
SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 96-0126
	:	
SUPERIOR RIGGING & ERECTING CO.,	:	
	:	
Respondent.	:	

ORDER

This matter is before the Commission on a Direction for Review entered by former Commissioner Stuart E. Weisberg on September 11, 2000. The parties have now filed a Settlement Stipulation and Joint Motion disposing of all remaining issues in this case. In view of the Settlement Stipulation, we conclude that no further review by the Commission is warranted. Accordingly, the Settlement Stipulation is approved and the Joint Motion is granted.

We incorporate the Settlement Stipulation and Joint Motion into this Order and we set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Settlement Stipulation. This is the final order of the Commission.

Date: May 15, 2001

/s/ _____
 Thomasina V. Rogers
 Chairman

/s/ _____
 Ross Eisenbrey
 Commissioner

96-0126

NOTICE IS GIVEN TO THE FOLLOWING:

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Cynthia Welch Brown, Associate Regional Solicitor
Kathleen G. Henderson, Attorney
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David E. Jones, Esq.
Ogletree, Deakins, Nash,
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600 Peachtree Street, Suite 2100
Atlanta, GA 30308

Ken S. Welsch
Occupational Safety and Health
Review Commission
100 Alabama Street, S.W.
Building 1924, Room 2R90
Atlanta, GA 30303-3104

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELAINE L. CHAO,
Secretary of Labor,
United States Department of Labor,
Complainant,

OSHRC DOCKET NO. 96-126

v.

SUPERIOR RIGGING & ERECTING
CO.,
Respondent.

SETTLEMENT STIPULATION AND JOINT MOTION

COME NOW, the complainant, Elaine L. Chao, Secretary of Labor, United States Department of Labor [hereinafter "the Secretary"] and the respondent, Superior Rigging & Erecting Co., and its successors [hereinafter "the respondent"], collectively referred to hereinafter as "the parties", submit this Settlement Stipulation and Joint Motion pursuant to 29 C.F.R. § 2200.100.

This agreement specifies the terms of settlement for Item No. 3 of Citation No. I and Item No. I of Citation No. 2 of the Citation and Notification of Penalty, issued pursuant to OSHA Inspection No. 106102106 on December 14, 1995 [hereinafter "the Citation and Notification of Penalty"] as amended thereafter, thus disposing of all remaining issues in this case as follows:

1(a). The Secretary, without objection by the respondent, hereby amends Item No. I of Citation No. 2 of the Citation and Notification of Penalty so that the cited standard for the alleged violative conditions is 29 C.F.R. § 1926.451 (a)(4) and so that the alleged alternative

violation of 29 C.F.R. § 1926.501 (b) is dismissed.

1 (b). The parties agree that Item Nos. 1,4a, 4b,4c,4d, and 5 of Citation No. 1 of the Citation and Notification of Penalty were vacated pursuant to the decision issued by The Honorable Ken Welsch, Administrative Law Judge, Occupational Safety and Health Review Commission (OSHRC), in this matter on February 16,1998, and that neither party has appealed or will appeal the decision vacating those items.

1(c). The parties agree that Item No. 2 of Citation No. I of the Citation and Notification of Penalty was affirmed pursuant to the decision issued by the OSHRC in this matter on April 5, 2000, and that neither party has appealed or will appeal the decision affirming that item.

1(d). The Secretary, without objection by the respondent, hereby amends the Citation and Notification of Penalty so that the proposed penalties are as follows:

Citation No.	Item No.	Penalty Amount
1	1	Vacated
1	2	\$ 7,000.00
1	3	\$ 5,600.00
1	4a, b, c, & d	Vacated
1	5	Vacated
2	1	\$ 56,000.00
Total		\$ 68,600.00

2. Respondent hereby withdraws its Notice of Contest to Item No. 3 of

Citation No. 1 and to Item No. 1 of Citation No. 2 of the Citation and Notification of Penalty, as amended by this Settlement Stipulation and Joint Motion. Respondent states that this withdrawal was not induced by a promise of any other party hereto except as may appear herein.

3. For all purposes other than actions arising directly under the Occupational Safety and Health Act of 1970 (the "Act"), respondent denies any violation of the Act.

