680, 42687 (Nov. 25, 1986), is the following:

> OSHA's view is that [provisions proposed to clarify 1926.451(a)(13)] should not apply to employees performing scaffold erection and dismantling operations because such rules often are not feasible until a scaffold has been erected and properly braced.

"the existing [standard] do[es] not require the use of ladders during erection and dismantling operations."[4]

Involved in this case is a scaffold attached to the east side of formwork that Baker had begun to dismantle when Steven Medlock, an OSHA compliance officer, came to Baker's construction site at a shopping mall in Cincinnati, Ohio. Medlock saw several employees access the east scaffold by climbing the formwork, using its grid-like framework ("the webs") as a ladder. At most a fall could have been approximately 10 to 11 feet. Baker's employees were taking the bolts and other connecting devices out of all the formwork inside a large, approximately rectangular poured-concrete planter, from which all the formwork was going to be removed that day. The preceding day, Baker had erected the formwork and scaffolding for the planter, and the preceding evening, Baker had poured the planter's concrete walls. Baker's plan for this next day was to dismantle all the formwork and scaffolding at the planter.

In testimony at the hearing, Joseph Tellup, union steward and lead carpenter, detailed the dismantling work that was done prior to Medlock's arrival. "The first thing we did was begin to remove all the nails and everything that holds everything together, and we took the two [north and south scaffold] ends down." According to Tellup, a ladder on the west section of scaffolding "was in the process of being removed, so [that] the scaffold could be taken down," *i.e.*, "one of the first things to be removed would have to be the ladder when you get to that rung of scaffolding." According to Tellup, no one ought to have used that ladder. When asked whether the activity of climbing the webs was a safe practice, Tellup testified:

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[4]In full, the 1992 interpretation stated:

> Although the existing regulations, the 1988 ANSI rules, and the 1986 proposed OSHA rules do not require the use of ladders during erection and dismantling operations, it is strongly recommended that ladders be used whenever feasible. To this end, scaffold frame ladders meeting the criteria set out in the 1986 NPRM [Notice of Proposed Rulemaking], would be acceptable for use as ladders.

> Yes, sir, I am convinced it is. You can stand on the ground and see [that] the wedge bolts and wall ties are still intact. You know the panel is not going to come off the wall. You have plenty of things to hold onto. If it is wrong, it is wrong, but it has been a common practice to climb panels. That is not a strange thing to me.

Tellup also testified that the scaffolds were "not 100 percent" intact. "A lot of the nails that would hold the handrail[s] in place [were missing], [and] the planking had been denailed." As Tellup specified, the scaffolding "was in the process of being demolished," and he would only "trust it enough to stand on one of the planks to take another plank and hand [it] down to a man." Tellup's practice was to "check the scaffolding out, and then access it and finish taking it down." In short, this testimony reveals that Baker was in the process of rendering all of the formwork and scaffolding unsafe for use as ladder landings and work platforms, inasmuch as Baker's plan was to finish doing the dismantling on that one day.

Further, the evidence that Baker presented at the hearing indicates that, on the basis of OSHA's three pronouncements, Baker considered § 1926.451(a)(13) inapplicable or unenforceable for scaffold assembly and disassembly. Bruce Slattery, Baker's corporate safety director, testified at the hearing that these "interpretations . . . are widely known throughout the industry" and that "other safety directors" with whom he had discussed the applicability of § 1926.451(a)(13) "agree[d] with me that they knew of the same interpretation that says when the scaffold is not complete, . . . this regulation does not apply." Slattery also testified that training and experience led him to believe that "the intention of the access" required by § 1926.451(a)(13) "is for completed scaffold[s]."[5]

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[5]Slattery, Baker's safety director for eight years, had received training from the OSHA Training Institute, become a certified OSHA instructor in the Outreach Program, asked the OSHA Training Institute on numerous occasions for interpretations of standards, asked manufacturers and providers of safety equipment for guidance as to safety requirements, served on the safety committees of several trade organizations, and observed concrete construction in about 20 states. According to Slattery, it is common practice in the industry to climb formwork to access partially disassembled scaffolds: "Just about any day you can go to a job site where this type of form system is being used, and you will see it." He listed companies and worksites. In similar testimony, Stephen Spaulding, safety director for Turner

(continued...)

