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. LAKE COUNTY SEWER CO., INC., Respondent.	OSHRC Docket No. 07-1786

APPEARANCES:

Paul Spanos, Trial Attorney; Benjamin T. Chinni, Associate Regional Solicitor; Joan E. Gestrin, Regional Solicitor; Gregory F. Jacob, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

John P. O'Donnell, Esq.; Lyons & O'Donnell Co., L.P.A., Painesville, OH
For the Respondent

REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission on review is a decision by Administrative Law Judge Stephen J. Simko Jr., in which the judge affirmed two serious citation items issued to Lake County Sewer Co., Inc. ("Lake") and assessed a total penalty of $2,100. Lake argues, as a threshold matter, that it did not have an employment relationship with the workers exposed to the cited conditions. For the following reasons, we set aside the judge's decision and remand this case for further proceedings consistent with this opinion.

Background

Lake is in the business of inspecting, certifying and rehabilitating sewers using "no dig" technology. In 2004, the city of Willowick, Ohio, hired Lake to repair and replace sewer laterals. On December 31, 2004, Lake's chief operating officer, Richard Marucci, subcontracted with Brennan Excavating, Inc. ("Brennan Excavating"), to perform the excavation work. On May 10, 2007, Brennan Excavating's owner, Gary Brennan, and two laborers—Brooks Stanek and Scott

Kazsuk—were working on an excavation of a sewer lateral located at East 324th Street in Willowick when the excavation collapsed, burying Stanek inside the 8-foot trench. Stanek was rescued and taken to a hospital where he spent the night.

Following an inspection of the worksite, the Occupational Safety and Health Administration ("OSHA") issued Lake a three-item serious citation for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, with a total proposed penalty of $2,700. After a hearing was held and the Secretary withdrew one of the citation items, the judge issued a decision in which he concluded that "the Secretary properly cited Lake as an employer of the workers in the excavation." He then affirmed the two remaining citation items and assessed a total penalty of $2,100.

Discussion

In determining whether the Secretary has met her burden of proving that a cited entity is an employer, the Commission relies upon the test set forth by the Supreme Court in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992) ("*Darden*"). The Court identified the factors for determining whether an employment relationship exists as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323-324. "While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers." *Allstate Painting & Contracting*, 21 BNA OSHC 1033, 1035, 2005 CCH OSHD ¶ 32,804, p. 52,506 (No. 97-1631, 2005) (citing *Don Davis*, 19 BNA OSHC 1477, 2001 CCH OSHD ¶ 32,402 (No. 96-1378, 2001)).

In his decision, the judge applied the *Darden* test and made a number of factual findings to support his conclusion that Lake was properly cited as an employer of the three workers. He found, *inter alia*, that (1) the employees considered Lake to be their employer; (2) Lake paid the workers; (3) Lake could hire and fire the workers; (4) Lake determined the size of the crew and its start time; and (5) Lake assigned additional projects and provided the materials and equipment for the work.

The judge did not, however, explicitly resolve conflicting testimony given by Marucci, Brennan, Stanek, and Kazsuk regarding key *Darden* factors, such as who had the authority to supervise the excavation work and who had the authority to hire and fire the workers. At the hearing, Brennan testified that Marucci supervised the workers by making daily visits to the worksite to "check up [and] see how things [we]re going and ask [the workers] if [they] needed anything." Stanek and Kazsuk testified that Marucci made periodic visits to the job sites and had the authority to tell them where to work and what to do. Marucci, on the other hand, testified that he never visited the worksite, had no knowledge of who worked there besides Brennan, had no input regarding who worked at the site, and did not know where the workers reported to work. Marucci also testified that he lacked the authority to hire or fire the two laborers, while Brennan testified that Marucci did have such authority. In addition, the judge's decision did not address other record evidence that may be relevant, including: (1) testimony from Brennan and Stanek that the tools and equipment used at the worksite belonged to Brennan Excavating; (2) testimony from Marucci that Lake contracted with Brennan Excavating because Lake is not in the excavation business; (3) testimony from Stanek and Kazsuk that they had worked for Brennan Excavating for a number of years prior to this project; and (4) evidence regarding the award of workmen's compensation benefits to Stanek.