4. Respondent represents that it will make payment of the penalty in the amount of \$ 68,600.00 by certified or cashier's check or money order made out to "U.S. Department of Labor - OSHA" and that it will deliver such payment to the following address no later than May 31, 2001:

Lana Graves, Area Director
OSHA
3737 Government Boulevard, Suite 100
Mobile, Alabama 36693

5. Affected employees herein are represented by the Ironworkers Local 387, 109 Selig Drive, S.W., Atlanta, Georgia 30336.

6. Each party hereby agrees to bear its own fees (including attorney fees) and other expenses incurred by such party in connection with any stage of this proceeding including, but not limited to, attorney's fees which may be available under the Equal Access to Justice Act, as amended.

7. Respondent certifies that on 4/27, 2001, notice of the foregoing has been or will be given to employees by posting a true copy (as executed by Respondent) of this Settlement Stipulation and Joint Motion, in accordance with Commission's

Rule 7(g) [29 C.F.R. 2200.7(g)], and by mailing an additional such copy to the above named union.

ACCORDINGLY, the parties agree that the Occupational Safety and Health Review Commission may issue an order appropriate for final disposition of this matter as aforesaid.

For the Respondent:

SUPERIOR RIGGING & ERECTING CO.,
and its successors

By: /s/ _____

David E. Jones

Attorney

Ogletree, Deakins, Nash, Smoak,
& Stewart, P.C.

Dated: April 27, 2001.

OSHA Inspection No. 106102106

SOL Case No. 0000222

For the Secretary:

JUDITH KRAMER

Acting Solicitor of Labor

JAYLYNN K. FORTNEY

Regional Solicitor

CYNTHIA WELCH BROWN

Associate Regional Solicitor

KATHLEEN G. HENDERSON

Attorney

By: /s/ _____

Kathleen G. Henderson

Attorney

Attorneys for the Secretary of Labor,
United States Department of Labor.

Dated: May 4 , 2001.

CERTIFICATE OF SERVICE

I certify that the foregoing "Settlement Stipulation And Joint Motion" was served on this 4th day of May, 2001, by mailing a true copy thereof, by postage prepaid first class mail addressed as follows:

David E. Jones, Esquire
Ogletree, Deakins, Nash,
Smoak & Stewart
600 Peachtree Street, Suite 2100
Atlanta, Georgia 30308

_____/s/_____
Kathleen G. Henderson
Attorney

SOL Case No. 0000222

OSHA Inspection No. 106102106

Secretary of Labor,
Complainant,
v.
Superior Rigging & Erecting Co.,
Respondent.

OSHRC Docket No. **96-0126**

Briefs on Remand filed by:

Kathleen G. Henderson, Esq.
Office of the Solicitor
P.C.
U. S. Department of Labor
Birmingham, Alabama
For Complainant

David E. Jones, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart,
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION ON REMAND

On April 5, 2000, the Review Commission remanded the captioned case for further proceedings. The Commission directed reconsideration of item 1 of citation no. 2, which had been affirmed as a repeated violation of § 1926.451(a)(4) in the judge's decision. Section 1926.451(a)(4) requires the installation of guardrails on scaffolds more than 10 feet above the ground or floor. The Commission gave further alternative directions, dependent upon the outcome of the reconsideration.

The parties filed briefs on remand. Having reconsidered item 1 of citation no. 2, the court finds again, for the reasons set out below, that Superior Rigging & Erecting Co. (Superior) committed a repeated violation of 29 C.F.R. § 1926.451(a)(4) by failing to install guardrails on a scaffold it had erected in an elevator shaft.

The judge's initial decision had also affirmed a violation of item 3 of citation no. 1, which alleged a violation of 29 C.F.R. § 1926.502(d)(23). That standard prohibits tying off a personal fall arrest system (PFAS) to a guardrail system. The Commission directed that this item be vacated if item 1 of citation no. 2 was reaffirmed. Because item 1 of citation no. 2 is affirmed, item 3 of citation no. 1 is vacated at the direction of the Commission.