We find that Baker was justified in relying on the three pronouncements for permission to omit ladder-like access to its scaffolds during the day of their disassembly. *Compare Martin v. Miami Industries, Inc.*, 983 F.2d 1067 (6th Cir. 1992) (unpublished opinion) ("inartful drafting" of regulatory requirements, "common understanding and commercial practice," and "confirmation of industry practice by the pattern of administrative enforcement" can together demonstrate lack of notice, citing *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978)). The Secretary's argument to limit any exemption only to times when scaffold assembly or disassembly was actually taking place is not consistent with a reading of the three interpretative pronouncements (1983, 1986 NPRM, and 1992). All three pronouncements refer to the impracticality or infeasibility resulting from instability as the rationale for OSHA's decision to exempt partially erected scaffolds from standards requiring ladder-like access. They certainly did not give Baker notice that the cited standard could apply intermittently during a process of scaffold disassembly that would render the

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[5](...continued)
Construction, and Alan Morgan, Baker's project manager (employed by Baker for 15 years in various capacities), stated on the basis of their training and experience that industry practice is to permit employees to climb formwork during assembly or disassembly. Furthermore, Tellup, the union steward on the worksite in this case, and Kelly Wood, a journeyman carpenter involved in taking down the scaffolding in this case, both testified that climbing the formwork during disassembly is a common practice. Medlock disagreed, but his experience with the industry was limited; he had only inspected two construction sites having formwork as high as the 10-foot height involved in this case.

scaffolds unstable throughout the day. Accordingly, we reverse the judge's decision on the basis of lack of notice of the cited standard's applicability and we vacate the citation.[6]

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Dated: April 27, 1995

[6]Commissioner Foulke wholeheartedly agrees with the substance of Commissioner Montoya's concurring opinion. He adheres to the view he expressed in *Contractors Welding of Western New York, Inc.*, 15 BNA OSHC 1249, 1991 CCH OSHD ¶ 29,454 (No. 88-1847 1991), *rev'd in part and remanded*, 996 F.2d 1409 (2d Cir. 1993), that the meaning of the word "provide" is clearly to "make available" rather than to "ensure use." In his view, *Contractors Welding* overruled *Borton, Inc.*, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 72-2115, 1982), *rev'd*, 734 F.2d 508 (10th Cir. 1984). But for the Secretary's inappropriate use of the settlement process alluded to in the concurrence, this issue need not be raised at this time. As it is, *Borton, Inc.* has been overruled in its own circuit and, in Commissioner Foulke's view, is not consistent with the weight of other court precedent or sound jurisprudence. Nevertheless, noting that the Commission is unanimous in its conclusion that the citation should be vacated based on the threshold issue of lack of fair notice of the standard's applicability, Commissioner Foulke finds it unnecessary in this case to reach the subordinate question of the standard's interpretation posed by the concurrence.

MONTOYA, Commissioner, concurring:

I agree with my colleagues' decision to vacate the alleged violation of 29 C.F.R. § 1926.451(a)(13) based on the Secretary's representations regarding the disassembly process. However, I would also consider whether the term "provide" in the standard means "require the use of," and if not, whether the ladders were provided. These are the issues the parties were asked to brief.

In my opinion, the term "provide" in section 1926.451(a)(13) should not be read to include a requirement that employers "ensure the use of" ladders or equivalent safe access. I recognize that the Commission reached the opposite conclusion in *Borton, Inc.*, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 72-2115, 1982), but that decision was reversed by the Tenth Circuit, which held that, by its plain meaning, "provide" does *not* require that a company ensure the use of a ladder. *Borton, Inc. v. OSHRC*, 734 F.2d 508 (10th Cir. 1984). *See also Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977) (1910.28(a)(12)); *General Elec. Co. v. OSHRC*, 540 F.2d 67 (2d Cir. 1976) (1910.133(a)(1)); *Pratt & Whitney Aircraft Group*, 12 BNA OSHC 1770, 1986-87 CCH OSHD ¶ 27,564 (No. 80-5830, 1986), *aff'd*, 805 F.2d 391 (2d Cir. 1986) (Table) (unpublished opinion); *but see Cleveland Aluminum Casting Co. v. Secretary*, 788 F.2d 38 (D.C. Cir. 1986) (unpublished opinion). I rely on the Commission's reasoning in *Contractors Welding of Western New York Inc.*, 15 BNA OSHC 1249, 1991 CCH OSHD ¶ 29,454 (No. 88-1847 1991) *rev'd in part and remanded*, 996 F.2d 1409 (2d Cir. 1993). There, the Commission examined the Second and Tenth Circuit case law cited above and found that "the word 'provide' is not ambiguous and that it means make available." The Commission further concluded that by interpreting "provide" to mean "require the use of" the Secretary had "stretche[d] the word far beyond its commonly understood meaning." The Secretary succeeded in eliminating our decision as precedent through settlement, a practice that has been since disallowed by the Supreme Court. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994). As a result, I welcome this opportunity to state my position on this issue.

