

**FINAL ORDERS OF THE VIRGINIA  
GENERAL DISTRICT COURTS  
AND  
CIRCUIT COURTS  
IN  
CONTESTED CASES ARISING UNDER THE  
VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT  
JULY 1, 1991 - JUNE 30, 1992  
VOLUME XIII**

**ISSUED BY**

**The Virginia Department of Labor and Industry  
Posers-Taylor Building  
13 South Thirteenth Street  
Richmond, Virginia 23219**

**Carol A. Amato, Commissioner**

## **PREFACE**

This publication contains the orders of the Virginia General District and Circuit Courts in contested cases from July 1, 1991 through June 30, 1992, arising under Title 40.1 of the Code of Virginia, 1950, as amended July 1, 1992. The Department of Labor and Industry is responsible for publishing the final orders by virtue of §40.1-49.7 which states, "The Commissioner of Labor shall be responsible for the printing, maintenance, publication and distribution of all final orders of the General District and Circuit Courts. Every Commonwealth's Attorney's office shall receive at least one copy of each such order (1979, C. 354)."

The Table of Contents provides an alphabetical listing of the reported cases for the fiscal year. The full texts of decisions are categorized as Health or Safety and are arranged and indexed in chronological order.

Reference is made to Title 29 of the Code of Federal Regulations, Parts 1910 and 1926. These regulations were adopted by the Virginia Safety and Health Codes Board pursuant to section 40.1-22 of the Code of Virginia, as amended. The Standard's Index provides a reference to cases which involved these regulations. The Subject Index provides an alphabetical listing of the hazard or regulation cited and contested for all cases.

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**OCCUPATIONAL SAFETY**

**PART I**

-----  
VIRGINIA:

IN THE GENERAL DISTRICT COURT OF THE CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA, ex rel.  
Commissioner of Labor and Industry,  
Plaintiff

v.

Case No. V91-5048

CENTRAL JANITORIAL SERVICES, INC.  
Defendant

**FINAL ORDER**

On September 11, 1991, came plaintiff and defendant, pursuant to a summons, to be heard on defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations issued by plaintiff on November 29, 1990. Upon consideration of the evidence and arguments of the parties, this Court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Plaintiff, the Commissioner of Labor and Industry issued two VOSH Citations to the defendant, alleging Serious and Willful violations of VOSH Standards for General Industry, as a result of an inspection by VOSH Compliance Officer, James C. Dunn, beginning on July 11, 1990, at a worksite located in a commercial building on 2000 Enterprise Drive, in the city of Lynchburg,

Virginia. Employees of the defendant were injured in a flash fire while stripping paint from the floors of a multi-story commercial building,

2. On the basis of the facts described below the Department of Labor and Industry issued to defendant citations and proposed penalties describing Willful and Serious violations of standards and regulations pursuant to Va. Code § 40.1-49.4. The cited VOSH standards for General Industry apply to all businesses in Virginia employing one or more employees. The first VOSH Citation alleged six (6) Serious violations, and the second alleged two (2) Willful violations as described below:

#### **CITATION 1 - SERIOUS**

1. **§ 1910.304(a)(2)** - grounded electrical conductors of the Tornado floor buffer were attached to the terminal of the male plug so as to reverse the designated polarity. A civil penalty of \$600.00 was proposed.
2. **§ 1910.304(f)(4)** - The electrical grounding wire of the Tornado floor buffer was loosely attached at the male plug, thus failing to provide a secure and permanent grounding path. A civil penalty of \$600.00 was proposed.
3. **§ 1910.305(g)(2)(iii)** - The flexible power cord of the Tornado electric buffer was not connected to the device in a way to prevent pull from being directly transmitted to the terminal screws. A civil penalty of \$600.00 was proposed.
4. **§ 1910.1200(e)(1)** - The employer had not developed or implemented a written hazard communication program for its employees. A civil penalty of \$1,000.00 was proposed.
5. **§ 1910.1200(g)(1)** - The employer did not provide a Material Safety Data Sheet (MSDS) for a hazardous chemical used in the workplace, specifically the Savogran Kutzit paint remover. A civil penalty of \$1,000.00 was proposed.
6. **§ 1910.1200(h)** - Employees were not provided training on hazardous chemicals, particularly, the proper use of the Savogran Kutzit paint remover. A civil penalty of \$1,000.00 was proposed.

**CITATION 2 - WILLFUL**

1. **§ 1910.106(e)(2)(iv)(c)** - A Class I flammable liquid, (Savogran Kutzit paint and varnish remover), was used where the source of ignition, namely the Tornado electric buffer, was in the path of vapor travel. A civil penalty of \$10,000.00 was proposed.
2. **§ 1910.132(a)** - Personal protective equipment was not provided for employees where they were exposed to material hazardous to face, eyes, and skin, namely the Savogran Kutzit paint remover. A civil penalty of \$10,000.00 was proposed.

A total civil penalty of \$24,800.00 was proposed for both VOSH Citations. Defendant contested the citations and penalties pursuant to Va. Code § 40.1-49.4(A)(4)(b), and pursuant to an application and summons the matter was set for trial and argued before this Court.

3. Defendant is a Virginia corporation and janitorial service which, at the time of the inspection employed two or more workers in the commonwealth of Virginia.

4. Plaintiff's evidence at trial established that on July 10, 1990 defendant's corporate president and owner of the company, Mr. Dennis C. Walker, was working at the above address, assisting two employees, David F. Campbell and Douglas E. Hancock, in stripping paint from the concrete floors of two bathrooms. Mr. Walker supplied and directed the two employees in using a five gallon can of Savogran Kutzit brand paint and varnish remover, hand mops, and a Tornado brand electrically powered floor buffer.

5. Mr. Hancock testified that Mr. Walker directed the other employee, David F. Campbell, to remove paint with the Tornado electric floor buffer from the floor of the second restroom. As Mr. Campbell switched on the buffer, the fumes from the Kutzit paint remover instantaneously ignited. Mr. Walker and the two workers were immediately engulfed in flames. Mr. Campbell died from his injuries, and Mr. Hancock suffered third degree burns over sixty percent of his body.

6. Plaintiff's evidence established that Mr. Walker did not follow the precautions and warnings prominently displayed on the five gallon can of Kutzit. He provided no personal protective equipment for his employees, he did not ensure adequate ventilation of the area of application, and he did not observe caution in operating electrical equipment in the vicinity of the Kutzit paint remover. Mr. Walker poured unspecified amounts of the Kutzit paint remover on the floors of both bathrooms and directed his employees to remove the paint with their mops and the electric floor buffer.

7. Plaintiff's evidence established that warnings and precautions were clearly and prominently displayed on the five gallon can of Kutzit paint remover, prohibiting the operation of electrical equipment nearby, and requiring the provision of gloves, eye protection and other appropriate personal protective equipment to avoid contact with the liquid.



8. VOSH Compliance Officer Charles H. Ferguson, Jr., inspected the electric floor buffer used in the bathrooms. Compliance Officer Ferguson found three electrical violations of VOSH standards in the condition of the floor buffer. The male plug at one end of the electrical power cord was incorrectly wired, reversing the polarity of the current supplied to the electrical motor. The wires attached to the male plug were also loosely connected, presenting the hazard of a possible electric shock. Finally, the power cord was connected to the electric motor without proper strain relief supporting the power cord.