Item 1 of Citation No. 2

This item involves a platform erected inside the elevator shaft of a 24-story office building in Montgomery, Alabama. Superior Rigging & Erecting Co. (Superior) was in the process of installing elevator sill angles at the shaft openings. Some of the employees installed the sill angles by lying on their stomachs on the floor of the building and reaching over into the elevator shaft while welding. Several of the employees were not tall enough to do this comfortably. To enable these employees to weld the bottom of the sill angles, Superior installed a plywood platform inside the elevator shaft and set a ladder on it from which the employees could work. Superior constructed the platform by laying two 4x4s across two I-beams in the elevator shaft, and then setting a 4x8 sheet of plywood across the 4x4s.

The Secretary alleged initially that Superior failed to provide fall protection for employees working from the platform in violation of § 29 C.F.R. 1926.501(b)(1), which provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, or personal fall arrest systems.

At the hearing, the Secretary moved to amend this item to allege in the alternative a repeated violation of 29 C.F.R. § 1926.451(a)(4), which at the time of the inspection provided:

Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor[.] . . . Scaffolds 4 feet to 10 feet in heights, having a minimum horizontal dimension in either direction of less than 45 inches shall have standard guardrails installed on all open sides and ends of the platforms.

The Secretary's motion to amend was granted over Superior's objection. The record was left open to take additional witnesses at the conclusion of the hearing to allow Superior to adduce rebuttal evidence. Superior chose not to do so. Section 1926.451(a)(4) was found to be the applicable standard over § 1926.501(b). The judge's decision found Superior to be in repeated violation of the standard.

On review, the Commission found "no *procedural* reason to deny an amendment of the charge to allege that the platform was a scaffold requiring guardrails" (Commission Decision, p. 15, emphasis in original). Despite this finding, the Commission remanded the case "for

reconsideration [of] that portion of the judge’s decision finding that Superior committed a repeated violation by failing to comply with section 1926.451(a)(4)” (Commission Decision, p. 17).

Reconsideration of the finding that Superior violated § 1926.451(a)(4) results in the same conclusion: Section 1926.451(a)(4), and not § 1926.501(b)(1), is the applicable standard and Superior violated it. Section 1926.452(b)(27) defines “scaffold” and § 1926.500(b) defines “walking/working surface.” As the original decision sets out, Superior’s platform met the definition of a scaffold and not of a walking/working surface.

The only new grounds for reconsideration asserted by Superior is that OSHA would not have cited it for violating § 1926.451(a)(4) if the inspection had occurred after August 30, 1996. OSHA issued its final rule on Subpart L--Scaffolds on August 30, 1996. 61 Fed. Reg. 46,026 (1996). Section 1926.451(a)(4) no longer exists as it was cited in the case against Superior. Superior argues in its brief on remand that § 1926.501(b) should be the applicable standard because § 1926.451(a)(4) has been superseded. This argument is rejected. This court’s concern is with the standards that were in effect at the time of the alleged violation. The fact that a subsequently enacted standard altered the requirements for scaffolds does not relieve an employer of its obligation to comply with the currently operative standard.

The original finding of a repeated violation also stands. At the time of the violation in the present case, there was a Commission final order against Superior for a violation of § 1926.451(e)(10). That violation presented the hazard of falling off a scaffold, which is the same hazard presented in the instant case. The penalty determination for this item remains the same as stated in the original decision.

Reconsideration of Item 3 of Citation No. 1

In its Decision and Remand, the Commission notes that the court’s decision did not make findings as to whether the anchorage used to tie off the PFAS was “capable of supporting at least 5,000 pounds . . . per employee attached” as required by § 1926.502(d)(15). The court now makes such findings.

Huber, Hunt & Nichols, the general contractor at the site, had installed a horizontal perimeter cable. The perimeter cable served two purposes: it acted as a guardrail for employees working at the elevator shaft opening on the floor where the cable was installed, and it was an

anchorage to which employees working below could tie off. The Secretary cited Superior for violating § 1926.502(d)(23) because employees were tying their PFASs to the cable guardrail system. Superior argued that the cable guardrail came under an exception to the cited standard, which was specified in § 1926.502(d)(15). The judge’s decision held that Superior failed to establish that the cable guardrail fit within the exception to § 1926.502(d)(23) and found Superior in violation of that standard.

