United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. BARNHART, INC., Respondent.	OSHRC Docket No. 10-0108

FINAL ORDER

Administrative Law Judge Ken S. Welsch issued a Decision and Order in this matter which was directed for review on July 14, 2011. After the Commission issued its briefing notice, the Secretary filed the parties' Settlement Agreement resolving all issues in the case on November 16, 2011.

Having reviewed the record, the Commission approves the Settlement Agreement. Commission Rule 100, 29 C.F.R. § 2200.100. The Commission sets aside the judge's Decision and Order to the extent that it is inconsistent with the parties' Settlement Agreement and accords the decision as modified the status of an unreviewed judge's decision. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976) (unreviewed part of judge's decision does not constitute binding Commission precedent).

SO ORDERED.

BY DIRECTION OF THE COMMISSION

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: December 6, 2011

__/s/_____
John X. Cerveny
Deputy Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Barnhart, Inc., Respondent.	OSHRC Docket No. **10-0108**

Appearances:

Grace A. Kim, Esquire, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California
For Complainant

Fred Walter, Esquire, Walter and Prince, L.L.P., Healdsburg, California
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Barnhart, Inc., is a general construction contractor located in San Diego, California. Barnhart, a subsidiary of Balfour Beatty, specializes in government and school district projects. In September 2009, Barnhart was acting as general contractor for the renovation of a Marine Corps barracks at Camp Pendleton, California. Occupational Safety and Health Administration (OSHA) compliance officer Van Howell conducted an inspection of the project site on September 16, 2009. As a result of Howell's inspection, the Secretary issued a citation to Barnhart on December 21, 2009, alleging serious violations of nine construction standards of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1926.20(b)(2), for failing to initiate and maintain a safety program that provides for frequent and regular inspections by a competent person. The Secretary withdrew Item 2, which alleged a serious violation of 29 C.F.R. § 1926.403(b)(2), at the hearing (Tr. 11). Item 3 alleges a serious violation of 29 C.F.R. 2§ 1926.405(a)(2)(ii)(I), for failing to protect flexible cords used for temporary wiring from

damage. Item 4 alleges a serious violation of 29 C.F.R. § 1926.405(g)(2)(iv) for failing to provided strain relief to flexible cords connected to devices and fittings. Item 5 alleges a serious violation of 29 C.F.R. § 1926.501(b)(4)(ii), for failing to protect each employee from tripping or stepping into holes in the floor. Item 6 alleges a serious violation of 29 C.F.R. § 1926.502(d)(8), for failing to design, install, and use horizontal lifelines under the supervision of a qualified person.[1] Item 7 alleges a serious violation of 29 C.F.R. § 1926.502(d)(21), for failing to inspect personal fall arrest systems prior to each use. The Secretary proposed a penalty of $ 1,875.00 each for Items 1 through 7.

The Secretary grouped Items 8a and 8b because the alleged violations involve similar or related hazards. Item 8a alleges a serious violation of 29 C.F.R. § 1926.503(a)(1), for failing to provide a training program for each employee who may be exposed to a fall hazard. Item 8b alleges a serious violation of 29 C.F.R. § 1926.503(b)(1) for failing to verify fall protection training by preparing a written certification record. The Secretary proposed a combined penalty of $ 1,875.00 for Items 8a and 8b.

Barnhart timely contested the citation. The court held a hearing in this matter in San Diego, California, from October 26 to October 29, 2010. The parties have filed post-hearing briefs. The Secretary cited Barnhart, as general contractor, under the Multi-Employer Policy (MEP). Barnhart stipulates it was a controlling employer at the project site (Tr. 12), but argues it did not have knowledge of the alleged violative conditions.

For reasons discussed more fully below, the court affirms Items 3, 5, and 8b. The court vacates Items 1, 4, 6, 7, and 8a.

Background

OSHA has implemented a local emphasis program for construction within the State of California. Pursuant to that program, OSHA's Director of Enforcement and Investigation assigned compliance officer Van Howell to inspect all American Reinvestment and Recovery Act (ARRA) renovation projects at Camp Pendleton in September 2009 (Tr. 39).

[1] In her post-hearing brief, the Secretary moved to amend Item 6 to allege, in the alternative, a serious violation of 29 C.F.R. § 1926.502(d)(16)(iii), for failing to rig personal fall arrest systems such that an employee can neither free fall more than 6 feet nor contact any lower level (Secretary's Brief, pp. 30-31).

When Howell first arrived at Camp Pendleton on Monday, September 14, 2009, he reported to the Installation Safety Office, and then to the Naval Facility Engineering Command. There, he met with Deputy Curt Kronberg from the Resident Office in Charge of Construction (ROICC). The ROICC contracts with construction companies for demolition and renovation services, as well as for new construction. Kronberg assigned a different officer from the ROICC to accompany Howell each day he visited Camp Pendleton. Kronberg gave Howell a list of ARRA project sites at Camp Pendleton. One of those projects was the renovation of a Marine barracks, referred to as Bachelor Enlisted Quarters (BEQ) 52609. The general contractor for the BEQ was Barnhart. The barracks renovation project began on August 24, 2009. At the time of Howell's inspection, the electrical subcontractor and the demolition subcontractor had performed work at the site (Tr. 37-42).

On Wednesday, September 16, 2009, Howell arrived at Camp Pendleton at 7:30 a. m. That day, he was accompanied by ROICC Officer Dennis Redger (Tr. 42). Howell conducted inspections of two ARRA project sites not at issue here. At approximately 10:00 a. m., Howell and Redger arrived at the BEQ site. They met with Jason Plitz, Barnhart's project superintendent. Howell held an opening conference with Plitz. The conference was also attended by Barnhart's project manager and quality control manager (Tr. 45, 576, 612). After the opening conference, Howell conducted a walk-around inspection of the BEQ site (Tr.45).

The BEQ site covered approximately two acres. The BEQ itself was a four-story building, containing approximately 120 living units. The site also included a smaller electrical building (Building 52610), which provided power for the site; a construction trailer brought in by Barnhart; and a construction trailer for Maximum Demolition, Inc. (MDI or "Max Demo"), a demolition contractor subcontracted by Barnhart. MDI's foreman was Shane LaPlante (Tr. 77).

