United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Ingram Plastering and Company, Inc., Respondent.	OSHRC Docket No. **02-0173** **EZ**

Appearances:

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

Douglas W. Ingram, Esq., Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Ingram Plastering and Company, Inc. (IP), is a small contractor engaged in exterior stucco and interior plastering work. On November 30, 2001, IP began work installing exterior stucco around the roof eaves of the two-story BankPlus building in Jackson, Mississippi. Based on the observation of the worksite by an Occupational Safety and Health Administration (OSHA) discrimination inspector on November 30, 2001, a referral inspection was conducted by OSHA compliance officer (CO) Colleen K. D. Darrell on December 4 and 7, 2001. As a result of this inspection, IP was issued serious and repeat citations on January 8, 2002.[1] IP timely filed a notice of contest.

Citation 1, Item 1, alleges a serious violation of 29 C. F. R. § 1926.451(b)(1) for failing to fully plank or deck all working levels of scaffolding; and Item 2 alleges a serious violation of 29

[1] The Secretary's motion to amend the citations to reflect the dates of the alleged violations to be November 30 and December 7, 2001, and the height of the scaffolding to be 22-24 feet are granted (Tr. 9, 288). IP is not prejudiced by the amendments. The parties do not dispute the dates of inspection and the height of scaffolding.

C. F. R. 1926.451(f)(3) for failing to have a competent person inspect the scaffolding for visible defects before each work shift and after any occurrence which could affect the scaffold's structural integrity. The penalty for each serious violation is $1,400.00.

Citation 2, Item 1, alleges a repeat violation of 29 C. F. R. § 1926.100(a) for failing to protect employees exposed to overhead hazards by wearing hard hats; and Item 2 alleges a repeat violation of 29 C. F. R. § 1926.451(g)(1)(vii) for failing to provide fall protection for employees working on scaffolding more than 10 feet above the ground. The total penalty for the repeat violations is $13,000.00.

The case was designated for E-Z trial procedures under 29 C. F. R. § 2200.200, *et seq.* The hearing was held on April 25-26, 2002, in Jackson, Mississippi. IP stipulates jurisdiction and coverage. IP was represented by attorney Douglas W. Ingram, father of Martin and Roman Ingram, president and vice-president respectively, of IP. Attorney Ingram has no capacity in IP.

IP denies that it violated the scaffolding standards because it lacked knowledge of the violations. The scaffolding was erected by a subcontractor. IP asserts the affirmative defense of unpreventable employee misconduct as to the hard hat violation.

For the following reasons, IP's lack of knowledge and employee misconduct defenses are rejected, the violations are affirmed, and a total penalty of $10,800.00 is assessed..

Background

IP is a small construction company specializing in stucco and plastering. Its office is in Jackson, Mississippi, and it does business throughout the state. IP has been in business for 20 years and was incorporated as Ingram Plastering and Company, Inc., in 1999 (Tr. 21). At the time of the inspection, IP had a total of 9 employees, including Martin Ingram, the president; his brother Roman Ingram, the vice-president and foreman; and his wife, Christine Ingram, the office manager. The remaining employees are plasterers, called "mechanics" by IP, and laborers who assist the mechanics.

In November, 2001, H & P Construction hired IP to install exterior stucco around the roof eaves of the 2-story BankPlus building under construction in Jackson, Mississippi. The job involved first, hanging an exterior fiberglass sheetrock, called dens glass, then applying styrofoam primace,

which is a base coat adhesive, and installing styrofoam shapes, mesh, and an exterior insulation finish system (Exhs. C-1, C-9; Tr. 25, 29).

IP rented scaffolding from Direct Scaffolding, who erected tower scaffolding up to the cornice work and completely around the BankPlus building (Tr. 243). According to Chris Reichle, manager and partner of Direct Scaffolding, the height of each scaffolding section was 6 feet 4 inches for a total height of 22 feet 3 inches to 23 feet 3 inches (depending on the level of the ground) (Tr. 259, 260). Direct Scaffolding finished erecting the scaffolding on Monday, November 26, 2001, and turned it over to IP (Tr. 255). Reichle testified that the completed scaffolding was fully decked and guardrailed at the top level (Tr. 255).