9. Mr. Walker admitted to Compliance Officer Dunn that his company had not established a written hazard communication program, that it had not trained employees regarding evaluating and handling hazardous chemicals, and that Material Safety Data Sheets (MSDS's) for hazardous chemicals used in his business had not been provided for the employees, including the MSDS for the Kutzit paint remover.

#### **CONCLUSIONS OF LAW**

1. The Court finds that the plaintiff has proven by preponderant evidence (1) that the cited VOSH standards for General Industry apply to the defendant, (2) that the defendant failed to comply with the cited standard for each violation listed above, (3) that employees of the defendant were exposed to each violative condition, (4) and that the defendant employer

knew or should have known of the hazards with the exercise of reasonable diligence.

2. The Court finds each of the violations of VOSH Standards for General Industry cited in the first citation to be Serious, as defined in Va. Code § 40.1-49.3(5). In the second citation, the Court upholds the Willful character of both violations, based on the defendant's demonstrated plain indifference to precautions displayed on the five gallon can of Kutzit paint remover, and to the requirements of the cited VOSH Standards.

3. The Court AFFIRMS the issuance of all violations in each VOSH Citation, and ORDERS that the civil penalties be modified as follows:

SERIOUS CITATION

1. The civil penalty for violations 1 through 7 is reduced to a single penalty of \$600.00.

WILLFUL CITATION

1. The civil penalty is reduced to \$5,000.00.

2. The civil penalty is reduced to \$2,000.00.

Judgment is hereby granted to the plaintiff in the total amount of \$7,600.00.

4. The Clerk shall mail certified copies of this order to counsel of record parties and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.

5. Pursuant to Va. Code § 40.1-51.1(e), defendant shall post a copy of this order for ten working days at a conspicuous place where notices to employees are usually posted.

Enter: March 9, 1992

Paul Whitehead, Jr.  
Judge

I ask for this:

Michael R. Doucette  
Assistant Commonwealth's Attorney  
901 Church Street  
Lynchburg, Virginia 24505  
(804) 847-1593

Seen and objected to:

James B. Feinman  
203 Ninth Street  
P.O. Box 697  
Lynchburg, Virginia 24505  
(804) 846-7603

CONSTRUCTION SAFETY

PART II

-----  
VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF ARLINGTON

COMMONWEALTH OF VIRGINIA ex rel.  
Commissioner of Labor and Industry  
Plaintiff

v.

Case No. V90-6238

American Iron Works, Inc.  
Defendant

AGREED ORDER

Comes now the plaintiff, Carol A. Amato, Commissioner, Department of Labor and Industry, Commonwealth of Virginia, and the defendant, by counsel, and in order to provide for the safety, health, and welfare of the defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed:

The defendant is before this Court pursuant to § 40.1-49.4(E) of the Code of Virginia, contesting citations issued to it by the by plaintiff on August 30, 1989. The citations were issued as a result of a Virginia Occupational Safety and Health (VOSH) inspection (Inspection #105707160) of a construction site located at 4200 North Fairfax Drive, Arlington, Virginia where the defendant was employed as a subcontractor. An inspection was initiated pursuant to a fatality which occurred at the site,

involving one of the defendant's employees.

Plaintiff agrees to modify the Citations and Notifications of Penalty with respect to the above captioned inspection as follows:

**Citation 1, item 1**--§40.1-51.1(a), Code of Virginia, General Duty Clause: The employer did not furnish employment and a place of employment which were free of recognized hazards that were causing or likely to cause death or serious physical harm to employees in that open web joists did not have the bridging installed and were not permanently fastened prior to the storing of construction loads. This violation was cited as serious with an assessed penalty of \$800. The penalty and the violation are vacated;

**Citation 1, item 2**--§1926.20(b)(1), Programs were not initiated or maintained to comply with the employer's responsibility for accident prevention. The employer had not implemented and maintained an accident prevention program which would have adequately trained the employees in hazard recognition. This violation was cited as serious with an assessed penalty of \$800. This violation and penalty are vacated; and

**Citation 2, item 1**--§1926.750(b)(1)(ii), on tiered buildings or structures not adaptable to temporary flooring and where scaffolds were not used, safety nets were not installed and maintained where the fall distance exceeded 25 feet. This violation was initially cited as willful with an assessed penalty of \$10,000. The parties agree to amend this citation to an other-than-serious violation of §1926.105(a) with an assessed penalty of \$1000.

#### **TERMS AND CONDITIONS OF AGREEMENT**

In an effort to settle the case short of litigation, the parties agree to the following terms and conditions:

1. As consideration for the modification of the terms of the original citations, the Defendant waives its right to contest the amended citations and agrees to the terms contained in this agreement.

2. The parties agree that the abatement terms for the above citations as a result of both inspections, shall be as set forth in this agreement. The Defendant shall furnish quarterly reports to the Department of Labor and Industry with respect to the abatement as set forth in this agreement, through October 31, 1992.

3. The parties further agree that the violations alleged in this agreement have been abated. The Defendant agrees to pay the assessed penalty of \$1,000 within fifteen (15) days of the execution of this Agreed Order.

4. The Defendant agrees to consider Occupational Safety and Health as one of its corporate top priorities. This exhibition of priority shall be manifested by the attendance, through October 1, 1993, of each management employee at a minimum of one safety seminar per year which is satisfactory to the Commonwealth. To qualify as satisfactory to the Commonwealth, a safety seminar must, at a minimum, be sponsored by a reputable safety association such as the Association of General Contractors (AGC), the Association of Builders and Contractors (ABC), or equivalent (i.e., Construction Safety Institute).

5. The owners of the company shall be responsible for the development, writing, implementation and monitoring of the Defendant's safety program as listed below. A Safety Officer

shall be designated by the Defendant.

6. Within three months of the effective date of this Settlement Agreement the Defendant shall develop, implement and maintain a written safety program which establishes policies and procedures for recognizing and protecting employees from safety and health hazards. This program, at a minimum, shall address the following subjects:

- (a) management commitment and employee involvement to safety;
- (b) worksite hazard recognition, prevention and control; and
- (c) safety and health training.

7. The safety program shall list and discuss the respective responsibilities of management, supervisors, lead men and field employees with respect to safety on the worksite. Authority and responsibilities must be delegated to supervisors and lead men for the enforcement of safety rules. The safety director and officers must have the authority delegated to them by management to issue internal warnings, or reports, for violations of safety and health rules. Additionally, the staff must have the authority to halt work where a hazardous condition is present and it is observed by them on the jobsite.

8. The Defendant further agrees to initiate within the written safety program, an internal system of enforcement of

Defendant and state safety and health rules and regulations which provides for progressive internal disciplinary rules and possible penalties culminating in the option of removal of the unsafe employee from his or her employment, consistent with Union rules, (if applicable), upon the occurrence of a third repeat violation. This system of enforcement shall apply equally to all the Defendant's employees, both management and field personnel.

9. Defendant agrees to institute a policy whereunder new employees receive a basic safety briefing prior to being employed at a jobsite. In addition, a system of training on basic jobsite safety for all new employees within thirty (30) days of the employee's initial employment shall be established to complete the new employee's initial safety indoctrination. This employee training shall include the discussion of Defendant safety rules and general hazards associated with the Defendant's industry, especially in the area of steel erection.