During the walk-around inspection, Howell observed several conditions and activities he considered to be in violation of OSHA's construction standards. Based upon his inspection, the Secretary issued the citation that gave rise to this proceeding.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer

> failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary contends that, under the MEP, Barnhart exposed employees of MDI to various violative conditions. In 2010, the Commission reversed its previous position on the MEP, and held the Secretary may cite a non-exposing, controlling employer under this policy. In *Summit Contractors Inc.,* 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010), the Commission states:

> "[A]n employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act . . . to protect not only its own employees, but those of other employees 'engaged in the common undertaking.'" *McDevitt Street Bovis,* 19 BNA OSHC, 1108, 1109 (No. 97-1918, 2000),(citation omitted). With respect to controlling employer liability, "an employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Id.* (citation omitted); *Grossman Steel,* 4 BNA OSHC 1185, 1188 (No. 12775, 1976).

Barnhart concedes it is the controlling employer of MDI (Tr. 12, 19).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.20(b)(2)

The citation alleges, in pertinent part:

> At the Construction Site for the BEQ Building 52609–On or about 16 SEP 09, and at times prior thereto, the controlling employer Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc. protected its employees from the hazards of falls, from the hazard of being injured by improperly wearing fall protection equipment. . . , failed to protect employees from tripping hazards; [and] failed to protect employees from the hazard of being struck by tools and other materials falling through floor holes and from electrical hazards.

Section 1926.20(b)(2) provides:

> Such [safety] programs shall provide for frequent and regular inspections of the jobsites, materials, and equipment to be made by competent persons designated by the employers.

(1) Applicability

Barnhart was the general contractor on the BEQ renovation project. Subpart C of the construction standard addresses "General Safety and Health Provisions." Section 1926.20(a) provides that "no contractor . . . shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." Section 1926.20(b)(1) requires the employer "to initiate and maintain such programs as may be necessary to comply with this part."

Section 1926.20(b)(2) applies to the BEQ site.

(2) Compliance with the Terms of the Standard

The Secretary alleges Barnhart violated § 1926.20(b)(2) in two ways: (1) Barnhart itself failed to have a competent person conduct frequent and regular inspections of the worksite, and (2) Barnhart failed to ensure MDI had a competent person who conducted frequent and regular inspections. Essentially, the Secretary wants Barnhart to defend itself twice for the same offense. The court rejects this approach.

Howell's testimony in support of Item 1 exclusively deals with the perceived failings of Barnhart superintendent Jason Plitz. Howell identified Plitz as Barnhart's Site Safety and Health Officer (SSHO), and stated the SSHO "is required to have a certain level of training to recognize and control these hazards and failed to do so" (Tr. 208). Howell does not mention MDI foreman Shane LaPlante or any other MDI representative's failure to conduct inspections. The Secretary cannot tack on a late addition to the citation item in order to bolster her case. If both Barnhart and MDI failed to conduct frequent and regular inspections of the worksite, then a violation of § 1926.20(b)(2) is established. If, however, either Barnhart or MDI conducted frequent and regular inspections of the worksite, then the requirements of the cited standard are satisfied.

Section 1926.32(f) defines "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." The record establishes Plitz was qualified as a competent person.

Plitz graduated from the University of Minnesota in 1999 with a degree in construction management. At the time of the hearing he had worked in construction for 15 years. He had worked as a superintendent for Barnhart since 2003 (Tr. 494-495). The Navy accepted Plitz as Barnhart's SSHO, a position which requires proof of five years of safety experience with 24

hours of safety training during each year, for a total of 120 hours. He was also required to complete the OSHA 30 hour course and the U. S. Army Corps of Engineer's EM 385-1-1 safety classes (Tr. 873).

Plitz testified he conducted three or four inspections of the worksite each day (Tr. 337). LaPlante testified he was in contact with Plitz "pretty much throughout the day. . . on the site, going over production, where we're at or look at this" (Tr. 668).

Despite recommending the Secretary cite Barnhart for violating § 1926.20(b)(2), Howell "considered [Plitz] to have the skills to perform the job as a competent person" (Tr. 267). Howell testified Plitz informed him that he conducted daily inspections of the worksite (Tr. 217, 220, 221). Howell conceded a competent person does not have to inspect the worksite more than once a day to meet the requirements of § 1926.20(b)(2). Howell stated, "Daily inspection may be fine if you're identifying the hazards that are on the job site and controlling the job site" (Tr. 267).

Howell does not dispute Plitz's qualifications as a competent person, nor does he argue Plitz failed to make the required inspections. Howell concluded Barnhart violated § 1926.20(b)(2) because he observed what he considered to be unsafe conditions at the BEQ site:

> I came to that conclusion based upon the hazards at the job site that weren't identified. I came to that conclusion based upon the fall hazards that existed where Mr. Jason Plitz indicated that he hadn't taken an opportunity to look at the job. I came to that conclusion based upon hazards that were identified one week prior as far as the floor hole hazards and the smaller holes that were within the utility corridor.

(Tr. 206-207).

Section 1926.20(b)(2) is not established by evidence violative conditions existed at the worksite. It is established by evidence showing no competent person made frequent and regular inspections of the worksite. Here, Howell concedes both that Plitz was a competent person as defined by the OSHA standards, and that he made frequent and regular inspections of the worksite. Other alleged violations will be addressed in this decision, but they cannot serve as the basis for proving a violation of § 1926.20(b)(2).

The Secretary has failed to establish Barnhart was not in compliance with § 1926.20(b)(2). Item 1 is vacated.

Item 3: Alleged Serious Violation of § 1926.405(a)(2)(ii)(I)

The citation alleges:

> BEQ Building 52609 Electrical Distribution Area–On or about 16 SEP 09 and at times prior to, temporary power cords were draped over the top of the hurricane fence. The jagged side of the hurricane fence was placed on the top. The temporary power cords were subjected to potential damage from the jagged edge of the hurricane fence.

Section 1926.405(a)(2)(ii)(I) provides:

> Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

(1) Applicability

The temporary power cords draped over the hurricane fence were flexible cords. Section 1926.405(a)(2)(ii)(I) applies to flexible cords. The cited standard applies to the conditions at the worksite.

(2) Compliance with the Terms of the Standard

At the conclusion of Howell's opening conference with Barnhart, he asked Plitz to take him to the highest point on the worksite where employees were working. Plitz told him the highest point was the roof of the BEQ Building. Howell stated:

> We talked about that there wasn't a good access to the roof area and so we decided to go to the fourth floor. As we were walking from the trailer to go up to the fourth floor, we walked by a fenced-in area, a concrete masonry unit, a fenced-in area with a hurricane fenced gate. And I stopped before we entered the staircase because I noticed the [cords] running over the fence and the jagged end of the hurricane fence was pointing up.

(Tr. 47).