Section 1926.502(d)(23) prohibits attaching a personal fall arrest system (PFAS) to a guardrail system “except as specified in other subparts of this part.” Exceptions to the standard allow the attachment of a PFAS to a guardrail system under certain conditions. Section 1926.502(d)(15) provides:

Anchorage used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2kN) per employee attached, or shall be designed, installed, and used as follows:

- (i) as part of a complete fall arrest system which maintains a safety factor of at least two; and
- (ii) under the supervision of a qualified person.

Section 1926.500(b) defines “anchorage” as “a secure point of attachment for lifelines, lanyards or deceleration devices.” The note to § 1926.502(d)(16) listing performance criteria for fall arrest systems specifies that if a fall arrest system meets the criteria set forth in Appendix C to subpart M, and the employee using the system has a combined body and tool weight of less than 310 pounds, then the fall arrest system will be considered to be in compliance with § 1926.502(d)(16).

Appendix C at § II(h)(ii) provides that (emphasis added):

there will be [at times] a need to devise an anchor point from existing structures. Examples of what might be appropriate anchor points are . . . *guardrails* or railings if they have been designed for use as an anchor point.

The Commission found that the judge erroneously considered only the second part of the disjunctive § 1926.502(d)(15), requiring the design and installation of the guardrail system to be supervised by a qualified person, and failed to consider the first part requiring the supportive capability of the anchorages to be at least 5,000 pounds. The amount of force the anchorage could

withstand will now be considered.

Superior argues that its method of allowing employees to attach their PFASs to the guardrail system fits within the exception to § 1926.502(d)(23) by complying with § 1926.502(d)(15). “A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.” *C. J. Hughes Construction, Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). Superior acknowledges that it has the burden of proving that its method of fall protection met the requirements of the exception to § 1926.502(d)(23) (Superior’s brief on remand, p. 3).

Superior must establish that the guardrail system (the anchorage or secure point of attachment) was capable of supporting at least 5,000 pounds per employee attached. The parties agree that the guardrail system consisted of five separate components: the eye bolts, the anchors, the turnbuckles, the wire rope clips, and the wire cable. The parties agree that Superior must show that each component was capable of supporting at least 5,000 pounds per employee attached. If Superior fails to show that any one of the components could withstand that force, Superior will fail to establish compliance with § 1926.502.¹

¹ Superior mentions in its brief on remand that management personnel from Huber, Hunt & Nichols told Superior’s management personnel that the cable guardrail was an acceptable fall arrest anchorage under OSHA’s regulations. Herschel Lynch, Superior’s general foreman and superintendent, testified that he did not attempt to confirm this information because, “It’s not my obligation to do the test” (Tr. 611).

As discussed in the judge’s original decision, the installation (but not the design) of the guardrail system was supervised by a carpenter foreman who was not a qualified person within the meaning of § 1926.502. Under these circumstances it was not reasonable for Superior to rely upon representations made by another employer that the guardrail system was an acceptable anchorage for PFASs. Superior asked for no documentation supporting the claim that the system could withstand 5,000 pounds per employee. Superior did not inquire as to the qualifications of the people who designed and installed the system.

Superior cannot evade the obligations of the construction standards by accepting at face value a casual assurance that a system that its employees will be using is safe. Superior had a duty to take further steps to confirm that the system complied with the requirements of § 1926.502.

(1) The eye bolts

Doug Underwood was the field superintendent of Huber, Hunt & Nichols. He purchased various components of the guardrail system, but did not oversee its design or installation (Tr. 1405, 1420). Underwood testified that he purchased some eye bolts, also known as hoist eyes, for the guardrail system. One end of the wire cable is passed through an eye bolt and then clamped with a cable clamp (Tr. 1429). Superior contends that Exhibit R-26 contains the specifications for the eye bolts used. Exhibit R-26 consists of two pages of specifications for eye bolts manufactured by Chicago Machinery and one page of specifications for eye bolts manufactured by Forged M Machinery. Underwood did not identify which manufacturer's eye bolts were used in the guardrail system.