IP began work on Friday, November 30, 2001. When Roman Ingram arrived at 7:00 a.m., there were 6 employees on site: Martin Ingram; mechanics David Matthews, Todd Craft, and Robert Davenport; and laborers Bruce Warren and Walter Mayberry (Tr. 27-29, 104, 279). Everyone was unloading work materials from a delivery truck (Tr. 27). After a short time on site, Martin Ingram left the jobsite, followed by Roman Ingram at approximately 7:30 – 7:45 a.m. Before he left, Roman Ingram instructed the employees to finish unloading the truck and to start work (Tr. 280, 283). After unloading the truck, the employees began installing the dens glass under the roof eaves (Exh. C-1). When foreman Roman Ingram is not on site, no one is left in charge (Tr. 284).

Around 11:00 a.m. that same day, OSHA discrimination inspector Johnny O. McDowell was driving by the BankPlus construction site while running errands. McDowell observed that employees were working on scaffolding over 10 feet high without fall protection (Tr. 119). He stopped his car at a service station across the street from the BankPlus building and took photographs of the employees and the site for about 10 minutes (Exh. C-1, Photos 1, 2; Exh. C-9). After finishing his errands, McDowell returned around 12:50 p.m. and took additional photographs for another 10 minutes (Exhs. C-1, C-9; Tr. 132). He returned to the OSHA office and made a safety referral (Tr. 128).

On December 4, 2001, CO Darrell inspected the BankPlus worksite. She met with Barry Cook, superintendent for the general contractor H & P Construction (Tr. 160). No one from IP was at the worksite because they were waiting for supplies to be delivered. Cook telephoned Martin

Ingram, who came to the site along with Keith Tisdale of Direct Scaffolding. CO Darrell held an opening conference with them.

CO Darrell returned to the site on December 7, 2001, in order to interview IP employees who were returning to work that day. IP employees were installing styrofoam shapes (Exh. C-1, Photo 4). Martin Ingram and other IP employees were dismantling scaffolding on the rear of the building where they had finished the stucco work (Tr. 171). The contract between IP and Direct Scaffolding provided that IP would dismantle the scaffolding after completing work on a section of the building so that the bricklayers could begin their work (Tr. 110).

DISCUSSION

Alleged Violations

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard. 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

IP does not dispute the applicability of the construction standards to its work. Also, it is undisputed that IP employees were exposed to the violative conditions.

Alleged Serious Violation of 29 C. F. R. § 1926.451(b)(1)

The citation alleges that IP failed to provide personal fall protection to employees who were working on a single manufactured plankboard on a scaffold which was not guarded with standard guardrails. Section 1926.451(b)(1) provides, in pertinent part:

> (b) *Scaffold platform construction.* (1) Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports.

According to CO Darrell, the violation is based on the conditions observed on November 30, 2001 (Exh. C-1, Photo 1; Exh. C-9, Photo 8). OSHA discrimination inspector McDowell observed

an employee on the ground passing up dens glass panels to an employee on the first level of the scaffold (6 feet 3 inches high), who in turn passed it up to an employee on the second level (12 feet 3 inches high), then up to an employee on the top level (Tr. 123). The employees were standing on one plank or pic board which was 18 inches wide (Exh. C-9, Photo 8; Tr. 125, 169). The work levels were not fully planked.

IP does not dispute that employees were standing on work levels that were not fully planked. IP contends that it had no knowledge of the unsafe conditions of the scaffold because neither Martin nor Roman Ingram was on the worksite on November 30, 2001, when employees were on the scaffold.

Knowledge

The test for knowledge is whether "the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Service,* 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

On November 30, 2001, when the Ingrams left the worksite, the employees were unloading the delivery truck. Roman Ingram told them to start work after the truck was unloaded. Neither Ingram was there when the employees began work on the scaffold. There is no evidence that either Ingram looked at or examined the scaffolding before they left the worksite. IP lacked actual knowledge that employees were working on scaffolding that was not fully planked.