Howell took photographs of the cords lying across the top of the fence (Exhs. C-3A and C-3B). Subcontractor Neal Electric had installed the cords when the BEQ renovation began. The cords had been draped over the fence for at least four weeks before Howell's inspection (Tr. 61, 236). Neal Electric had run the cords from the electrical building to temporary power distribution boxes (known as "spider boxes") in the BEQ Building. All electrical equipment in

the building had been dismantled and removed, so the spider boxes were necessary to provide electricity for lighting and hand tools (Tr. 51).

Howell testified the sharp projections of the fence could penetrate the cords and energize the conductors. This could create the hazard of electrifying the fence::

> If it energized the conductor, there probably wouldn't be enough voltage dropped to cause the amperage to draw to cause it to throw the breaker. You could go access the gate to open it up, you grab ahold of the chain or lock, you're definitely–your contraction muscles are stronger than your extension muscles. You'd stay in contact with the electrical chain or lock potentially and be electrocuted.

(Tr. 56-57).

Barnhart disputes Howell's assessment of the hazard. Sam Passanisi was Neal Electric's senior project manager on the BEQ project. He was at the BEQ site on a weekly basis during its renovation. He had visited the site four or five times before Howell's inspection (Tr. 752-753). Passanisi holds licenses in general engineering, general contracting, and electrical contracting (Tr. 746). He was qualified as an expert in electrical hazards at the hearing (Tr. 770).

Passanisi testified the configuration of the cords lying across the fence created no hazard to employees (Tr. 770-771). He stated that even if a cord was in direct contact with a sharp projection on the fence, no hazard would exist: "It would take a lot to go through a PVC cover like this. This is almost similar to a piece of conduit. . . . [I]t's very hard because it's an STW cable. And according to the manufacturer's interpretation, it's a very hard exterior cable or sheathing" (Tr. 791).

Passanisi testified that, even if the cord were punctured by a sharp projection on the fence, it would still not create a hazard:

> Passanisi: If it did go to the ground–if–you're saying if something penetrated the cable–
>
> Q. Yes.
>
> Passanisi: And–repeat the question.
>
> Q. And made contact with the energized conductor could it electrify the fence and not trip the breaker at the panel box?
>
> Passanisi: I don't think so. It would–it would trip. It would trip.
>
> Q. You don't think so, but it's possible?

Passanisi: Well, the –the fence is grounded because it's–it's going to be grounded.

(Tr. 796).

The cited standard allows no exceptions for cords with hard exteriors. It does not exempt cords draped over grounded objects. Section 1926.405(a)(2)(ii)(I) presumes a hazard when flexible cords or cables come in contact with sharp projections. In the instant case, the cords running from the electrical building to the spider boxes in the BEQ Building were exposed to sharp projections. Although Exhibits C-3A and C-3B do not show the cords making direct contact with the sharp projections on the fence, such contact could have resulted with a small movement of the cords. Howell testified workers inside the BEQ Building moved the spider boxes from one location to another. When that happens, Howell stated, "You're picking up the cord and moving it along the fence" (Tr. 241).

The court accepts Howell's assessment of the hazard created by the configuration of the cords over the assessment of Passanisi. Passanisi (who, as Neal Electric's senior project manager, has a vested interest in not recognizing a hazard), glossed over the requirements of the standard and focused on the unlikelihood that a fence projection could penetrate one of the cord's exteriors. This focus is misplaced. The fact the probability of a punctured cord is slight is irrelevant to whether the configuration was unsafe. "The proper inquiry is the probability that the resulting harm will be death or serious physical harm." *Automatic Sprinkler Corporation of America,* 8 BNA OSHC 1384, 1390 (No. 76-5089, 1980).

Passanisi testified that, even if a fence projection punctured the cord exterior and made contact with the conductor, the fence would not become energized. The court finds Passanisi's testimony in this regard to be tentative and speculative.

The Secretary has established Barnhart, as controlling employer, failed to comply with the terms of § 1926.405(a)(2)(ii)(I).

(3) Employee Access to Violative Condition

Barnhart project superintendent Plitz told Howell he had opened the fence gate and gone inside the electrical building two weeks before Howell's inspection. Plitz did this while the cords were lying across the fence (Tr. 59). Plitz's statement established his actual exposure to

the violative condition. Any employee walking along the outside of the fence had access to the violative condition. Howell stated:

> If the fence would become energized because it damaged the outer sheath and penetrated to a conductor, anyone walking through that area, even if somebody was even taking a break and talking with somebody and they reached out just to hold onto the fence or to lean against the fence while they were there, or brushed up against it, could be potentially exposed to an electrical shock hazard.

(Tr. 61).

The Secretary has established exposure to Jason Plitz and to other employees who walked along the path.

(4) Employer Knowledge

The fence was approximately 150 feet from Barnhart's trailer, and was next to the path commonly used to walk from the trailer to the BEQ Building (Tr. 47). The cords were lying on the fence in plain view of the common footpath between Barnhart's trailer and the BEQ Building. The cords had been lying across the fence for approximately four weeks at the time of Howell's inspection. Plitz had unlocked the fence gate approximately two weeks before Howell's inspection. Plitz led Howell past the fence as Howell conducted his walk-around inspection.

The Secretary has established Plitz had actual knowledge of the violative condition. As project superintendent, Plitz's knowledge is imputed to Barnhart. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.")

The Secretary has established Barnhart committed a violation of § 1926.405(a)(2)(ii)(I). The Secretary classified this item as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. An employee could have been electrocuted or suffered an electrical shock if a sharp projection on the fence had punctured one of the flexible cords. The violation is properly classified as serious.

Item 4: Alleged Serious Violation of § 1926.405(g)(2)(iv)

The citation alleges:

> BEQ Building 52609 4th Floor Area–On or about 16 SEP 09 and at times prior thereto the controlling employer Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc., protected its employees from electrical hazards. The outer sheath of the cord for the Milwaukee Heavy Duty vacuum cleaner (Cat number 8945/serial number 15996) was pulled out of the plug housing and the grounded, ungrounded and grounding conductors were exposed.

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

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

(1) Applicability

The vacuum cleaner at issue was equipped with a flexible cord connected to devices and fittings. Section 1926.405(g)(2)(iv) applies to the cited condition.

(2) Compliance with the Terms of the Standard

While on the fourth floor of the BEQ Building, Howell observed a heavy duty vacuum cleaner. The power cord to the vacuum cleaner was damaged (Exh. C-4A). Exhibit C-4A shows "a male plug that has the sheath, the outer sheath of the . . . cord pulled outside of the housing of the plug that's supposed to secure it, and it has the conductors exposed" (Tr. 75). Electrical tape was wrapped around the power cord where it had pulled away from the housing.

Barnhart does not dispute the power cord to the vacuum cleaner was defective (Tr. 22, 27-28). In its post-hearing brief, Barnhart states it "does not contest that the condition of the plug was not in compliance with the cited safety order" (Barnhart's brief, p. 12).