Carpenter foreman Mannus "Doc" Foster also ordered component parts of the guardrail system. Foster stated that he used ½-inch eye bolts from Ram Tool (Tr. 1477, 1482, 1507). Foster actually supervised the installation of the cable system and was in a better position to know the size and make of the eye bolts. Superior adduced no evidence of the specifications for eye bolts manufactured by Ram Tool.

Superior asserts in its brief on remand, with no citation to the testimony, that the guardrail system used two ½-inch Chicago Machinery eye bolts each with a maximum load limit of 2,600 pounds. The specifications for the Chicago Machinery eye bolts (which Superior has failed to show were the eye bolts used) give two different maximum loads for ½-inch eye bolts. One maximum load limit is given as 2,600 pounds and the other is given as 2,200 pounds. Superior contends that using two eye bolts, each with a maximum load limit of 2,600 pounds, to support a single cable resulted in a maximum load limit for the eye bolts of 5,200 pounds per employee attached. Superior has adduced no evidence supporting its contention that using two eye bolts to support a single cable would double the maximum load capacity of the eye bolts.

Furthermore, Superior has failed to establish that only one employee attached his PFAS to the guardrail system at a time. The day of the accident, Superior employees Freddie Payne and Leonard Whitlow were working together installing sill angles on the 15th and 16th floors (Tr. 697, 936-938). Superior had no work rule prohibiting more than one employee from attaching his PFAS to the guardrail system at a time. If more than one employee was attached at a time, the guardrail system would have to be capable of supporting an additional 5,000 pounds per employee.

Superior has failed to establish that the eye bolts used in the guardrail system were capable of supporting at least 5,000 pounds per employee attached. The most credible evidence shows that it is more likely than not that the guardrail system used eye bolts manufactured by Ram Tool, for which Superior adduced no specifications. Without specifications for the eye bolts actually used, Superior cannot establish that the eye bolts could support at least 5,000 pounds.

(2) The Turnbuckles and Wire Rope Clips

Superior also failed to establish that the turnbuckles and wire rope clips were capable of supporting at least 5,000 pounds. Exhibit R-27 is a copy of the manufacturer's specifications for the turnbuckles used in the guardrail system. Although Superior claims that ½-inch by 6-inch turnbuckles were used, the record does not identify the size of the turnbuckles (Tr. 1439). Exhibit R-25 contains two sets of specifications for wire rope clips made by two different manufacturers, Fist Grip Clips and Chicago. Although Superior claims in its brief on remand that "Underwood testified that HH&N used Chicago brand wire rope clips made of drop forged steel" (p. 7), the record does not support this identification (Tr. 1427-1428):

Q.: Do you recall whether or not the wire rope clips that were used were drop forge steel or malleable iron wire rope clips?

Underwood: I do not specifically know, but I believe that Steve marked that for us to be the product that he sent to us, the drop forge steel.

Q.: And, again, at the time that Huber, Hunt and Nichols was considering the components of the safety cable system, did you refer to catalogs that you had on various wire rope clips?

Underwood: Yes, we did.

Q.: And, did you have discussions with Ram Tool and representatives of Ram Tool regarding the application of wire rope clips in that safety cable system?

Underwood: Yes, we did.

Q.: And, do the two specification sheets for wire rope clips represent wire rope clips that were used in the installation of the safety cables at the RSA Tower?

Underwood: Yes, I believe they are.

The specification sheets contained in Exhibit R-25 do not provide any information as to the supportive weight capability of the clips.

Superior conducted a test of a guardrail system whose components Superior claims had equivalent specifications as those used in the RSA Tower guardrail system. Superior hired Law Engineering to analyze and provide a written report on a load test of the system's support capacity (Exh. R-31; Tr. 1607). The results of this test are given no weight. The size of the wire rope clips and the distance between the columns into which the guardrail system was set differed from those of the RSA Tower guardrail system (Tr. 1618, 1624-1625).

Superior has failed to establish that the guardrail system was capable of supporting at least 5,000 pounds per employee attached.

Item 3 of Citation No. 1: The Commission's Remand Order

The Commission's remand order states: "If the judge determines that Superior's employees should have been protected by guardrails [under § 1926.451(a)(4)], then we direct that item 3 of citation no. 1 be vacated" (Commission Decision, p. 17).