An employer who lacks actual knowledge can nevertheless be charged with constructive knowledge. Constructive knowledge involves the exercise of reasonable diligence by the employer. "Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees." *N & N Contractors, Inc.,* 18 BNA OSHA 2121, 2123 (No. 96-0606, 2000), *aff'd.* 255 F.3d 122 (4th Cir. 2001). Reasonable diligence also requires that an employer "make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work." *Automatic Sprinkler Corporation of America,* 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). *See also Texas A. C. A., Inc.,*17 BNA OSHC 1048, 1050 (No. 91-3467, 1995). Specifically, an employer must "determine what hazards exist or may arise during the work" and "must then give specific and appropriate instructions to prevent exposure to unsafe conditions." *Automatic Sprinkler* at 1387.

In essence, an employer is obligated to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence. *Pride Oil Well Service*, *supra*, at 1814.

With the exercise of reasonable diligence, IP could have discovered that the scaffolding had only 1 plank instead of 2 planks, forcing employees to work on an 18 inch platform as much as 23 feet above the ground. IP failed to examine and inspect the scaffold prior to starting work and failed to adequately supervise the employees while they were on the scaffold. IP failed to give specific, appropriate instructions to its employees to prevent exposing them to the danger of falling from a scaffold that was not fully planked. There is no showing that IP trained its employees to recognize the hazard of working on a scaffold. IP's safety program, which states that employees "be familiar with standard scaffold equipment," did not specifically address hazards involved in working on scaffolding (Exh. C-2). Accordingly, IP should have known that the scaffolding was not fully planked.

Therefore, the violation of 29 C. F. R. § 1926.451(b)(1) is affirmed.

Serious Classification

Under § 17(k) of the Occupational Safety and Health Act (Act), a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition and the employer knew or should have known, with the exercise of reasonable diligence, of the presence of the unsafe condition. 29 U.S.C. § 666(k).

IP's violation of § 1926.451(b)(1) is serious because an employee could have fallen from a scaffold that was not fully planked. IP's employees were working at heights of 6 to 22 feet above the ground. A fall from that height would likely result in serious injury or death.

Alleged Serious Violation of 29 C. F. R. § 1926.451(f)(3)

The citation alleges that IP failed to have a scaffold, used by its employees, inspected by a competent person. Section 1926.451(f)(3) provides:

> (f) *Use*. (3) Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

Section 1926.450(b) defines a competent person:

> *Competent person* means 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.

Although Direct Scaffolding erected the scaffolding and its competent person inspected it before turning it over to IP on November 26, 2001, IP did not inspect the scaffolding on November 30 and December 7, 2001, before employees began work on those days. The arrangement between IP and Direct Scaffolding did not provide for scaffold inspections by Direct Scaffolding's competent person during IP's work on it (Tr. 109).

At the time of the OSHA inspection, no one at IP was qualified as a competent person.[2] Martin Ingram admits that no one from IP inspected the scaffolding after November 26, 2001 (Tr. 108, 220).

The violation of 29 C. F. R. § 1926.451(f)(3) is affirmed. Failure to have a competent person inspect a scaffold daily is a serious violation. Serious injury or death is the likely result if an employee falls because of defective scaffolding.

Alleged Repeat Violation of 29 C. F. R. § 1926.100(a)

The citation alleges that IP failed to have employees, who were exposed to overhead hazards, wear hard hats while working on scaffolding passing materials from ground level to the top of the scaffolding and while roofing work was being performed above them. Section 1926.100(a) 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.

Discrimination inspector McDowell saw IP employees on November 30, 2001, working without hard hats and exposed to overhead hazards from materials passed up and used on the scaffolding and from the roofers above them (Exh. C-1, Photo 1, Exh. C-9, Photos 8, 9; Tr. 120). Also, CO Darrell observed IP employees installing styrofoam shapes on December 7, 2001, without their hard hats (Tr. 226). Martin Ingram admitted that employees did not always wear their hard hats (Tr. 112).

[2] Since the inspection, all IP employees have taken a competent person course in scaffolding (Tr. 50).

IP contends that employees cannot wear their hard hats when they are working under the eaves because the hat will fall off. IP did not present any evidence that it was not possible to use a chin strap on the hard hat. CO Darrell testified that a chin strap is effective in keeping a hard hat on when bending over to work (Tr. 152). Also, the employees observed by McDowell were not working under the eaves.

A violation of 29 C. F. R. § 1926.100(a) is established.