The Defendant through its safety director, shall also institute weekly, site specific tool box discussions of hazards and corresponding safety practices for all its employees employed at each individual jobsite or at the home office. As a part of said meetings, employees will be encouraged to notify management, without reprisal, of any unsafe condition(s) on the jobsite. Management shall address such concerns within a reasonable period. Management shall also provide for investigation of accidents so that their causes and means for prevention can be



identified and discussed with employees at these meetings.

Documentation of said meetings and training shall be forwarded to the Director of Safety Enforcement, Department of Labor and Industry, on a monthly basis, beginning on November 1, 1991 and continuing thereafter for a minimum of one year.

10. As part of the above safety program, the Defendant agrees to conduct periodic monitoring of its jobsites to determine that its employees, including its supervisors, are in compliance with the VOSH regulations, including those regulations that deal specifically with steel erection and fall protection, [i.e. §§1926.750-53, §1926.28(a) and § 1926.105(a)], and the Defendant's safety program which requires adequate protection for all employees exposed to hazards while working.

11. The safety program shall also emphasize hazard prevention and control. Hazards which are detected shall be corrected in a timely and reasonable manner.

#### **REQUIREMENTS FOR A WARRANT**

With the execution of this agreement, and for a period of one (1) year, the defendant expressly waives its right to require and inspection warrant to be issued in order to allow access to any Virginia Compliance Safety and Health Officer, to any of its construction sites within the Commonwealth of Virginia, and further understands that compliance inspections of said construction sites, will be conducted by Commonwealth's

inspectors on a reasonable, but random and unannounced basis.

#### **POSTING**

The defendant shall post a copy of this Settlement Agreement for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

#### **FAILURE TO ABATE**

Failure by the Defendant to comply with the requirements specified in this Agreed Order may result in the issuance of a failure-to-abate citation(s), or other remedy as provided by law.

#### **SETTLEMENT OF CLAIMS**

THIS ORDER is meant to compromise and settle the above contested claim. Pursuant to §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, for the reasons stated above, it is hereby ADJUDGED, ORDERED, AND DECREED that the above citations and penalties are VACATED in part and AFFIRMED in part as modified.

Enter: 11-6-91

Hon. F. E. Thomas  
Judge

We ask for this:

Theophani K. Stamos  
Assistant Commonwealth's Attorney  
County of Arlington  
Courthouse  
1400 North Courthouse Road  
Arlington, Virginia 22201  
(703) 358-4410

Seen and agreed to:

Leonard A. Sacks  
Attorney at Law  
One Church Street  
Suite 201  
Rockville, Maryland 20850  
(301) 738-2470

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

COMMONWEALTH

VS.

File No. 91-CRC-14  
91-CRC-15

B & B STEEL ERECTORS, INC.

On July 10, 1991, came William F. Neely, the Attorney for the Commonwealth, and B & B Steel Erectors, Inc., the defendant, in person without an attorney to represent them and advised the Court that they did not desire to retain an attorney, and expressly waived their right to counsel, except that the president of the corporation asked the Court to appoint counsel, which request was denied because there was no risk of incarceration. The Court being of the opinion that the waiver was freely and voluntarily made, the waiver was accepted, and the Court proceeded to try the case.

Whereupon the accused was arraigned on March 14, 1991, and pleaded not guilty to the Indictments, which pleas were tendered by the accused through its attorney, Gerald F. Dalton, who subsequently was permitted to withdraw as counsel with concurrence of the defendant.

The Court then empaneled thirteen qualified jurors, free from exception for the trial of the defendant. Whereupon the Attorney for the Commonwealth and the defendant each alternately exercised their right to strike the names of three veniremen from the panel, as provided by law, and the remaining seven jurors, constituting the jury for the trial of the defendant were duly sworn.

After opening statements, the evidence was presented.

After hearing the evidence, the instructions of the court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words:

"We the jury, find the defendant corporation guilty of Violating the Child Labor Law and fix its punishment at a fine of \$1,000. Jana K. Lanceley, Foreman."

and

"We the jury, find the defendant corporation guilty of Willfully Violating O.S.H.A. Regulations causing the death of an employee and fix its punishment at a fine of \$10,000.00. Jana K. Lanceley, Foreman."

The Court then asked the president of the defendant corporation whether he desired to make a statement or to advance any reason why judgment should not be pronounced against him. The defendnt having declined, the Court finds the defendant guilty of Violating the Child Labor Law and Willfully Violating O.S.H.A. Regulations, causing the death of an employee, as charged in the Indictments.

It is adjudged that the Commonwealth recover from the defendant the sum of \$ , the costs assessed in this proceeding, and the sum of \$1,000.00 and \$10,000.00, the fines assessed by the jury.

The Court advised the defendant of its right to appeal these cases to the Virginia Court of Appeals.

The defendant is allowed to depart.

ENTER: W. H. Ledbetter, Jr., Judge

DATE: August 12, 1991

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF SPOTSYLVANIA

**COMMONWEALTH OF VIRGINIA, ex rel.,**  
Commissioner of Labor and Industry  
Plaintiff

v.

Case No. V91-2203

B & B Steel Erectors, Inc.  
Defendant

**ORDER FOR JUDGMENT**

Citations were issued to the defendant on October 15, 1990, as a result of an occupational safety and health inspection conducted by the plaintiff, Virginia Occupational Safety and Health (VOSH), Department of Labor and Industry, from April 25, through May 2, 1991.

The defendant contested the following citations and penalties as a result of the inspection:

**Citation 1, item 1--§1926.21(b)(2), cited as a serious violation, penalty of \$900;**

**Citation 1, item 2--§1926.350(a)(1), cited as a serious violation, with a penalty of \$700;**

**Citation 1, item 3--§1926.350(a)(9), cited as a serious violation, with a penalty of \$700;**

**Citation 1, item 4--§1926.350(j), cited as a serious violation, with a penalty of \$700;**

**Citation 2, item 1--§40.1-51.1(a), Code of Virginia, cited as a willful violation, with a penalty of \$10,000;**

**Citation 3, item 1--§40.1-51.1(a), Code of Virginia, cited as a willful violation with a penalty of \$10,000;**

**Citation 3, item 2--§1926.28(a) and §1926.105(a), cited as a willful violation, with a penalty of \$9,000;**

**Citation 3, item 3--§1926.550(b)(2), cited as a willful violation, with a penalty of \$9,000;**

**Citation 3, item 4**--§1926.602(c)(1)(vi), cited as a willful violation, with a penalty of \$9,000;

**Citation 4, item 1**--§1926.152(a)(1), cited as an other-than-serious violation, no penalty is assessed; and

serious violation, no penalty is assessed.

The total penalties assessed for the above violations equal Fifty-Thousand dollars (\$50,000).

#### **ORDER**

On August 20, 1991, came the plaintiff, by counsel, the Commonwealth's Attorney of this jurisdiction. Defendant, after proper service of the Summons through the Secretary of the Commonwealth, did not appear to be heard on its contest of the Virginia Occupational Safety and Health (VOSH) citations issued by the plaintiff. Plaintiff made a motion for judgment to be entered in favor of the plaintiff and against the defendant. The plaintiff submitted into evidence, through the testimony of its Compliance Officer, the alleged violations observed during the inspection of the defendant's worksite and the assessed penalties for said violations.