(3) Employee Access to Violative Condition

The vacuum cleaner was on the fourth floor where MDI employees were working. Although the evidence establishes the vacuum cleaner had not been used on site, it was available for use in its defective condition. The Secretary has established MDI's employees had access to the violative vacuum cleaner.

(4) Employer Knowledge

Barnhart disputes the Secretary's contention it knew the defective vacuum cleaner was available for use by employees working on the site. Barnhart argues subcontractor MDI had brought the vacuum cleaner to the site the morning of Howell's inspection. No one had used the

vacuum cleaner in that condition, and Barnhart had no knowledge the vacuum cleaner was there until Plitz arrived with Howell on the fourth floor. The Secretary argues, based on Howell's testimony, that Barnhart employee Pedro Hernandez had used the vacuum cleaner prior to Howell's inspection. The court must determine who among the witnesses is most credible on this issue.

Compliance Officer Van Howell

Howell took notes contemporaneous with his inspection (Exh. C-10). Howell testified he questioned Plitz and LaPlante, as well as Pedro Hernandez, who worked for Barnhart, about the use of the vacuum cleaner. At the time of the inspection, Howell mistakenly thought Hernandez worked for MDI (Tr. 78). Howell read from his notes at the hearing: "Hernandez stated he has used [the vacuum cleaner] and the cord has been in this condition since . . . the beginning of the project. . . . Hernandez was not sure last time used and not sure how many times used. However, it has been used a few times by Pedro Hernandez. . . . Jason Plitz and Shane LaPlante stated vacuum has been on site since 8/24/09" (Tr. 79-80).

Jason Plitz

Plitz testified the vacuum cleaner was brought to the fourth floor of the BEQ Building the morning of September 16, 2009, the same day as Howell's inspection. The purpose of the vacuum cleaner was to vacuum up slurry created when MDI cut through the concrete grouted masonry block. MDI planned on using a wet-cutting method (where water is used to lubricate the diamond blades of a chainsaw), which is "a messy process" (Tr. 545). The chainsaw MDI was planning to use was not yet on site (Tr. 548).

Plitz stated it was impossible for Hernandez to have used the vacuum cleaner previously, because it had not been on site until the morning of September 16, 2009. Furthermore, Hernandez worked for Barnhart. The vacuum cleaner was the property of MDI, and would only have been used by an MDI employee. Plitz testified the vacuum cleaner was brought on site specifically to clean up the slurry when MDI used its chainsaw to cut the concrete blocks.

> [W]e didn't even have the chainsaw on site yet. So it would have had to have been a Max Demo employee when the chainsaw actually arrived. That's not reason–if I would have caught Pedro using someone else's equipment, he would–we would have had words. He would have been in trouble. And there was no– we had no reason for him to be touching it.

(Tr. 548).

Plitz stated it was against protocol for a contractor's employee to use a subcontractor's equipment. "You don't do it. You don't use anyone else's equipment" (Tr. 548).[2] Hernandez was on site at the time to cover floor holes created by the demolition process. Plitz stated, "There was nothing [Hernandez] was doing that he would use a shop vac for" (Tr. 549).

Shane LaPlante

Shane LaPlante was MDI's foreman on the BEQ project. He was adamant that the vacuum cleaner was not brought to the BEQ Building until the day of Howell's inspection, and it had not been used. When asked how he was certain of the date, LaPlante replied, "Because I had scheduled it, like, a day or two prior. And the guy who–the operator for that equipment had brought it up in his truck and came–came there. I don't know what time he got there. Probably around 8 o'clock that morning just letting me know that he had finally gotten there from the shop. And then I directed him to go start setting up" (Tr. 695).

Pedro Hernandez

Pedro Hernandez is a cement mason. He had worked for Barnhart for four years at the time of the hearing (Tr. 644). English is not Hernandez's first language (Tr. 643). Hernandez testified he remembered speaking with Howell, but that Howell did not question him regarding the vacuum cleaner (Tr. 650).

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[2] LaPlante echoed Plitz's sentiments:

> Q. Was Pedro Hernandez expected to participate in the cutting?
>
> LaPlante: No.
>
> Q. Would it–would it be–if Pedro Hernandez or anybody else from Barnhart asked to borrow the vacuum for their own purposes–
>
> LaPlante: No.
>
> Q. –would they have been given it?
>
> LaPlante: No.

(Tr. 675-676).

Credibility Determination

The court finds the Secretary failed to establish by a preponderance of the evidence that the vacuum cleaner had been on the project site prior to the day of Howell's inspection. Although Howell's contemporaneous notes establish he believed the evidence indicated the vacuum cleaner had been on site since August 24, the court cannot discount the possibility Howell misunderstood the responses to his questions.

This determination is based on the convincing testimony of Plitz and LaPLante, as well as Howell's mistaken impression that Hernandez worked for MDI, instead of for Barnhart. Plitz was persuasive in his testimony that a Barnhart employee would not use MDI's equipment, and that the work in which Hernandez was engaged did not require him to use a vacuum cleaner. As MDI's foreman, LaPlante was in the best position to know when the vacuum cleaner was brought to the worksite. He testified with convincing specificity regarding the scheduling for the equipment. LaPlante's detailed memory of the arrival of the vacuum cleaner, and his unwavering surety that Hernandez had never used it, is credited. Unlike Barnhart employees Plitz and Hernandez, LaPlante had no motivation in this hearing to minimize the amount of time the vacuum cleaner had been on site.

Howell's misunderstanding regarding whom Hernandez worked for on the project opens up the possibility he misunderstood other responses he received. Howell testified he conducted his interview with Hernandez on a balcony off the fourth floor of the BEQ Building. Howell noted at least ten employees in the vicinity who had access to the vacuum cleaner. The BEQ inspection was Howell's third inspection of the day on his third straight day of inspections. The constant activity of the worksite and the number of interviews Howell had conducted during the week may have contributed to his misunderstanding Hernandez's answers.

Plitz provided a reasonable explanation for Howell's beliefs:

> Q. Now, Mr. Howell's notes and his testimony are that Shane LaPlante said that, "Yes, this vacuum had been on the site since the beginning and had been used previously."
>
> Plitz: No. It–he may have been mistaken. He may have misconstrued how we had–we had been on the site for about a month. But I–
>
> Q. Well, what–what did you hear? Did you hear Mr. Howell ask Shane how long this vacuum had been on the property?

> Plitz: I remember him asking us both questions about it and asking us both, you know, when this had shown up.

(Tr. 546).