Under these circumstances, we find it appropriate to remand this case to the judge to allow him an opportunity to fully consider this evidence and further explain the basis for his conclusion about Lake's employment relationship with the exposed workers. On remand, the judge should address all conflicting testimony, as well as any other record evidence relevant to this issue, making credibility findings where necessary. *See Agra Erectors Inc.*, 19 BNA OSHC 1063, 1066, 2000 CCH OSHD ¶ 32,175, p. 48,607 (No. 98-0866, 2000) (remanding case to judge to make credibility determinations regarding conflicting testimony because judge who heard the case is best qualified to make such findings).

Accordingly, we set aside the judge's decision and remand for further proceedings consistent with this opinion.

SO ORDERED.

__/s/_____
Horace A. Thompson III
Chairman

__/s/_____
Thomasina V. Rogers
Commissioner

Dated: February 2, 2009

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Lake County Sewer Company, Respondent.	OSHRC Docket No. **07-1786**

Appearances:

Paul Spanos, Esquire, Cleveland, Ohio
For Complainant

John P. O'Donnell, Esquire,Painesville, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Lake County Sewer Company, Inc. (Lake), inspects, certifies, and rehabilitates sewers. On May 10, 2007, an excavation collapsed at Lake's worksite in Willowick, Ohio, seriously injuring Brooks Stanek, who was working in the excavation. Occupational Safety and Health Administration (OSHA) compliance officer Joseph Schwarz inspected the site later that day. Based upon his inspection, the Secretary issued a citation to Lake On October 5, 2007.

The citation alleges serious violations of three subsections of the construction standards of the Occupational Safety and Health Act of 1970 (Act):

Item 1 alleges a serious violation of 29 C. F. R. § 1926.100(a) for failing to ensure employees used protective helmets while working in areas where there was a possible danger of a head injury. The Secretary proposes a penalty of $ 600.00 for this item.

Item 2 alleges a serious violation of 29 C. F. R. § 1926.651(c)(2) for failing to provide a ladder or other safe means of egress from an excavation more than 4 feet deep and more than 25 feet long. The Secretary proposed a penalty of $ 600.00 for this item.

Item 3 alleges a serious violation of 29 C. F. R. § 1926.652(a)(1), for failing to provide an adequate protective system for employees working in an excavation. The Secretary proposes a penalty of $ 1,500.00 for this item.

The court held a hearing in this matter on May 7, 2008, in Cleveland, Ohio. The primary issue at the hearing was whether the Secretary properly cited Lake as the employer in this case. Lake contends the workers at the excavation site, including Stanek, were employed by Brennan Excavating, Inc. Lake argues it had subcontracted Brennan Excavating to perform the excavation work at the site, and that Lake was not in an employment relationship with the workers in the excavation. The Secretary contends Lake exercised sufficient control over the excavation workers to create an employment relationship under the Act.

The parties have filed post-hearing briefs. In her brief, the Secretary withdraws Item 2 of the Citation (Secretary's brief, p. 2).

For the reasons discussed below, the court determines the Secretary properly cited Lake as an employer of the workers in the excavation. Items 1 and 3 of the Citation are affirmed, and penalties of $ 600.00 and $ 1,500.00, respectively, are assessed.

Facts

Richard Marucci is the majority shareholder and chief operating officer of Lake. In 2004, Lake won a competitive bid for a project to repair and replace sewer laterals for the City of Willowick, Ohio.

Gary Brennan is the owner of Brennan Excavating, Inc. On December 31, 2004, Marucci and Gary Brennan signed a "subcontract agreement" designating Lake as "Contractor" and "Brennan Sewer & Concrete"[1] as "Subcontractor." The contract states in pertinent part (Exh. R-1):

> The Contractor has entered into a contract with the Subcontractor (as attached) for the construction of the project to be constructed on property (site) under the Contractor's control, in accordance with the Drawings, Plans and Specifications as prepared and that are part of the Contract with the Owner and are now made a part of the Agreement.
>
> The Subcontractor hereby agrees to furnish all materials, tools, fuel, machinery and equipment, shop and erection drawings, samples, labor under

[1]The company name "Brennan Sewer & Concrete" appears only in the subcontract agreement. All witnesses referred to the company owned by Gary Brennan as "Brennan Excavating." No explanation has been given for the discrepancy.

supervision satisfactory to the Owner, transportation and utilities to complete the following part or parts of the Project, including all work incidental thereto[.]

* * *

II PAYMENT

A. ALL WORK

1. Payment will be made per Monthly Progress Payment Applications as approved by The City of Willowick for work performed to date as follows: After combining total dollars spent on labor equipment and materials and deducting the sum from the total amount invoiced, per month, the remaining sum will be split 50% between Brennan Concrete & Sewer and Lake County Sewer Company, Inc.