The Court finds for the plaintiff and **ORDERS** that the citations as issued and described above, be **AFFIRMED**. Judgment is hereby granted to the plaintiff, against the defendant in the amount of Fifty Thousand Dollars (\$50,000) as a civil penalty for the violations of the Virginia Occupational Safety and Health (VOSH) Standards listed above. An appeal bond in the amount of \$50,000 is also set should the defendant seek to appeal the order



of this court.

The Clerk shall forthwith mail certified copies of this Order to counsel and parties of record and to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South 13th Street, Richmond, Virginia 23219 within ten (10) working days after the entry of this Order.

Enter: August 22, 1991

Judge H. A. Revercomb, III

I ask for this:

William F. Neely  
Commonwealth's Attorney  
American Legion Drive  
Spotsylvania, Virginia 22553  
(703) 582-7148

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

COMMONWEALTH OF VIRGINIA

V.

EDDIE DEAN BUTTRAM,

Defendant

PLEA AGREEMENT

1. My name is EDDIE DEAN BUTTRAM and my age is 32 years.
2. I am represented by counsel whose name is Allen F. Bareford, Assistant Public Defender, and I am satisfied with his services as an attorney.

3. I have received a copy of the warrant(s) or indictment(s) before being called upon to plead, and have read and discussed it with my attorney, and believe that I understand the charges against me in this case. I am the person named in the indictment. I have told my attorney all the facts and circumstances, as known to me, concerning the case against me. My attorney has discussed with me the nature of the charge, has explained to me the elements of the offense, and has advised me as to any possible defense I might have in this case. I have had ample time to discuss the case and all possible defenses with my attorney.

3A. Stipulation of Facts: I agree to the following summary of the Commonwealth's evidence against me (which I stipulate can all be proved by the Commonwealth) in the foregoing case and I request that the Court accept this summary in lieu of presentation of any evidence by the Commonwealth. I further

stipulate that the Commonwealth's evidence constitutes a prima facie case in the instance of the crime with which I am charged.

Summary: James Dougherty, Vice President for Kenbridge Construction Company, Inc., would testify that his company was the General Contractor for the erection of a United Parcel Service ("UPS") distribution building in Lee Hill Industrial Park in Spotsylvania County in April of 1990. He would further testify that on or about April 17, 1990, his company contracted with B & B Steel Erectors, Inc., a Missouri Corporation, to erect the steel framework of the UPS building. He would also testify that during the contract negotiations with Robert Pilger, President of B & B Steel Erectors, Inc., Mr. Pilger represented his company as having erected many prior steel buildings in the past and as being experts in steel erection. The reason the contract was awarded to B & B was because Pilger promised to do the job two weeks quicker than any of the other bidders. When asked how his men could complete that much faster, Pilger advised Dougherty that he intended to push his men, that they did not work from 9:00 to 5:00 p.m. but would work into the night if necessary to finish the job quicker.

Esther Ward of Mountain Grove, Missouri, would testify that she is the mother of Troy Brent Ward, aged 16, date of birth-November 2, 1973. She would further testify that on or about April 16, 1990, her 16-year-old son was hired by Bob Pilger to work. According to Mrs. Ward, Troy had no prior work experience, especially none in construction. Eddie Dean Buttram, the defendant, is her nephew and helped her son obtain this job.

Ernest M. "Pat" McCarthy of Oakhurst, Missouri, would testify that he was a steel worker for B & B Steel Erectors on the UPS job in Spotsylvania County. He would testify that he was hired shortly before the crew left Missouri and had no prior experience in steel erection, but had worked in construction. When the crew arrived in Spotsylvania County Eddie Dean Buttram, the foreman for B & B, was already at the job site. On April 25, 1990, as the crew was erecting steel rafters across the steel columns which had already been put in place, a crane arrived to lift the rafters in place. Mr. McCarthy would further testify that Mr. Buttram told him and the rest of the crew to hurry up and get the rafters up as quickly as possible, using as little bracing as possible, so that they could get rid of the crane and save the expense. On April 25, 1990, Mr. McCarthy was atop one of the rafters when at approximately 3:30 p.m. he noticed a storm approaching from the north. He and some of the other steel workers called down to Mr. Buttram as to whether they should stop work, but Mr. Buttram replied: "Let's finish with the crane and then get down." Mr. McCarthy would further testify that at approximately 4:12 p.m. on April 25, 1990, a gust of wind hit the steel rafters from a northerly direction and the seven rafters that had been erected thus far toppled towards him in a north-to-south direction like dominos. At the time of the

collapse, Troy Brent Ward was seated atop another rafter and was thrown to the ground and killed. Mr. McCarthy would further testify that while he and the other workmen were wearing safety belts they were not wearing safety harnesses because they were told by Mr. Buttram there was no place to tie them off. Mr. McCarthy would further testify that when he awoke he was in Mary Washington Hospital emergency room with a crushed left shoulder and other serious injuries. Shortly thereafter, Mr. Pilger, President of B & B Steel Erectors, Inc., arrived in his room and told him that "the blame for the collapse would have to be laid off on someone else because he was broke...."

Gary D. Pritchard would testify that on April 25, 1990, he was the crane operator for Valley Crane at the UPS job site. He would testify that he arrived that morning around 7:00 a.m. and that the crane cost \$68 per hour and was hired by B & B Steel Erectors, Inc., purportedly for 40 hours of work.

When Mr. Pritchard conferred with Buttram, B & B's foreman, he learned that Buttram wanted the B & B workmen to ride the steel rafters up as the crane lifted them on top of the columns. When Mr. Pritchard protested that this was not the proper way and that the men should ride a man-lift, which could be supplied by his company, Buttram replied that he had no time or money to put into such equipment and that "you work for me and will do as I say." Mr. Pritchard would further testify that he also saw the storm coming about 3:30 in the afternoon on April 25. The storm struck about 4:12 p.m. from a northerly direction and toppled the rafters towards him like dominos. After the structure's collapse, he observed Troy Brent Ward, one of the workers who had been on top of one of the rafters, dead on the ground.

See Medical Examiner's Report, which is attached hereto as Commonwealth's Exhibit "2".

William Troy Bailey would testify that he was the on-site job superintendent for Kenbridge Construction Company, Inc. He would further testify that on April 23, 1990, he questioned Eddie Dean Buttram, B & B's foreman, as to whether he was going to put any wind bracing (wire cable supports) for the steel columns which B & B had erected thus far. Buttram's response was that it was not necessary and too time consuming and that should such wind bracing become necessary he would return from the nearby motel where the crew was staying and put it in place.