Plitz believes he and LaPlante were responding to Howell's question regarding when the BEQ renovation started (August 24), but Howell took their responses to mean that was the date the vacuum cleaner was brought onsite. This explanation appears to the court to be the most likely, and accounts for the confident demeanors of Howell, Plitz, and LaPlante when they each testified on this issue. The court credits the testimony of Plitz and LaPlante when they state the vacuum cleaner was not brought to the worksite until the morning of September 16, 2011.

Based on the record, it is determined the Secretary failed to establish the vacuum cleaner was on site prior to the day of Howell's inspection, and that Hernandez had used it in its violative state. The vacuum cleaner had only been on site for approximately two hours when Plitz and Howell first saw it. Plitz testified the wet chainsaw intended for cutting the concrete blocks was not yet on site. Plitz had no reasonable expectation that the vacuum cleaner would be used prior to the arrival of the wet chainsaw (Tr. 408-409). Therefore, Barnhart lacked either actual or constructive knowledge of the defective vacuum cleaner. Item 4 is vacated.

Item 5: Alleged Serious Violation of § 1926.501(b)(4)(ii)

The citation alleges:

> BEQ Building 52609 2nd, 3rd and 4th Floor Utility Corridors–On or about 16 SEP 09 and at times prior thereto, the controlling employer Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc., protected its employees from numerous floor holes measuring from 3 inches in diameter to 5 ¼ inches in diameter.

Section 1926.501(b)(4)(ii) provides:

> Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

(1) Applicability

The second, third, and fourth floor utility corridors of the BEQ Building were walking surfaces. Section 1926.501(b)(4)(ii) applies to the cited conditions.

(2) Compliance with the Terms of the Standard

As part of the demolition process, MDI had removed the utility pipes from the BEQ Building. This created numerous holes throughout the structure. Howell described the layout of the building:

> [O]n the perimeter of this long Bachelor Enlisted Quarters are rooms on each side. Between the two rooms is a utility corridor, and in that utility corridor various chaseways are there for ventilation systems, pipes, vent pipes, water, electrical conduit, and these type of things that would feed all the way from the first floor all the way to the fourth floor.
>
> And they'd have an identical footprint as far as the rooms on each level. They'd have an identical footprint as far as the utility corridor between them. And the hole pattern that would exist on the second, third, and fourth floor for the penetration of conduit pipes, and vents, and ventilation systems was an identical footprint as you went up.

(Tr. 89-90).

Howell took photographs showing several holes which ranged from 3 to 5¼ inches in diameter (Exhs. C-5a, C-5b, and C-5c). Howell noted some larger holes that had been covered (Tr. 226). Section 1926.500(b) defines a "hole" as "a gap or void 2 inches (5.1 cm) or more in its least dimension in a floor, roof, or other walking/working surface."

Barnhart concedes that there were uncovered holes in the BEQ Building (Tr. 28). Plitz testified the holes had been created approximately a week before Howell's inspection. He explained MDI was contractually obligated to cover the holes as soon as they were created. "Every hole they're supposed to protect immediately as soon as they get done pulling the pipes out of the openings" (Tr. 599). Plitz stated that he and Redger had discussed the need to cover the holes. Plitz ensured the largest holes, measuring 24 to 30 inches in diameter, were covered first, "because those are the ones I felt were obviously dangerous. Someone could actually fall into those, literally fall into them, could get injured" (Tr. 411). Plitz believed Redger wanted him to cover the holes in the living unit areas before covering the holes in the utility corridors, because more employees were working in the living unit areas (Tr. 412). Plitz estimated there were 2,000 holes in the living unit areas (Tr. 413).

Although it was MDI's contractual responsibility to cover the holes, Plitz assigned two Barnhart employees to assist in covering the holes in order to speed up the process. MDI

employees worked in the living unit areas, and Barnhart's employees worked in the utility corridors (Tr. 415). Plitz stated:

> I took the focus off the demo contractor's hands because he was so busy. I said, "I'll get my own laborers; we're taking care of the large holes in the chases cause those are our major hazard. I'm going to jump on those." Then we'll fall back and hit the smaller ones as we–but I wanted to get the larger ones first. I was going on a priorities kind of a set up or a priority–what was the most dangerous, I guess, is how I looked at it.

(Tr. 414).

Plitz had previously taped off the utility corridors with caution tape, but someone had taken it down by the day of the inspection (Tr. 424). When Howell discovered the holes in the course of his inspection, Redger became upset with Plitz, stating, "I thought I told you to cover those" (Tr. 425). The Secretary has established Barnhart failed to ensure its own employees working in the utility corridors were protected from tripping hazards created by the holes.

(3) Employee Access to Violative Condition

Plitz acknowledged the areas with exposed holes were not blocked off and all employees working in the BEQ Building had access to them (Tr. 423). Plitz stated, "Someone could trip on the hole" (Tr. 599). Employee access tot he uncovered holes is established.

(4) Employer Knowledge

Jason Plitz had actual knowledge of the continuing existence of the holes. Barnhart argues it reasonably relied on the expertise of MDI to cover the holes, and therefore should not be held liable for the violation. Barnhart cites *Sasser Electric and Manufacturing Co.*, 11 BNA OSHC 2133 (No. 82-0178, 1984), in support of this argument. In *Sasser*, the Commission held:

> In many situations in the workplace, it is natural for an employer to rely upon the specialist to perform work related to that specialty in accordance with OSHA standards. . . . [W]hen some of the work is performed by a specialist, an employer is justified in relying upon the specialist to protect against hazards related to the specialists's expertise so long as the reliance is reasonable and the employer has not reason to foresee that the work will be performed unsafely.

Id. at 2136.

Sasser is distinguishable from the instant case. Here, Plitz had actual knowledge that MDI was behind schedule in covering the holes. He knew he could not rely on MDI to cover the

holes, because he could see for himself on a daily basis that MDI was not getting the job done. Plitz had every "reason to foresee that the work [would] be performed unsafely." Plitz realized MDI had failed to cover the holes immediately upon removing the utility pipes. He went so far as to assign two of Barnhart's employees to assist in covering the holes.

Barnhart argues, "Plitz's reliance on MDI foreman LaPlante to cover and re-cover all of the holes was justified" (Barnhart's Brief, p. 15). The record demonstrates otherwise. MDI's failure to cover the holes immediately had been a topic of discussion between Redger and Plitz. Plitz had assigned two Barnhart employees to cover the holes a week prior to Howell's inspection. His reliance on MDI was not justified; in fact, he did not rely on MDI to cover the holes.