Lake completed the project referred to in this subcontract in 2006. Sometime after the completion of the sewer laterals listed in the original bid, the City and Lake extended the contract for the calendar year 2006 under the same terms and conditions. The City provided Lake with a new list of sewer laterals for repair or replacement. Lake did not execute a new written subcontract with Brennan Sewer & Concrete.

On May 10, 2007, Gary Brennan, Brooks Stanek, and Scott Kazsuk were working on the excavation of a sewer lateral on East 324th Street in Willowick. Stanek was in an 8 foot deep excavation repairing a lateral line. Brennan was at the edge of the excavation handing down materials and equipment to Stanek. One side of the excavation collapsed, pinning Stanek against the other side. Brennan and others at the site helped dig Stanek out of the dirt. Stanek was hospitalized overnight. He sustained a contusion on his chest.

Captain Tim Bynane of the local fire department contacted OSHA about the collapse. Compliance officer Joseph Schwarz inspected the site that day. By the time he arrived at the site, the excavation had been backfilled. Captain Bynane provided Schwarz with information about the excavation, including its dimensions, and told Schwarz there were no protective helmets, ladders, or a protective system at the site. No photos were taken before the excavation was backfilled. Schwarz subsequently interviewed Marucci, Brennan, and Stanek.

The Secretary determined Lake was the employer of the workers in the excavation. She issued the instant citation to Lake on October 5, 2007.

Was Lake an Employer within the Meaning of the Act?

Lake contends the three workers at the excavation the day of the accident were employees of Brennan Excavating. Gary Brennan, not surprisingly, agrees with the Secretary that he and his fellow workers were employees of Lake at that time, and not Brennan Excavating.

Because "employee" in the Act is circularly defined as "an employee of an employer who is employed in a business of his employer which affects commerce," 29 U.S.C. § 652, the Supreme Court has looked beyond the statutory language for guidance in interpreting this and other statutes dealing with employees.

In *Nationwide Mutual Insurance Co. v. Darden*, 503 US 326 (1992), the Court held that the term "employee" in a federal statute should be interpreted under common law principles unless Congress clearly indicates otherwise. In *Darden*, the Court cited its discussion of the general common law of agency in *Community for Creative Non-Violence v. Reid*, 490 US 730, 751-752 (1989), in which it held that the determinative factor is "the hiring party's right to control the manner and means by which the product is accomplished." The Supreme Court listed the following as factors in determining whether a worker is an employer's employee (*Creative Non-Violence*, 490 US at 751-752):

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

In *Loomis Cabinet Co.*, 15 BNA OSHC 1635 (No. 88-2012, 1992), the Review Commission acknowledged the Supreme Court's treatment of the issue in *Darden* and noted that many of the factors considered in that case also appear in the Commission's own "economic realities test." The Commission stated that it primarily relies on who has control over the work environment such that abatement of hazards can be obtained. "Thus, the inquiry central to both tests is the question of whether the alleged employer controls the workplace." *Loomis*, 15 BNA at 1638.

The Commission first set out its "economic realities" test in *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703 (No. 14801, 1978), in which it stated that it had considered a

number of factors when determining whether workers were employees of a specific employer, including:

1. Whom do the workers consider their employer?
2. Who pays the workers' wages?
3. Who has the responsibility to control the workers?
4. Does the alleged employer have the power to control the workers?
5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7. How are the workers' wages established?

The Commission in *Loomis* reiterated this test.

The Commission in *Don Davis*, 19 BNA OSHC 1477, 1482 (No. 96-1378, 2001), offers a slightly more specific analysis of control in determining the employment issue:

> Control over the "manner and means of accomplishing the work" must include control over the *workers* and not just the results of their work. One who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker's pay or work hours cannot be said to control the worker.

Lake owner Richard Marucci determined how many employees were needed to work on the excavation. Gary Brennan stated he was Lake's supervisor on the project. Brennan had the authority to hire and fire employees, as did Marucci. Brennan kept track of the workers' hours on a job sheet and turned the sheet in to Lake when it was completed. Brennan stated Marucci instructed him specifically to hire Stanek and Kazsuk to work on the excavation at issue. Marucci set the time (7:30 a.m.) the workers were supposed to show up each day. Brennan stated Marucci yelled at him if he was not on time in the morning: "My work habits, he didn't really like too much. I mean, I would talk to him every morning, and if I wasn't on the job on time, I would have to argue with him for the rest of the day" (Tr. 75-76).