David Cline, Compliance Officer with the Virginia Department of Labor, would testify that on April 25, 1990, he was dispatched to the scene of this collapse, arriving at approximately 7:30 p.m. Upon his arrival, he found the steel structure collapsed in a domino fashion, three of the workers seriously injured, and Troy Brent Ward dead. He secured the construction scene and saw to it that security guards were placed at the scene so that none of the site could be disturbed until the investigation could be completed; this investigation was not completed until May 2,

1990. On April 26, 1990, he walked the scene with Mr. Pilger, President for B & B, and Mr. Buttram, the foreman, with both men confirming the placement of the steel at the time of the collapse, the location of any supports or lack thereof at the time of the collapse, and the placement of the workmen for B & B Construction at the time of the collapse. On April 28, 1990, he and John Wiseman, a Federal OSHA inspector, interviewed Eddie Dean Buttram. Buttram told them that he had been a foreman for B & B Steel Erectors, Inc., for a year and a half and had supervised the erection of at least 12 steel buildings before, two or three of which were identical to the one under construction at the UPS site. Mr. Cline would further testify that Buttram, when asked why he didn't use guy wires to stabilize the steel construction, stated that it was his procedure to use ropes instead. Mr. Cline would further testify that safety belts and harnesses required to be used by the steel workers under OSHA regulations were observed to still be in the company truck on the site. He would further testify that he observed that there was absolutely no wind bracing erected at the site at the time of the collapse. He observed that in the first bay (known as the "brace bay") for the steel structure, only three roof purlins (braces) were in place where 20 were required by the manufacturer's specifications; that only three girts (side supports) were in place when six were required; that no eve struts (supports) were installed as required; and that no portal frames were installed as required.

William Hardenberg would testify that he is a part-time pilot who, on April 25, 1990, happened to be at Shannon Airport, which is located one-half mile east of Lee Hill Industrial Park. He would further testify that at 4:15 p.m. he observed the air speed indicator and saw that the wind was blowing 310 degrees from the northwest at 20 miles per hour, gusting from 30 to 32 miles per hour.

Fred Anderson, an engineer with the United States Department of Labor, would testify as an expert witness that his office conducted an OSHA investigation into the cause of the UPS building collapse. He would further testify that the concrete piers upon which the steel structure was erected were tested and found to meet the design specifications. He would further testify that in his expert opinion the cause of the building collapse was due to the complete lack of any wind bracing (guy wires) in place, as required by the manufacturer's specifications and as further required by all recognized engineering standards. Additionally, contributing to the collapse of the structure was the fact that insufficient permanent steel bracing had been put in place against the manufacturer's specifications and against all engineering standards. Thus, the cause of the building collapse, in his expert opinion, was totally insufficient bracing for the amount of steel that had been erected at the time of the collapse.

John R. Wiseman, an OSHA inspector with the United States Department of Labor who has over 30 years experience in steel erection, would testify as an expert in steel erection that he was part of the Federal OSHA investigation into the collapse of the UPS building. He would testify that in his expert opinion the cause of the UPS building collapse was the utter and complete failure of B & B Steel Erectors, Inc., as supervised on the site by Eddie Dean Buttram, the foreman, to place any wind bracing to protect the steel against sudden gusts of wind as is required by common practice in the steel erection industry. Additionally, insufficient permanent bracing was installed in violation of steel industry standards. Mr. Wiseman would further testify that the failure to brace such a steel structure against the wind with temporary wind bracing and the failure to better brace it with the permanent bracing not installed as per the manufacturer's specification, engineering standards, and steel erection standards were grossly in violation of all competent steel erection standards in the industry.

4. My attorney has advised me that the offense charges, as follows:

(Please see copy of attached indictment marked Commonwealth's Exhibit "1".)

The punishment which the law provides is as follows:

(Please see copy of attached indictment marked Commonwealth's Exhibit "1".)

5. I understand that I may, if I so choose, plead "not guilty" to any charge against me, and that if I do plead "not guilty," the Constitution guarantees me (a) the right to a speedy and public trial by jury; (b) the process of the Court to compel the production of any evidence and attendance of witnesses in my behalf; (c) the right to have the assistance of a lawyer at all stages of the proceedings; (d) the right against self-incrimination; and (e) the right to be confronted by my accuser.

6. I understand that by pleading guilty I waive my right to an appeal and that I am admitting that I committed the

offense(s) as charged and that the only issue to be decided by the Court is punishment.

7. I understand that the Commonwealth's Attorney has agreed to recommend to the Court the following specific punishment as the appropriate disposition in this case, as follows:

The Commonwealth recommends a sentence of two years in the penitentiary, all suspended conditioned upon:

- A. That the defendant be of good behavior for a period of two years; and
- B. That the defendant pay the costs of this proceeding.

As a condition of his suspended sentence, in addition to any other conditions herein imposed, the defendant forthwith shall have a sample of his blood taken for DNA analysis, pursuant to Virginia Code Section 19.2-310.2, et seq., and shall cooperate fully in such procedure, under the direction and supervision of his probation officer.

8. I understand that the Court may or may not follow the Commonwealth's Attorney's recommendation and may accept or reject this plea agreement. I understand that if the Court rejects this agreement, I will be permitted to withdraw my plea of guilty if I so choose, and if I do not withdraw my guilty plea neither side is bound by this agreement and the Court may impose any sentence within the limits set forth in Paragraph 4, which disposition may be less favorable to me than is contained in this agreement.

9. I declare no officer or employee of the State or County or Commonwealth's Attorney's Office, or anyone else, has made any

promises to me except as contained in this agreement.

10. After having discussed the matter with my attorney, I do freely and voluntarily plead guilty to the offense of INVOLUNTARY MANSLAUGHTER, and waive my right to a trial by jury and request the Court to hear all matters of law and fact.

Signed by me in the presence of my attorney this 12 day of July, 1991.

\_\_\_\_\_  
EDDIE DEAN BUTTRAM  
Defendant



CERTIFICATE OF DEFENDANT'S COUNSEL

The undersigned attorney for the above named defendant, after having made a thorough investigation of the facts relating to this case, do certify that I have explained to the defendant the elements of the charges in this case; that the defendant's plea of guilty is voluntarily and understandingly made.

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ALLEN F. BAREFORD  
Assistant Public Defender  
Attorney for the defendant

CERTIFICATE OF COMMONWEALTH'S ATTORNEY

The above accords with my understanding of the facts in this case.

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WILLIAM F. NEELY  
Commonwealth's Attorney

The Court, being of the opinion that the plea of guilty and waiver of jury trial are voluntarily made, that the defendant understands the nature of the charges and the consequences of said plea of guilty, doth accept same and concur therewith.

Filed and made a part of the record this 12 day of July, 1991.

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Horace A. Revercomb, III  
JUDGE

COMMONWEALTH OF VIRGINIA

COUNTY OF SPOTSYLVANIA, to-wit:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of Spotsylvania County, and now attending the Circuit Court of said County, upon their oaths present:

DIRECT INDICTMENT:

That on or about the 25th day of April, 1990, Eddie Dean Buttram (foreman for B & B Steel Erectors, Inc.) did unlawfully, feloniously and unintentionally kill and slay Troy Brent Ward (age 16), in violation of Section 18.2-36 (involuntary manslaughter), of the Code of Virginia, 1950, as amended, in the County aforesaid, against the peace and dignity of the Commonwealth.

Upon the testimony of David Cline, Compliance Safety and Health Officer with the Virginia Department of Labor and Industry, a witness duly sworn and sent before the Grand Jury to testify.

PUNISHMENT: 1 to 10 years in the penitentiary; or confinement in jail for not more than 12 months and a fine of not more than \$2,500.00, either or both.