Plitz's knowledge is imputed to Barnhart. The Secretary has established that Barnhart, as both controlling and exposing employer, violated § 1926.500(b)(4)(ii). The open holes created a tripping hazard. Howell stated, "[O]ne could be walking and get their feet stuck in that hole and then if they tripped and fell, their foot would stay in one position. Their body would fall forward. They could suffer a broken ankle" (Tr. 102). Item 5 is properly classified as serious.

Item 6: Alleged Serious Violation of § 1926.502(d)(8)

The citation alleges:

> Roof Edge of the Four Story BEQ Building 52609–On or about 16 SEP 09 and at times prior thereto, the controlling contractor Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc., protected its employees from the hazard of falls and equipment failure. In plain view, Maximum Demolition, Inc., used the SafeWaze Thunderbolt 30 foot long self-retracting lifelines (SRL) in a horizontal application up to 15 feet away from the JLG lift (Rental # 240647/Model E 600A/Serial # 0300134002) which was used as an anchorage point for the SRL. According to the manufacturer's specifications for safe use of the SRL, which were on-site, the SRL can only be used in a vertical application within a 30 degree angle.

Section 1926.502(d)(8) provides:

> Horizontal lifelines shall be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system, which maintains a safety factor of at least two.

As Howell was walking along the fourth floor balcony, he observed an aerial lift with its basket raised next to the roof of the building, with no one in the basket. Howell looked up and

saw two lines attached to the aerial lift basket and extending to somewhere on the roof. From his position, Howell could not see anyone on the roof, but he could hear people working there (Tr. 108-110).

Howell testified:

> I could tell that they were at the edge of the roof. And I could tell that they were far enough away from the roof of they fell that they'd have a pendulum swing. And so at that point, I decided that I wanted to get a picture and see what they were doing.
>
> So I kind of led the way and I started walking to the staircase and quickly walked down the stairs and walked out away from the building, and then walked through a gate of the construction fences, because I had to get far enough away to see the activity. And as we were walking away from the structure, one of the members of the party yelled, "Hey" to the people up there. . . . [Plitz] was the one that yelled up to them.

(Tr. 111).

By the time Howell had walked to a location where he could view the roof, the two employees on the roof had returned to the lift basket. Howell asked them to come down to the ground. The two employees were Jesus Chavez and Luis Magana, who worked for MDI. They were wearing full body harnesses with attached self-retracting lifelines (SRLs) (Tr. 113, 118, 120).

Howell identified the lift as a JLG Aerial Lift 600A. The basket of the lift is 8 feet wide. The basket is equipped with an engineered anchorage point, to which the employees' SRLs were attached (Tr. 114).

Howell interviewed Chavez and Magana. They told him they were working on the roof, stripping facia, gutters, and facing from the building's eaves. The employees tied off to the anchorage point in the basket, and then climbed over the basket guardrails onto the roof. They were working approximately 15 feet from the basket when they heard Plitz yell (Tr. 121). Howell asked them to demonstrate (while on ground-level) how they climbed out of the basket to access the roof, and how far away from the basket they had walked. As the workers demonstrated these activities, Howell and Redger took photographs (Exhs. C-7A through C-7G).

Plitz testified that the original plan was for the MDI employees to perform the work while standing in the basket of the aerial lift. This method proved to be slow and inconvenient.

Plitz stated, "It was an awkward position . . . And they were having a hard time getting any leverage to get under it, and it was really difficult" (Tr, 434-435).

Plitz and LaPlante together devised an alternate plan in which the employees could perform the work while standing on the roof. Their plan was to bring the basket of the lift to the edge of the roof, and use the 8-foot long basket as a guardrail. In Plitz's conception, the workers would be confined to the area immediately in front of the basket:: "[I]f you draw an imaginary line perpendicular to the roof where the basket intercepted it, they could–they had to stay right in front of that–that guardrail, right directly in front of it" (Tr. 435). Plitz testified he yelled, "Hey," at the MDI employees during the inspection "[b]ecause I was mad that they were off to the side of this aerial lift" (Tr. 432).

Howell determined the BEQ Building was 40 feet high. The SRLs of the employees were extended at least 15 feet (Tr. 121). Howell testified that if the employees fell from the roof, they would fall in a pendulum swing that could result in striking either the aerial lift or the side of the building (Tr, 162).

(1) Applicability

Barnhart contends § 1926.502(d)(8) does not apply to the cited conditions. Section 1926.502(d)(8) requires that horizontal lifelines "shall be designed, installed, and used under the supervision of a qualified person[.]" Section 1926.500(b) provides (emphasis added):

> Lifeline means a component consisting of a flexible line . . . for connection to *anchorages at both ends* to stretch horizontally (horizontal lifeline), and which serves as a means of connecting other components of a personal fall arrest system to the anchorage.

Barnhart called J. Robert Harrell as a witness. Harrell owns and consults for Safety Management Services in San Diego, California. Harrell has taught as an Adjunct Professor at the University of California at San Diego's OSHA Training Institute since it was founded in 1991 (Exh. R-1; Tr. 805). The court recognized Harrell as a safety consultant expert (Tr. 869).

Harrell testified the MDI employees did not create a horizontal lifeline when they tied off their SRLs to the basket's anchorage point:

> [A] self-retracting lanyard is a separate piece of fall protection equipment. It is not designed to be a horizontal lifeline system, mainly because the casing is

> anchored to an anchorage or attached to an anchorage point, and the other end is attached to the dorsal D-ring on the back of the harness.
>
> With a lifeline, a lifeline is strung between two anchorage points and then you take your snap hook from your lanyard or you can attach an SRL to it, self-retracting lanyard, and snap into one of the rings that is on the horizontal lifeline.

(Tr. 878).

Based upon the § 1926.500(b) definition of "lifeline," it is clear that Chavez and Magana were not using, and did not intend to use, a horizontal lifeline as they worked on the roof of the BEQ Building. Rather, the workers were using the SRLs of their personal fall protection equipment to tie off to the basket's anchorage point. Section 1926.502(d)(8) does not apply to the fall protection system used by Chavez and Magana.

The Secretary did not move to amend Item 6 at the hearing. In her post-hearing brief, however, she moved "to amend the pleadings to conform to the proof offered at trial such that Citation 1, Item 6, alleges, in the alternative, a violation of 29 C.F.R. § 1926.502(d)(16)(iii)" (Secretary's Brief, p. 30).

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.

Barnhart filed an objection to this motion, citing Commission Rule § 2200.40(a). That Rule states:

> A motion shall not be included in another document, such as a brief or a petition for discretionary review, but shall be made in a separate document.

The Secretary responded with a request to be allowed to file a separate motion to amend , and a suggestion that the court amend the pleadings *sua sponte.* The court denies her request and declines to follow her suggestion.