Unpreventable Employee Misconduct Defense

IP asserts the affirmative defense of unpreventable employee misconduct because it had a safety rule that employees should wear their hard hats.

In order to establish the affirmative defense of employee misconduct, an employer must show:

> (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated the rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

The employer must first show that it has established work rules designed to implement the requirements of the standard. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994). IP had a hard hat requirement, and this rule was reiterated at the Monday morning safety meetings. However, there is nothing specifically addressing hard hats in IP's written safety program (Exh. C-2).

The second requirement to prove the affirmative defense is that an employer must show that it has adequately communicated the rules to its employees. At the Monday morning meeting, IP did tell employees to wear their hard hats. Employee Matthews stated that IP is "strict about the hard hats" (Tr. 265). Nevertheless, employees did not always wear their hard hats. It was permissible for them to take their hats off when working under the eaves. Also, such instruction was ineffective, as evident by the failure of the 5 employees on site on November 30, 2001, to wear hard hats (Exhs. C-1, C-9).

Third, an employer must show that it has taken steps to discover violations. "Effective implementation of a safety program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" *Propellex Corp.,* 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999). It is clear that IP employees were not wearing their hard hats all the time and were disobeying the hard hat rule. IP did not show that it made a diligent effort to discover violations of its hard hat rule.

Finally, the employer must effectively enforce the rules when violations have been discovered. "To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rules violations occurred." *GEM Industrial, Inc.,* 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996). "Evidence of verbal reprimands alone suggests an ineffective disciplinary system." *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd. without published opinion,* 106 F.3d 401 (6th Cir. 1997). In this case, employees were not disciplined for not wearing their hard hats (Tr. 275). IP did not present any evidence of a formal discipline program consisting of increasingly harsher discipline measures, such as verbal warnings, written warnings, work suspension, and termination.

Therefore, IP's employee misconduct defense is rejected because it has not established that it adequately communicated the hard hat rule, that it took steps to discover the violations, and that it enforced the rule. The violation of 29 C. F. R. § 1926.100(a) is affirmed.

Repeat Classification

Under the Commission's long-stated test, a repeat violation under § 17(a) of the Act, 29 U.S.C. § 666(a), occurs if the Secretary shows "a Commission final order against the same employer for a substantially similar violation." *Potlatch Corporation,* 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity "by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing." *Monitor Construction Co.,* 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The repeat classification is based on a citation issued to "Martin Ingram and its successors" on February 7, 1997, for serious violation of § 1926.100(a) because employees were not wearing hard hats at a job that used scaffolding in Jackson, Mississippi (Exh. C-8). The citation was not contested and the penalty was paid. That citation became a final order. "Martin Ingram and its

successors" was the predecessor company to Ingram Plastering and Company, Inc., which has been in business in Jackson, Mississippi, since 1992 (Tr. 89). This prior citation was for violation of the same standard under similar conditions as the instant case. IP does not dispute the similarity of the violations. *See Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994), *aff'd.* 901 F.2d 1112 (5th Cir. 1990) (employer found to have previously violated same standard is enough to characterize current violation for failure to keep work area clear of debris as repeated); *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990) (citations involving the same standard and applied to similar conditions of employee exposure to similar falls are repeat violations); and *Hudson Wood Recycling, Inc.*, 17 BNA OSHC 1635 (No. 91-1597, 1996) (prior violation for failure to have midrail was substantially similar to current violation for failure to have guardrail in that both violations involved same standard and dealt with same hazard of falling).

Thus, the violation of § 1926.100(a) is affirmed as repeat.

Alleged Repeat Violation of 29 C. F. R. § 1926.451(g)(1)(vii)

The citation alleges that IP did not provide personal fall protection for an employee who was working on a single plank on the 12-foot level, without a guardrail. Section 1926.451(g)(1)(vii) provides:

> (g) *Fall Protection.* (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.
>
> (vii) For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

It is clear from the citation and the evidence that this violation is limited to conditions observed by discrimination inspector McDowell on November 30, 2001. There is no dispute that on November 30, 2001, an employee standing on a single, 18-inch pic board at the 12-foot level of scaffolding was not protected by a guardrail or personal fall arrest system (Exh. C-1, Photo 1; Exh. C-9; Tr. 119-120).