( X ) A TRUE BILL:

( ) NOT A TRUE BILL:

/s/ Robert Ashley  
Foreman

January 22, 1991  
Date

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE CITY OF FALLS CHURCH

COMMONWEALTH OF VIRGINIA, *ex rel.*  
Commissioner of Labor and Industry,

v.

File No. V91-385

CALDWELL & SANTMYER, INC.

Inspection Number: 105757223

**AGREED ORDER**

Comes now the plaintiff, the Commonwealth of Virginia, by counsel, and the defendant, in order to provide for the safety, health and welfare of the defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed as follows:

The parties are before this Court pursuant to Va. Code §40.1-49.4(E), to be heard on defendant's contest of citations issued by plaintiff on June 17, 1991. These citations allege willful and other-than-serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry.

The following violations were cited as willful and other-than-serious. In consideration for the actions of the defendant set forth below, the plaintiff agrees to take the following actions concerning the violations:

1. The following violations are affirmed

Citation 1, Item 1, Willful - §1926.100(a):

Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact or from falling or flying objects, or from electrical shock and burns.

The original penalty of \$7,000.00 is reduced to \$4,200.00.

Citation 1, Item 2a, Willful - §1926.451(a)(2):

Unstable objects such as barrels, boxes, loose brick or concrete blocks were used to support scaffold(s) or plank(s).

Citation 1, Item 2b, Willful - §1926.451(d)(4):

Scaffold legs were not on plain bases placed on mud sills or other foundations.

The original penalty of \$7,000.00 for grouped items 2a and 2b is reduced to \$4,200.00.

Citation 1, Item 3, Willful - §1926.451(a)(13):

An access ladder or equivalent safe access to scaffolds were not provided.

The original penalty of \$7,000.00 is reduced to \$4,200.00.

Citation 1, Item 4, Willful - §1926.451(d)(10):

Standard guardrails and toeboards were not installed at all open sides and on ends on tubular welded frame scaffolds more than 10 feet above the floor or ground.

The original penalty of \$7,000.00 is reduced to \$4,200.00.

Citation 2, Item 1, Other-than-serious - ARM §11.3.A:

The Job Safety and Health Notice was not posted to inform employees of the protections and obligations provided in the Labor Laws of Virginia.

The penalty for this violation is \$100.00.

2. Defendant has abated the above violations.
3. With respect to the penalty payment of \$16,900, the parties agree as follows:
  - a. The defendant, upon execution of this Agreed Order shall pay to the plaintiff the initial sum of \$8,450 in partial payment of the penalties assessed for the above citations in the following manner: a check, money order, or cash in the amount of \$400 shall be paid to the plaintiff within fifteen (15) days of the effective date of this Order. The remaining \$8,050, in similar form, shall be paid in no more than twenty-three (23) equal payments of \$350, each payable on the first day of each month for the next twenty-three (23) successive months.
  - b. Should the defendant, during the period February 1, 1992 to January 31, 1994, violate any of the sections of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry which formed the bases for the citations set forth above, it shall pay a second partial payment of the total penalties assessed, in the amount of \$8,450 in the manner and schedule described in paragraph 3a above, upon the final determination (Order) of the Commissioner of Labor and Industry or the final determination (Order) of a court of competent jurisdiction that the

defendant has again violated any of the sections mentioned above.

4. It is expressly understood by the defendant that the penalty payments referred to in paragraphs 3a and 3b above, are in addition to and separate from any penalties which may be proposed or assessed for the subsequent repeat violations which trigger the partial payments addressed above.
  
5. It is expressly understood and agreed by the parties that failure to comply with the terms of this Agreed Order or failure by the defendant to make a penalty payment in a timely manner as agreed herein, constitutes a breach of this Order. The responsibilities and duties of defendant under this Agreed Order over and above its responsibilities and duties under applicable law and regulation, shall cease on and after January 31, 1994, so long as all penalty amounts due plaintiff have been paid in full. In the event penalty payments are owed or are being paid to plaintiff on the above date, the responsibilities and duties of defendant under this Agreed Order shall continue until all such amounts have been paid in full and no further penalty amounts are due. At that time, the remaining amount of the penalty which has not yet become due and payable to plaintiff as a result of

subsequent violations is waived by the plaintiff.

6. Any breach of this Order shall mean that all unpaid amounts become due and payable 15 days following the breach.

## II. TERMS AND CONDITIONS OF AGREED ORDER

7. The defendant agrees to consider Occupational Safety and Health as one of its corporate top priorities. This exhibition of priority shall be manifested by the attendance, through December 31, 1993, of each management employee at a minimum of one safety seminar per year which is satisfactory to the Commonwealth. To qualify as satisfactory to the Commonwealth, a safety seminar must, at a minimum, be sponsored by a reputable safety association such as the Association of General Contractors (AGC), the Association of Builders and Contractors (ABC), or equivalent.
8. Within three months of the effective date of this Settlement Agreement the Employer shall develop, implement and maintain a written safety program which establishes policies and procedures for recognizing and protecting employees from safety and health hazards. This program, at a minimum, shall address the following

subjects:

- (a) management commitment and employee involvement to safety;
- (b) worksite analysis;
- (c) hazard recognition, prevention and control; and,
- (d) safety and health training.

9. The safety program shall list and discuss the respective responsibilities of management, supervisors, lead men and field employees with respect to safety on the worksite. The president shall be designated safety officer for the employer. Authority and responsibilities must be given to supervisors and lead men for the enforcement of safety rules. The safety officer and job superintendents must have authority delegated to them by management to issue internal Employer citations, or reports, for violations of safety and health rules. Additionally, the safety officer and job superintendents must have the authority to halt unsafe work which is likely to cause injury or death, when it is observed by them on the jobsite.

10. The Employer further agrees to initiate within the written safety program, an internal system of enforcement of Employer and state safety and health rules and regulations which provides for progressively severe internal penalties culminating in the option of removal of the unsafe employee from his or her employment upon the occurrence of a third repeat



violation. This system of enforcement shall apply equally to all the Employer's employees, both management and field personnel.

11. Employer agrees to institute a policy whereunder new employees receive a basic safety briefing prior to being employed at a jobsite. In addition, a system of training on basic jobsite safety for all new employees within thirty (30) days of the employee's initial employment shall be established to complete the new employee's initial safety indoctrination. This employee training shall include the discussion of Employer safety rules and general hazards associated with the Employer's industry, especially in the area of scaffolding erection.

The Employer through its safety officer, shall also institute weekly, site specific tool box discussions of hazards and corresponding safety practices for all employees employed at each individual jobsite. As a part of said meetings, employees will be encouraged to notify management, without reprisal, of any unsafe condition(s) on the jobsite. Management shall address such concerns within a reasonable period. Management shall also provide for investigation of accidents and "near miss" accidents, so that their causes and means for prevention can be identified and discussed with

employees at these meetings.

Documentation of said meetings and training shall be forwarded to the Director of Safety Enforcement, Department of Labor and Industry, on a quarterly basis, beginning on March 1, 1992 and continuing thereafter for a minimum of one year. On March 1, 1993, upon application of the Employer, the Commissioner shall determine whether the Employer shall thereafter be required to continue sending such documentation. If the Employer is so required, said documentation and time period will be specified at that time. Employer will be notified of the decision of the Commissioner in writing.