Lake provided trench boxes on the excavation sites. Marucci owned a backhoe used to excavate the trenches. Purchases of materials, including pipe, concrete, and asphalt were made on Lake's account. Stanek kept track of the purchases and collected the receipts, then dropped them

off at Lake's office. If the City of Willowick placed change work orders with Lake, Lake assigned the additional projects to Gary Brennan. Brennan, Stanek, and Kazsuk each testified he considered Lake to be his employer on May 10, 2007.

The Commission has held that a significant indicator of control over the workers is who pays them. *Allstate Painting and Contracting Co., Inc.*, 21 BNA OSHC 1033 (Nos. 97-1631 & 97-1727, 2005). Brennan, Stanek, and Kazsuk were all on Lake's payroll on May 10, 2007.

In 2005 (the period covered under the subcontract agreement), Brennan Excavating paid the workers. This would seem to indicate that the excavation workers were employees of Brennan Excavating in 2005 and 2006, and that after that project was completed, Lake hired them directly to work on the additional sewer laterals the City of Willowick wanted repaired.

Lake disputes this. Marucci testified that, initially, Gary Brennan was paying the excavation workers' payroll. In Spring 2006 (after the original project was completed), Lake placed the workers (including Brennan) on its payroll. Marucci testified as to the reasons for doing this (Tr. 220-221):

> Marucci: In, I'm going to say approximately mid-May or April, one of Gary's employees, Tom Stropki, approached me about his fringe benefits and overtime.
>
> Q. Was his complaint that he wasn't getting them?
>
> Marucci: Yes.
>
> Q. Did you talk to Brennan about this?
>
> Marucci: I did.
>
> Q. What was the reason that things had not gone–as far as payroll submittal and the submittal to the City, why did they change from '05 to '06?
>
> Marucci: Gary just wasn't paying the guys, and then if he did pay them, he wasn't paying them correctly.
>
> Q. Was it at this point still incumbent upon you as the general contractor to submit proper pay estimates?
>
> Marucci: I had to submit certified payroll records.
>
> Q. And, if you didn't?

Marucci: We don't get paid.

Q. As a result of what you've just described, tell me what action you took.

Marucci: Well, I had a meeting with the guys, and when they complained about overtime . . . we just said we will take the payroll and start paying you guys. Turn in the hours correctly, and we'll make sure you guys get paid correctly.

Exhibits C-10 and C-11 are certified payroll reports from 2006 submitted by Lake to the City of Willowick for the laterals project. They identify Brennan and Stanek as employees of Lake. Marucci handled the 2007 payroll for Lake the same way.

The certified payroll reports distinguish between a general/prime contractor and an employer. A company may choose to label itself as a general/prime contractor and not an employer. Lake's certified payroll reports identify it as both a general/prime contractor and an employer. The certified payroll reports identify an hourly wage for employees, as well as employee benefits.

Marucci acknowledged the payroll reports certify that the persons named in it are employees of the listed employer: "They're employees on this particular job" (Tr. 242). When asked why Lake lists itself as both the prime/general contractor and the employer if it is not the employer, Marucci answered, "That's just how these forms are" (Tr. 252).

The certified payroll records weigh heavily in favor of determining Lake is the employer of the excavation workers. So does the tax treatment of the workers. Lake sent Brennan a W-2 form in 2007 for work done in 2006. Stanek completed a W-4 form before he began working on the sewer laterals in 2006, naming Lake as his employer. His paycheck from Lake was directly deposited into his checking account. Stanek's W-2 form for 2006 lists Lake as his employer (Exh. C-6).

Lake (through Marucci) could hire and fire the excavation workers, determine the size of the crew and its start time, assign additional projects, and provide material and equipment. Lake paid the workers. They workers considered Lake their employer.

The record establishes the excavation workers were employees of Lake. Lake employed Gary Brennan as its supervisor at the time of the OSHA inspection. The Secretary properly cited Lake for the alleged violations.

The Citation

The Secretary has the burden of proving the violation by a preponderance of the evidence.

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

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

It is undisputed the cited construction standards apply to the cited conditions in this case.

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.100(a)

The Secretary alleges Lake violated 29 C. F. R. § 1926.100(a), which provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The citation states:

> Lake County Sewer Co. worksite, Willowick, Ohio: During a new lateral sewer installation activities, the employer did not ensure that the employees were utilizing proper head protection while working underneath and around the backhoe.