IP argues that it had no knowledge of the unsafe condition of the scaffold because neither Martin nor Roman Ingram was on the worksite on November 30, 2001, when the employee was on the scaffold.

IP's argument fails because it did not exercise reasonable diligence, which requires formulation and implementation of adequate work rules and training programs, and adequate supervision of employees to prevent exposure to hazards. Thus, IP should have known that its employees were not protected from falling by use of personal fall arrest systems or guardrail systems on the scaffolding.

The violation of 29 C. F. R. § 1926.451(g)(1)(vii) is affirmed.

Repeat Classification

The repeat classification is based on 2 citations. The first citation was issued to "Ingram Plastering" on April 29, 1999, for a serious violation of § 1926.451(g)(1) for failing to have a guardrail on scaffolding or personal fall protection for employees working on scaffolding that was over 10 feet high on a job site in Canton, Mississippi (Exh. C-3). That citation became a final order based on an order approving settlement (Exh. C-3).

The second citation was issued to "Martin Ingram, d/b/a Ingram Plastering," on October 1, 1999, for a repeat violation of § 1926.451(g)(1)(vii) for failure to provide guardrails where employees were working on approximately 19-inch wide scaffold walkboards and were exposed to falls of approximately 12, 18, and 24 feet to the ground below on a job site in Puckett, Mississippi (Exh. C-6). That citation became a final order based on an order approving settlement (Exh. C-6). These prior citations were for violations of the same standard under similar conditions as the instant case. IP does not dispute the similarity of the violations.

Thus, the violation of § 1926.451(g)(1)(vii) is affirmed as repeat.

Penalty Assessment for Citation Nos. 1 and 2

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

IP is a small corporation that had 9 employees at the time of the inspection; 7 employees were involved in the BankPlus job. Because of its small size, a reduction in the proposed penalties is appropriate.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

As to serious violation of § 1926.451(b)(1), the gravity is low because 3 employees were exposed on 1 day, November 30, 2001, while working on scaffolding that was not fully planked when moving material up to the top of scaffolding. The duration of exposure was limited.

For serious violation of § 1926.451(f)(3), the gravity is low because even though a competent person did not inspect the scaffolding on November 30 and December 7, 2001, defects in the scaffolding (lack of full planking and guardrails) were limited to November 30, 2001.

Regarding repeat violation of § 1926.100(a), the gravity is moderate because 5 employees on November 30 and December 7, 2001, were not wearing their hard hats all of the time.

For repeat violation of § 1926.451(g)(1)(vii), the gravity is low because only 1 employee was exposed to a fall on 1 day, November 30, 2001.

IP did not exhibit good faith. IP was not fully cooperative throughout the investigation. CO Darrell stated that Martin Ingram interrupted her interviews with the employees (Tr. 204). Martin Ingram admitted that he did tell 1 employee not to give a written statement to OSHA (Tr. 62). In addition, IP neglected to prevent the repeat of previous violations. Furthermore, IP did not have a comprehensive safety program, as demonstrated by its 1 page written program (Exh. C-2). No credit is given for good faith.

IP has a prior history of OSHA violations. IP was cited once for lack of hard hats and twice for failure to have personal fall arrest systems or guardrail systems. No credit is given for good history.

Based on these factors, a penalty of $900.00 is reasonable for Citation 1, Item 1; $900.00 is reasonable for Citation 1, Item 2; $3,000.00 is reasonable for Citation 2, Item 1; and $6,000.00 is reasonable for Citation 2, Item 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 on the preceding decision, it is ORDERED:

1. Citation 1, Item 1, alleging a serious violation of 29 C. F. R. § 1926.451(b)(1), is affirmed and a penalty of $900.00 is assessed.

2. Citation 1, Item 2, alleging a serious violation of 29 C. F. R. § 1926.451(f)(3), is affirmed and a penalty of $900.00 is assessed.

3. Citation 2, Item 1, alleging a repeat violation of 29 C. F. R. § 1926.100(a), is affirmed and a penalty of $3,000.00 is assessed.

4. Citation 2, Item 2, alleging a repeat violation of 29 C. F. R. § 1926.451(g)(1)(vii), is affirmed and a penalty of $6,000.00 is assessed.

/s/
KEN S. WELSCH
Judge

Date: May 31, 2002