I further find that the preponderance of the evidence establishes that ladders were provided. Although CO Medlock testified that Baker's employees had some difficulty locating a ladder, Baker's lead carpenter and steward Joseph Tellup testified that "[o]n this particular job, we had a lot of what we call fabricated job ladders." Alan Morgan, Baker's

project manager, added that, "I know there were several, because this was the last part of the job...[and] we had built several ladders to access our different levels of work." Although Baker's witnesses were unable to recall the exact number of ladders at the site or their exact locations, such precision is hardly necessary when the standard requires only that ladders be made available. I would therefore vacate the citation on this basis and overrule the Commission's decision in *Borton*.

Velma Montoya
Commissioner

Date: April 27, 1995

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-0606
BAKER CONCRETE CONSTRUCTION CO.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 27, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 27, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-0606

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SECRETARY OF LABOR
Complainant,
v.
BAKER CONCRETE CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 93-0606

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 February 14, 1994. The decision of the Judge will become a final order of the Commission on March 16, 1994 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 March 7, 1994 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:

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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

Ray H. Darling, Jr./KA

Date: February 14, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0606

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SECRETARY OF LABOR,
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v.

BAKER CONCRETE
CONSTRUCTION CO.,
Respondent.

OSHRC DOCKET
NO. 93-0606

APPEARANCES:

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Michael S. Holman, Esq., Sylvia Lynn Gillis, Esq., Bricker & Eckler, Columbus, Ohio

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, Baker Concrete Construction Co. (Baker), at all times relevant to this action maintained a place of business at the Northgate (Lazarus) Mall, Cincinnati, Ohio, where it was engaged in concrete construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 6-7, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Baker's Lazarus worksite (Tr. 35). As a result of the

inspection, Baker was issued a "serious" citation alleging violation of §1926.451(a)(13) of the Act, together with proposed penalties. By filing a timely notice of contest Baker brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing Complainant moved to amend the complaint to allege, in the alternative, violations of §§5(a)(1) or 1926.1051(a) of the Act. On October 21, 1993, a hearing was held in Cincinnati, Ohio, on the contested issues. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of §1926.451(a)(13)

Serious citation 1, item 1 alleges:

29 CFR 1926.451(a)(13): An access ladder or equivalent safe access to scaffold(s) was not provided:

> (a) Along the east central area of the structure employee(s) were observed climbing the Symons Forms to gain access to the formwork scaffold and were exposed to a fall potential in excess of 10'.

The cited standard provides:

> **Scaffolding.** (a) *General requirements.*
>
> * * *
>
> (13) An access ladder or equivalent safe access shall be provided.

Facts

On January 6, 1993 Baker was engaged in forming a 10 foot concrete foundation planter box wall on the east side of the steel structure at the Lazarus site (Tr. 62, 138). Scaffolding encircling the planter was erected prior to pouring; access to the scaffolding from the exterior of the planter was provided by means of a job ladder on the west side of the planter (Tr. 54, 152, 198). Baker had begun disassembling the formwork and had removed the scaffolding on the north and south ends of the planter prior to the OSHA inspection; the scaffolding remaining on the east was, at that time, inaccessible by means of the ladder (Tr. 58, 90, 106-8).

During the course of his inspection, OSHA Compliance Officer (CO), Steven Medlock, observed no portion of the scaffold being dismantled, but saw Baker employees

walk on the east scaffold to access other work areas (Tr. 77). Upon his arrival at the Lazarus site, Medlock observed a Baker employee climb the north face of vertical concrete formwork onto the scaffolding on the east, over the formwork, and out of sight (Tr. 36-37, 45-47). Later Medlock saw employee Kelly Wood accessing the scaffolding by climbing the formwork on the south (Tr. 68, 105). Other employees, including Joe Tellup, were observed climbing the formwork on the interior of the planter out onto the scaffolding (Tr. 68).

Tellup testified that he generally used a Symons handles hook attached to 18 inch safety chain to lock into the rib of the formwork to climb the planter wall (Tr. 146-47, 155-56). However, Tellup testified that when disassembling the scaffolding on the morning of January 6, he climbed up to and down from the scaffolding without the Symons hook, using only the formwork webbing (Tr. 168-69). Tellup stated that the Symons webbing includes welded square handle brackets designed for carrying the panels, spaced every three feet or so, which can be used to climb the panels (Tr. 169-70). Respondent's photographs indicate handle brackets located irregularly about the webbing (Exh. R-1 through R-4).