Both Brennan and Stanek testified that none of the employees working at the excavation were wearing protective helmets the day of the cave-in. Schwarz explained why he recommended the Secretary cite Lake for this condition (Tr. 151):

> I was concerned with, first, employees working in an excavation underneath, around or in close proximity of the backhoe and the bucket of the backhoe and also being eight feet deep, if there was a collapse, it was deep enough where the collapse might hit them on the head, or if the spoil pile was not far enough away, some rock could slide down and fall in the trench.

Stanek was working in the excavation, exposed to falling objects. Brennan was Lake's supervisor on the site. "When a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proving knowledge without having to demonstrate any inadequacy in the employer's safety program." *Superior Electric Co*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996). As supervisor, Brennan's knowledge of the violative condition is imputed to Lake.

In its brief, Lake argues the Secretary failed to prove any of the employees were working in the excavation while the backhoe was in operation. The citation does not allege the backhoe was in operation while employees worked in proximity to it. Furthermore, Lake attempts to litigate in its brief what it conceded at the hearing. In his opening statement, counsel for Lake stated (Tr. 6-7):

> The only issue in this case is whether Gary Brennan, Brooks Stanek and Scott Kazsuk were employees of Brennan Excavating Corporation. . . . So I believe at the close of this, Your Honor, the evidence will show that there were, in fact, the violations that Mr. Spanos alleged, but the violations should be properly attributable to Brennan Excavating, Incorporated.

The Secretary has established Lake committed a serious violation of 29 C. F. R. § 1926.100(a).

Item 3: Alleged Serious Violation of 29 C. F. R. § 1926.652(a)(1)

The Secretary alleges Lake violated 29 C. F. R. § 1926.652(a)(1), which provides:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:
>
> (i) Excavations are made entirely in stable rock; or
>
> (ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The citation states:

> Lake County Sewer Co. worksite, Willowick, Ohio: During a new lateral sewer line installation activities, the employer did not ensure that the employees were utilizing proper cave-in protection approximately 8 feet deep.

Captain Bynane told Schwarz the excavation was 8 feet deep. Brennan and Stanek also stated the excavation was 8 feet deep. The soil was previously disturbed. The employees were repairing a previously installed sewer lateral. The excavation was not sloped or shored, or otherwise provided with a protective system. Although Lake owns trench boxes, no trench box was on the site. Stanek was exposed to the hazard of a cave-in, and in fact was hospitalized overnight for injuries sustained in an actual cave-in. Brennan was aware there was no protective system in the excavation. His knowledge is imputed to Lake.

Despite Lake's opening statement conceding the alleged violations existed, in its brief Lake argues the Secretary failed to prove there was no protective system in the excavation. Lake makes an erroneous statement regarding this argument: "The only testimony offered on this issue

was Brennan's and Stanek's negative responses to Mr. Spanos's questions as to whether there was a trench box in the excavation. (T.p. 17;97)" (Lake's brief, p. 10). A review of the record demonstrates Lake is wholly mistaken on this point. The Secretary's examination of supervisor Brennan went beyond the use of a trench box. Brennan's testimony is unequivocal and was not rebutted or disputed by any other witness or evidence (Tr. 16-17):

Q. On May 10th of 2007, was there any protective system in the excavation?

Brennan: No, there wasn't.

Q. Was there a trench box in the excavation?

Brennan: No, there wasn't.

Q. Were the side walls of the excavation sloped at all?

Brennan: No.

Q. Was there any system of benching in the excavation?

Brennan: No.

The Secretary has established Lake committed a serious violation of 29 C. F. R. § 1926.652(a)(1).

Penalty Determination

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

The record does not indicate the number of employees employed by Lake. Three employees of Respondent worked at this site. Schwarz gave the company the maximum discount for size. The Secretary had not cited Lake in the previous three years. No evidence of bad faith was adduced at the hearing. The gravity of both violations is high. Working in an 8 foot deep excavation without a protective system or a hard hat exposes employees to serious injuries or death. It is determined the appropriate penalty for Item 1 is $600.00. The appropriate penalty for Item 3 is $ 1,500.00.

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 29 C. F. R. § 1926.100(a), is affirmed, and a penalty of $ 600.00 is assessed;

2. Item 2 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.651(c)(2), is vacated and no penalty is assessed; and

3. Item 3 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.652(a)(1), is affirmed, and a penalty of $ 1,500.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: September 29, 2008