12. As part of the above safety program, the Employer agrees to conduct periodic monitoring of its jobsites to determine that its employees, including its supervisors, are in compliance with the VOSH regulations, including those regulations that deal specifically with scaffolding, 1926.451, and the Employer's safety program which requires adequate protection for all employees exposed to hazards while working on scaffolding. Those who conduct this monitoring shall assure that personnel are protected from such hazards.

13. The safety program shall also emphasize hazard prevention and control. Hazards which are detected shall be corrected in a timely and reasonable manner.

#### **REQUIREMENTS FOR A WARRANT**

14. With the execution of this agreement, the Employer expressly waives its right to require an inspection warrant to be issued in order to allow access to any Virginia Compliance Safety and Health Officer, to any of its construction sites, and further understands that compliance inspections of Employer's construction sites will be conducted by Commonwealth's inspectors on a reasonable, but random and unannounced basis.

#### **POSTING**

15. The Employer shall post a copy of this Settlement Agreement for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

### **FAILURE TO ABATE**

16. Failure by the Employer to comply with the requirements specified in this Agreed Order may result in the issuance of a failure-to-abate citation(s), or other remedy as provided by law.

### **SETTLEMENT OF CLAIMS**

THIS AGREEMENT is meant to compromise and settle the above contested claim. Pursuant to §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED, AND DECREED that Citation 1, items 1 through 4, are AFFIRMED as AMENDED and Citation 2, item 1 is AFFIRMED herein as willful and other-than-serious violations and become a final order of this Court in accordance with Va. Code §40.1-49.4(E).

Let the Clerk forthwith transmit certified copies of this Order to all counsel of record and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.

Enter: February 3, 1992

Joseph C. Gwaltney  
Judge

I ask for this:

Stephen Haynie  
Assistant Commonwealth's Attorney  
County of Arlington  
1400 North Courthouse Road  
Room 101  
Arlington, Virginia 22201  
Counsel for Plaintiff

Seen and Agreed:

Mr. Vincent H. Santmyer, pro se  
President  
Caldwell & Santmyer, Inc.  
22585 F Markey Court  
Sterling, Virginia 22170

VIRGINIA:

THE GENERAL DISTRICT COURT OF THE COUNTY OF SPOTSYLVANIA

COMMONWEALTH OF VIRGINIA <u>ex rel.</u>	)	
Commissioner of Labor and Industry	)	
Plaintiff,	)	
	)	
v.	)	Case No. V92-04
	)	
CARL E. SMITH, INC.	)	
Defendant.	)	

AGREED ORDER

Comes now the Commissioner of Labor and Industry (Plaintiff) by counsel, William F. Neely, Commonwealth's Attorney for Spotsylvania County, and Carl E. Smith, Inc. (Defendant) by counsel, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

1. The parties are before this Court pursuant to Va. Code Ann. § 40.1-49.4.E (1991 Supp.), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 112374244, and issued to Defendant by Plaintiff on August 16, 1991. The citations alleged the following violations of VOSH Standards for the Construction Industry:

## SERIOUS VIOLATIONS

1-1a § 1926.20(b)(2) - Employer did not provide for frequent and regular inspections of the jobsite conducted by a competent person capable of recognizing workplace hazards, and possessing authority to take corrective action.

1-1b § 1926.21(b)(2) - Employer did not observe a requirement to instruct its employees in the observation and recognition of unsafe conditions, specifically, the recognition and avoidance of electrical shock, hazardous storage of compressed gas cylinders, and improperly sloped trenches.

1-1c § 1926.404(b)(1)(i) - At electrical receptacles installed in several jobsite trailers, the employer did not use either ground-fault circuit interrupters or implement a program to assure equipment grounding conduction.

1-1d § 1926.404(b)(1)(ii) - Employer did not provide the 110-volt receptacles on a Lincoln brand arc welder with ground fault circuit interrupters.

For the grouped violations 1-1a through 1-1d a single penalty of \$810.00 was proposed.

1-2a § 1926.59(f)(5)(i) - Employer did not maintain and make available on the work site copies of the Material Safety Data Sheets (MSDS) for compressed acetylene and oxygen, welding rods, and gasoline.

1-2b § 1926.59(f)(5)(ii) - Employer did not provide training on hazardous chemicals used in the work site, or on the requirements of the Hazard Communication Standard. For the grouped violations 1-2a and 1-2b a single penalty of \$540.00 was proposed.

1-2c § 1926.59(g)(8) - Employer did not provide training on hazardous chemicals used in the work site, or on the requirements of the Hazard Communication Standard. For the grouped violations 1-2a and 1-2b a single penalty of \$540.00 was proposed.

1-2d § 1926.59(h) - Employer did not provide training on hazardous chemicals used in the work site, or on the requirements of the Hazard Communication Standard.

For the grouped violations 1-2a through 1-2d a single penalty of \$450.00 was proposed.

- 1-3 § 1926.100(a) - Employer did not ensure that hard hats were worn while employees were exposed to danger of head injury while engaged in pipe welding operations in 6-ft. to 10-ft. deep trenches. A civil penalty of \$810.00 was proposed.
- 1-4 § 1926.303(c)(3) - Employer provided portable electrically powered grinders with unguarded abrasive wheels. A civil penalty of \$720.00 was proposed.
- 1-5a § 1926.350(a)(1) - Valve protection caps on a stored compressed gas cylinder were not in place.
- 1-5b § 1926.350(a)(4) - A compressed gas cylinder of oxygen being transported in the bed of employer's pickup truck, was not stored and secured in an upright position.
- 1-5c § 1926.350(a)(9) - Eleven oxygen compressed gas cylinders resting in a storage rack were not secured from tipping over.
- 1-5d § 1926.350(j) - In two instances oxygen and acetylene compressed gas cylinders in storage were not separated by either a minimum distance of 20 feet, or an appropriate noncombustible barrier.
- For the grouped violations 1-5a through 1-5d a single penalty of \$630.00 was proposed.
- 1-6 § 1926.404(a)(2) - Two duplex electrical receptacles were tested and found to have a terminal attached so as to reverse the designated polarity. A civil penalty of \$630.00 was proposed.
- 1-7 § 1926.404(f)(6) - Two electrical receptacles were tested and found to have an unconnected or open circuit to ground. A civil penalty of \$630.00 was proposed.
- 1-8 § 1926.405(a)(2)(ii)(E) - In five separate locations electric bulbs installed in employer's trailers were not guarded to prevent accidental breakage and potential electrical shock. A civil penalty of \$630.00 was proposed.
- 1-9 § 1926.405(l)(1)(i) - Two electrical bulb fixtures in the employer's trailers had unprotected live wires, exposing employees to a potential shock. A civil penalty of \$630.00 was proposed.
- 1-10 § 1926.601(b)(4) - Employer had in operation a Chevrolet utility truck not equipped with an operable back-up alarm, nor operated with the assistance of another employee while backing up. A civil penalty of \$720 was proposed.



1-11 § 1926.601(b)(8) - Employer was using a GMC flat-bed truck to transport employees without providing an adequate number of seats. A civil penalty of \$540 was proposed.