The Commission conflates the issue of employees tied off to the cable guardrail and working on the floor at the edge of elevator shaft with the issue of employees working from the unguarded platform. The Commission states that the judge's finding that Superior was required to install guardrails on the platform in the elevator shaft (Commission Decision, p. 15, emphasis added):

create[s] an inconsistency with item 3 of the serious citation, in which the parties have litigated issues concerning the use of personal fall arrest equipment. If it is the Secretary's position--as item 3 of the serious citation indicates--that the *employees on the scaffold platform* would have adequate fall protection if the PFAS had been rigged, secured, and tested in the manner required by section 1926.502(d), then to require the installation of guardrails as an additional means of fall protection would be contrary to the terms of section 1926.501(b)(1), which clearly provides that guardrails and a PFAS are alternative and equivalent means of fall protection.

This court respectfully suggests that the Commission's understanding of the Secretary's position as stated in the above-quoted section is contrary to the record, the judge's decision, and the arguments of both the Secretary and Superior.

Superior's employees were installing sill angles in one of two ways: welding from a ladder placed on the platform inside the elevator shaft or positioning themselves on the floor of the building outside the shaft (Tr. 721-722). The employees who worked from the floor were exposed to a fall hazard and they were instructed to tie off to the perimeter cable guardrail that is at issue in item 3 of citation no. 1. Guardrails installed on the platform from which they were not working afforded them no fall protection.

The judge's decision notes (Court's Decision, p.8):

The citation [for item 3 of citation no. 1] alleges, "Employees were allowed to attach personal fall arrest equipment to guardrails." It is undisputed that Superior's employees tied off their lanyards to the cable guardrails located at the elevator shafts when they were installing the sill angles.

Nothing in the citation or the judge's decision limits the exposed employees to the ones that were working from the platform.

The Secretary cites numerous instances in the record where witnesses testified that Superior's employees had tied off to the perimeter cable and were not working from the platform inside the elevator shaft (Secretary's brief on remand, pp. 32-36). Superior itself acknowledges that "Lendon Whitlow [the deceased employee] and Brian Stokes tied off to the horizontal cable while not on the platform in the elevator shaft" (Superior's brief, p. 24). Superior was quite specific on this point (Superior's brief, p. 17):

Lendon Whitlow would tie off to the cable when welding sills, and position himself on his stomach, on the floor outside the opening to the elevator shaft. Tr. 1063-1064, 1441. He never worked off the platform. Tr. 722. Brian Stokes, a certified welder and journeyman ironworker, testified that he tied off to the horizontal cable while positioned with the cable between himself and the opening to the elevator shaft. Tr. 1123, 1127, 1134-1135. Brian Bullard, and apprentice (Tr. 683) who did not weld, but cleaned embed plates to which sills would be attached (Tr. 1160), worked with the cable between himself and the opening of the elevator shaft, and did not work from the platform. Tr. 1161.

Contrary to what the Commission asserts in its decision, citing Superior under § 1926.502(d)(23) (item 3 of citation no. 1) for tying off to a cable guardrail and also citing Superior under § 1926.451(a)(4) (item 1 of citation no. 2) for failing to install guardrails on a scaffold is not duplicative. Employees working from the floors at the edge of the elevator shaft were using a potentially inadequate PFAS, and item 3 of citation no. 1 is the only item that

addresses that potentially violative condition. However, the court is specifically directed by the Commission to vacate item 3 of citation no. 1, if the court affirmed item 1 of citation no. 2. The Commission has long considered its judges bound to follow Commission rules and precedents. *Gindy Manufacturing Co.*, 1 BNA OSHC 1717 (No. 5708-P, 1974).

**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 ON REMAND

Based upon the foregoing decision, it is ORDERED that

1. Item 1 of citation no. 2, alleging a repeated violation of § 1926.451(a)(4), is affirmed and a penalty of \$70,000.00 is assessed; and
2. Item 3 of citation no. 1, alleging a serious violation of § 1926.502(d)(23), is vacated as directed by the Commission and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: August 3, 2000