In support of her original motion to amend, the Secretary cited Rule 15(b) of the Federal Rules of Civil Procedure, which provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A

> party may move–at any time, even after judgment–to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.

The Secretary cites *Southwestern Bell Telephone Company*, 6 BNA OSHC 2130 (No. 14761, 1978), in which the Commission affirmed the ALJ's decision to *sua sponte* amend the citation, finding the parties impliedly consented to trial of the requirements of the alternative standard. While the Commission noted that prejudice to the opposing party is a factor in determining whether an amendment should be granted, it found no demonstration of prejudice in that case. The Commission has held, "To determine whether a party has suffered prejudice, it is proper to look at whether the party had the opportunity to defend and whether it would have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992).

In the present case, it is possible Barnhart would have offered additional evidence if the company knew it was defending itself against a charge of violating § 1926.502(d)(16)(iii). Although the issue of falling more than six feet was alluded to, it was not the main focus of the original cited standard. The standard originally cited addresses the qualifications of the supervisor who designed the horizontal lifeline. The alternative standard addresses the rigging for personal fall arrest systems.

Howell specifically targeted LaPLante for failing to design an adequate horizontal lifeline:

> Howell: The regulation is 29 C.F.R. § 1926.502(d)(8). I felt that this was most on point because this was a lifeline being used in a horizontal fashion that was not installed by a qualified person. It wasn't installed in a method that is recognized by the standard for a horizontal lifeline.
>
> Q. Shane LaPlante, you didn't recognize him as a qualified person?
>
> Howell: No. Because a qualified person, if they're going to use a horizontal lifeline system, would design it in accordance with the parameters of ensuring that it would be an anchorage point on two points, and then that they would be tied off to this horizontal lifeline, and being able to approach a fall hazard so they wouldn't fall more than six feet from, you know, off the edge of the roof if they fell.

(Tr. 173-174),

It is concluded that Barnhart would suffer prejudice if the court amended the citation to allege an alternative standard. The Secretary's motion is denied.[3]

[3] Even if the court allowed the amendment, the Secretary would not prevail on Item 6. She failed to establish Plitz had knowledge of the violative activity. Plitz testified he did not observe Chavez and Magana on the roof. The duration they worked outside the parameters of width of the basket is unknown. The exposure of the employees may have been momentary. Even with the exercise of reasonable diligence, Plitz cannot be expected to detect every violation of short duration.

Item 7: Alleged Serious Violation of § 1926.502(d)(21)

The citation alleges:

> BEQ Building 52609–On or about 16 SEP 09 and at times prior thereto, the controlling employer Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc., properly inspected fall protection equipment before it was used. One employee wore a body harness that was too large for him. Two employees used a self retracting lanyard designed for vertical use in a horizontal application. Two employees utilized an aerial lift as an anchorage point. The anchorage point was designed to be used by personnel working inside of the aerial lift's basket. Employees were potentially exposed to free falls of 15 feet or more which may have subjected the aerial lift to being tipped over. Barnhart, Inc., had an opportunity to discover and correct these hazards.

Section 1926.502(d)(21) provides:

> Personal fall arrest systems shall be inspected prior to each use for wear, damage, and other deterioration, and defective components shall be removed from service.

(1) Applicability

Section 1926.502(d)(21) applies to personal fall arrest systems. MDI employees were working on a roof, exposed to a 40 foot fall. They were wearing personal fall arrest equipment. The cited standard applies.

(2) Compliance with the Terms of the Standard

After Chavez and Magana came down from the roof, Howell inspected their personal fall arrest equipment. He determined the full body harness worn by Chavez was too large for him. Howell stated, "I was able to basically, without lot of effort, pull the straps from his shoulders down across his arms, indicating that if he fell head first he had an opportunity to come out of his harness somewhat" (Tr, 182).

Howell took photographs of Chavez wearing the loose harness (Exhs. C-8A, C-8B, and C-8C). The photographs clearly show the body harness did not fit Chavez properly.

Nevertheless, Chavez's ill-fitting body harness is not evidence Barnhart or MDI was in violation of § 1926.502(d)(21). That standard requires employers to inspect fall protection gear for "wear, damage, and other deterioration, and/or defective components." The Secretary has only asserted the harness did not fit Chavez, not that it showed any signs of wear, damage, or deterioration. Nor did the Secretary show the body harness was defective. "Defective" means "imperfect or

faulty" (*New Oxford American Dictionary*, 2nd Ed., 2005). Here, the harness was neither imperfect nor faulty; had it been properly adjusted on a larger worker, it would have been appropriate safety gear.

The citation also alleges, "Two employees used a self-retracting lanyard designated for vertical use in a horizontal application." As with the full body harness, nothing in this description establishes the SRLs used by the workers were worn, damaged, deteriorated, or defective. Improper use of equipment is not the same as using damaged or defective equipment. Section 1926.502(d)(21) requires the employer to remove from service any component found to be worn, damaged, etc. It would not be necessary in the present case to remove the body harness or the SRLs from service. They could be kept in service if used in appropriate circumstances.

The Secretary is attempting to expand the reach of § 1926..502(d)(21) beyond the plain meaning of its language. The evidence she adduced with regard to Chavez's body harness and the use of the SRLs does not establish Barnhart failed to comply with § 1926.502(d)(21).

Item 7 is vacated.

Items 8a and 8b: Alleged Violations of §§ 1926.503(a)(1) and (b)(1)

The citation alleges:

> (Item 8a): BEQ Building 52609–On or about 16 SEP 09 and at times prior thereto, the controlling employer Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc., properly trained employees to wear, use and inspect fall protection equipment.
> (Item 8b): BEQ Building 52609–On or about 16 SEP 09 and at times prior thereto, the controlling employer Barnhart, Inc., failed to ensure that its sub-contractor Maximum Demolition, Inc.'s training for employees who were exposed to fall hazards was certified in writing to ensure safe utilization of fall protection equipment such as but not limited to full body harnesses and self retracting lines.

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.

Section 1926.503(b)(1) provides:

> The employer shall verify compliance with paragraph (a) of this section by preparing a written certification record. The written certification record shall contain the name or other identity of the employee trained, the date(s) of the training, and the signature of the person who conducted the training or the signature of the employer. If the employer relies on training conducted by another employer or completed prior to the effective date of this section, the certification record shall indicate the date the employer determined the prior training was adequate rather than the date of the actual training.

(1) Applicability

The cited standards apply to employers whose employees may be exposed to fall hazards. MDI's employees were working at the edge of a roof, exposed to a 40 foot fall. Sections 1926.503(a)(1) and (b)(1) apply to the cited conditions.