Wood testified that when dismantling formwork he generally climbs the forms, tying off with a Symons hook (Tr. 181-82), but admitted that on the day of the inspection he climbed the south end of the Symons formwork to access the east side of the scaffolding without tying off (Tr. 177, 183).

Baker's safety rules prohibit climbing formwork (Tr. 125; Exh. R-5). However, it is common practice, and employees are not disciplined for climbing forms one level or less, i.e. up to approximately 10 feet (Tr. 139, 178, 203, 225-227, 244).

The formwork consists of webs two inches deep over a plywood backing. CO Medlock testified that an employee climbing the formwork webbing would not have handholds or foot purchases equivalent to those furnished by a ladder, which under OSHA standards must have equally spaced skid resistant rungs with a seven inch clearance behind each rung to ensure a secure hand or foothold (Tr. 64-65, 72-73). Moreover, the webs are not uniformly spaced, which could cause a climber to misstep (Tr. 64,71). Finally, a ladder must extend 36" beyond the landing point to provide the

climber safe access to the landing; formwork webbing provides no such safe access (Tr. 73-74).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Baker maintains that Complainant failed to prove the cited standard's applicability. According to Baker industry practice does not require the use of ladders on scaffolding which is being dismantled. In addition, Baker maintains that the Secretary has admitted that "[i]t is not practical or intended that employers provide ladder access at all times for employees assembling or dismantling scaffold components" (Exh. R-6) and that the standard is, therefore, inapplicable where scaffolding is being dismantled.

It is clear that industry practice cannot be relied upon to determine the applicability of standards formulated to regulate that industry. Such an approach would lead to absurd results.

Rather, the Secretary's reasonable interpretation as to the reach of a standard is generally controlling. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991). Complainant's assertion that the standard is applicable to the scaffolding cited here in no way conflicts with the Secretary's general observation that it is not always practical to provide ladder access to scaffolds being dismantled. Infeasibility, or impracticality of compliance, however, is not an element of applicability, but is an affirmative defense which must be raised and proved by the employer. *Wyman-Gordon Company*, 15 BNA OSHC 1433, 1991 CCH OSHD ¶29,550 (No. 84-785, 1991). Because the defense has been raised neither in the pleadings nor in Baker's brief, the feasibility of providing ladder access cannot be considered here.

The evidence establishes that at the time of the inspection no ladder was available to access the scaffolding on the east side of the planter box under construction at Baker's

Baker's Lazarus worksite. With management's tacit approval, employees dismantling the scaffold or using it to access the planter's interior climbed formwork webbing without fall protection. Because its members are unevenly spaced, and are backed with plywood, formwork webbing does not provide hand or footholds as safe as that provided to an employee using a properly constructed ladder. Baker, therefore, was in violation of §1926.451(a)(13) on January 6, 1993. *See, H.E. Wiese, Inc. and Industrial Electrical Construction Co.*, 10 BNA OSHC 1499, 1982 CCH OSHD ¶25,985 (Nos. 78-204 & 78-205, 1982).

Because the Secretary has shown the cited violation, violations alleged in the alternative need not be discussed here.

Penalty

The violation was properly classified as serious. The scaffolding was 10 feet 4 inches high (Tr. 100). The CO testified that falls from 10 feet or less can result in serious physical harm (Tr. 91). Although Complainant's evidence attributing 3% of fatalities in concrete erection to falls under 10 feet (Tr. 95, 123) is insufficient to demonstrate that the probable result of a fall here would be death, the undersigned finds that the probability of broken bones establishes that the violation was serious.

Baker is a large company, with over 1,200 employees nationwide. Twelve workers were employed on the Lazarus site (Tr. 41). Baker has a history of prior OSHA citations (Exh. C-4). No evidence of bad faith was adduced at the hearing.

The gravity of the violation is moderate. As noted the hazard was one of broken bones; employee exposure to the hazard was brief. A ladder was provided for employee access prior to the day of the inspection; only after part of the scaffolding was removed did the east side become inaccessible, necessitating an additional means of access.

Taking into account the relevant factors, the undersigned finds that the gravity of the violation was overstated. The proposed penalty of $5,000.00 is deemed excessive. A penalty of $2,500.00 will be assessed.

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

1. Serious citation 1, item 1, alleging violation of §1926.451(a)(13) is AFFIRMED, and a penalty of $2,500.00 will be ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated: February 4, 1994