(2) Compliance with the Terms of the Standard Item 8a

Section 1926.503(a)(1) requires the employer to provide training programs "for each employee who might be exposed to fall hazards." Plitz testified LaPLante told him Chavez and Magana had received fall safety training. Plitz later learned this was not true. Counsel for Barnhart stated, "The employees from Maximum Demolition were not trained. Our superintendent on the job was told they were and he took Maximum at their word" (Tr. 29).

The Secretary contends Barnhart, as the controlling employer, should have ensured that MDI's employees had been trained. The court disagrees. Safety expert Harrell testified, "The employer who hires the employee is responsible for providing the training. Either the employer can provide it themselves if they have a qualified trainer, or they can go through an independent third party" (Tr. 886). Harrell stated that, in his expert opinion, the general contractor is not responsible for training the subcontractor's employees (Tr. 887).

Harrell's opinion is consistent with the Commission's assessment: "[I]n many instances it may not be feasible, because of an employer's lack of expertise, or wasteful, without necessarily resulting in the best achievement of safety for all employees, to require the contracting employer to duplicate the efforts of the specialist." *Sasser*, 11 BNA *at* 2136. Here, requiring Barnhart to provide training in fall protection would place an undue burden on the general contractor. MDI was in the best position to train its employees. Barnhart is entitled to rely on the expertise of a demolition contractor in training its own employees.

The Secretary has not established a violation of § 1926.503(a)(1)

Item 8b

Section 1926.503(b)(1) requires the employer to verify compliance with § 1926.503(a)(1) by preparing a written certification report. Plitz asked LaPlante for documentation establishing that Chavez and Magana had been trained. Plitz wanted the documentation before MDI began work on the site. LaPlante told Plitz he would get the paperwork to him. Plitz never received any documentation (Tr. 558-559).

LaPlante admitted he told Plitz he would deliver the paperwork to him, but failed to do so (Tr. 716). When Plitz repeated his request for training documentation, LaPlante put him off, saying, "I'm working on it" (Tr. 716).

As the controlling employer, Barnhart had a responsibility to verify the safety training of its subcontractor's employees. This subitem differs from 8a. Here, the controlling employer is not required to actually provide safety training to its subcontractor's employees; it is only required to verify training took place. Requiring verification is a relatively simple task. If the training has been completed, the subcontractor should be able to forward the verifying documents to the general contractor quickly. If the general contractor does not receive the requested documentation, it should raise a red flag.

Plitz asked MDI at least twice for the training documentation. Twice he was told it was coming, yet he never received it. This should have put Plitz on notice there was a problem with the safety training for Chavez and Magana. In fact, neither employee had been trained, as Plitz admitted at the hearing (Tr. 474). Plitz told Howell it was his fault he did not confirm the employees had been trained (Tr. 198).

The Secretary has established Barnhart failed to comply with the terms of § 1926.503(b)(1).

(3) Employee Access to Violative Condition

Chavez and Magana were exposed to the hazard of falling from the roof of the BEQ Building. Their lack of safety training showed in Chavez's improperly fitted body harness and the employees' use of SRL's exceeding 6 feet. The Secretary has established Chavez and Magana were exposed to fall hazards.

(4) Employer Knowledge

Plitz had actual knowledge of the lack of written verification of training for Chavez and Magana. He asked LaPlante for the verification at least twice. Plitz originally wanted the documentation before MDI began work on the project. By the time of Howell's inspection, MDI had been working on the site for four weeks. The Secretary has established Barnhart, through Plitz, knew of the violative conduct.

Item 8b is affirmed. The violation is serious. The requirements of § 1926.503(b)(1) provide an important safeguard against untrained employees engaging in hazardous conduct. The standard exists to help prevent the precise problem demonstrated in the instant case. A general contractor cannot rely on verbal assurances from its subcontractors that required training took place. By failing to follow through on his requests for training documentation, Plitz contributed to the exposure of untrained employees to a potentially deadly fall hazard.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

Barnhart employs between 300 and 400 employees (Tr, 487). The company has no history of OSHA violations for the three years prior to the September 16, 2009, inspection (Tr.69). Barnhart demonstrated good faith. Howell stated the company had a good written program (Tr. 68).

"Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Item 3–§ 1926.405(a)(2)(ii)(I): The gravity of this violation is high. The flexible cords had been draped over the hurricane fence, exposed to its sharp projections, for four weeks at the time of the inspection. Numerous employees passed by the cords on the fence on a daily basis. A penalty of $ 1,875.00 is assessed.

Item 5–§ 1926.501(b)(4)(ii): The gravity of this violation is moderate. Barnhart ensured the largest holes were covered first. The company was in the process of covering up the remaining smaller holes. Only two employees were working in the utility corridors where the small holes were, and they were the employees assigned to cover the holes. Given the small dimensions of the uncovered holes, the tripping hazards created were minimal. A penalty of $ 500.00 is assessed.

Item 8b–§ 1926.503(b)(1): The gravity of this violation is high. Lack of verification of training resulted in two untrained employees working at the edge of a 40 foot high roof. Both were wearing SRLs that were too long, exposing them to dangerous pendulum swings if they fell. Chavez was wearing a body harness that was too large, exposing him to the risk of falling the entire 40 feet to the ground if he fell and slipped through the harness. A penalty of $ 1,000.00 is assessed.

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. Item 1 of the Citation, alleging a serious violation of § 1926.20(b)(2), is vacated, and no penalty is assessed;

2. Item 2 of the Citation, alleging a serious violation of § 1926.403(b)(2), was withdrawn by the Secretary. Item 2 is vacated and no penalty is assessed;

3. Item 3 of the Citation, alleging a serious violation of 1926.405(a)(2)(ii)(I), is affirmed, and a penalty of $ 1,875.00 is assessed;

4. Item 4 of the Citation, alleging a serious violation of § 1926.405(g)(2)(iv), is vacated, and no penalty is assessed;

5. Item 5 of the Citation, alleging a serious violation of § 1926.501(b)(4)(ii), is affirmed, and a penalty of $ 500.00 is assessed;

6. Item 6 of the Citation, alleging a serious violation of § 1926.502(d)(8), is vacated, and no penalty is assessed;

7. Item 7 of the Citation, alleging a serious violation of § 1926.502(d)(21), is vacated, and no penalty is assessed;

8. Item 8a of the Citation, alleging a serious violation of § 1926.503(a)(1), is vacated, and no penalty is assessed; and

9. Item 8b of the Citation, alleging a serious violation of § 1926.503(b)(1), is affirmed, and a penalty of $ 1,000.00 is assessed.

/s/ Ken S. Welsch

KEN S. WELSCH
Judge

Date: May 20, 2011