**OTHER THAN SERIOUS**

2-1 Va. Code § 59.1-409(B) - An employee was operating a Caterpillar tractor with a side-boom crane and had not been trained on the safety requirements of the Overhead High Voltage Line Safety Act.

2-2 § 1926.51(c)(1) - Employees were not provided ready access to toilets and handwashing facilities on the jobsite.

2-3 § 1926.150(c)(1)(iii) - Two portable fire extinguishers stored on employer's trucks did not have tags indicating periodic inspection and maintenance.

2-4 § 1926.152(a)(1) - Employer had in use four portable gas cans which were not approved metal containers with spring-loaded lids.

2-5 § 1926.403(b)(2) - Employer had in use a 110-volt electrical receptacle with a damaged cover plate.

2-6 § 1926.405(b)(2) - Employer had in use an octagonal junction box which did not have a cover plate installed.

2-7 § 1926.405(j)(1)(ii) - Employer had in use a 110-volt electrical receptacle which was not securely supported and attached to the wall of the mechanic's trailer.

2-8 § 1926.550(a)(6) - Employer had not provided annual inspections of a side-boom crane attached to a Caterpillar tractor.

2-9 § 1926.550(b)(2) - Employer had not provided monthly inspections of a Link Belt FMC-80 crane and a side-boom crane attached to a Caterpillar tractor.

2-10 § 1926.602(a)(9)(i) - Employer did not equip a Caterpillar D-6 bulldozer with a operable horn.

2-11 § 1926.1052(c)(1) - At seven locations the employer did not maintain stairways to trailers with either handrails or stair rails.

2-12 § 1926.1052(b)(3)(i) - At two locations the employer did not erect stairway handrails at a sufficient height.

The total proposed penalty of \$7,200.00 was determined according to provisions of the VOSH Field Operations Manual, and

calculated according to the severity of the violations, the duration of exposure, and the previous history of the employer.

2. No employee or employee representative appeared in this matter or has filed a notice of contest.

3. Defendant withdraws its notice of contest to the violations and penalty as amended below. The Plaintiff and Defendant agree to the following amendments of the citations at issue:

**SERIOUS VIOLATIONS**

- 1-1a § 1926.20(b)(2) - This item is vacated.
- 1-1b § 1926.21(b)(2) - This item is vacated.
- 1-1c § 1926.404(b)(1)(i) - This item remains as issued.
- 1-1d § 1926.404(b)(1)(ii) - This item remains as issued, with a civil penalty for the grouped violations 1-1c and 1-1d of \$405.00.
- 1-2a § 1926.59(f)(5)(i) - This item remains as issued.
- 1-2b § 1926.59(f)(5)(ii) - This item remains as issued. For the grouped violations 1-2a and 1-2b the original penalty of \$450 is reduced 75% to \$112.50.
- 1-2c § 1926.59(g)(8) - This item is vacated.
- 1-2d § 1926.59(h) - This item is vacated.
- 1-3 § 1926.100(a) - This item remains as issued, with a civil penalty of \$810.00.
- 1-4 § 1926.303(c)(3) - This item remains as issued, with a civil penalty of \$720.00.
- 1-5a § 1926.350(a)(1) - This item is vacated.
- 1-5b § 1926.350(a)(4) - This item is vacated.
- 1-5c § 1926.350(a)(9) - This item is vacated.

- 1-5d § 1926.350(j) - This item is vacated.
- 1-6 § 1926.404(a)(2) - This item remains as issued, with a civil penalty of \$630.00.
- 1-7 § 1926.404(f)(6) - This item remains as issued, with a civil penalty of \$630.00.
- 1-8 § 1926.405(a)(2)(ii)(E) - This item is renamed as Violation 1-8a, and is grouped with former Violation 1-9 below.
- 1-9 § 1926.405(l)(1)(i) - This item is renamed as Violation 1-8b, with a civil penalty for the grouped violations 1-8a and 1-8b of \$630.00.
- 1-10 § 1926.601(b)(4) - This item is amended to an Other Than Serious Violation, with a civil penalty of \$100.00.
- 1-11 § 1926.601(b)(8) - This item remains as issued with a civil penalty of \$540.00.

**OTHER THAN SERIOUS**

- 2-1 Va. Code § 59.1-409(B) - This item is vacated upon the employer's provision of documentation supporting employee training relating to this cited condition.
- 2-2 § 1926.51(c)(1) - This item is vacated upon the employer's agreement of future compliance as further described in Paragraph 4 below.
- 2-3 § 1926.150(c)(1)(iii) - This item remains as issued with no civil penalty.
- 2-4 § 1926.152(a)(1) - This item remains as issued with no civil penalty.
- 2-5 § 1926.403(b)(2) - This item remains as issued with no civil penalty.
- 2-6 § 1926.405(b)(2) - This item remains as issued with no civil penalty.
- 2-7 § 1926.405(j)(1)(ii) - This item remains as issued with no civil penalty.
- 2-8 § 1926.550(a)(6) - This item is renamed Violation 2-8a and otherwise remains as issued.
- 2-9 § 1926.550(b)(2) - This item is renamed Violation 2-8b, and otherwise remains as issued.

2-10 § 1926.602(a)(9)(i) - This item remains as issued with no civil penalty.

2-11 § 1926.1052(c)(1) - This item is renamed Violation 2-11a and otherwise remains as issued.

2-12 § 1926.1052(b)(3)(i) - This item is renamed Violation 2-11b and otherwise remains as issued.

Based on the above amendments, the total civil penalty is amended to \$4,577.50.

4. Defendant agrees to hereafter provide on all its job sites in Virginia, except for mobile crews having transportation readily available to nearby toilet facilities, toilet facilities and potable water for handwashing facilities, readily accessible to all employees, pursuant to the requirements of § 1926.51 of the VOSH Standards For The Construction Industry and VOSH Program Directive 12-239A, (Copies Attached).

5. Defendant agrees to remit to the Commissioner of Labor and Industry, at 13 South Thirteenth Street, Richmond, Virginia 23219, the civil penalty of Four Thousand Five Hundred Seventy-Seven Dollars and Fifty Cents, (\$4,577.50), as assessed in paragraph 3 above, no later than fifteen days after notification of entry of this Agreed Order. A check or money order shall be made payable to "Commonwealth of Virginia."

6. This Agreed Order shall be posted by the Defendant with the original citations for ten (10) working days at a conspicuous place, or where notices to employees are normally posted.

7. By entering into this Agreed Order, the defendant does not admit any of the allegations contained in these citations. The defendant specifically denies each allegation and states that it has executed this Agreed Order solely for the purpose of settling this matter economically and amicably without further litigation. Pursuant to Va. Code § 40.1-51.3:2 and § 4.3 of the VOSH Administrative Regulations Manual, this Order may not be construed as an admission to any civil liability in any action for personal injury or property damage.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the Virginia Occupational Safety and Health Citations and proposed penalties as amended above, be AFFIRMED and become a final order of this Court in accordance with Va. Code Ann. § 40.1-49.4.E, (1991 Suppl.).

The Clerk shall mail certified copies of this Agreed Order to the parties listed below, and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.

Enter: June 25, 1992

John R. Stevens  
Judge

We ask for this:

By:           /s/            
William F. Neely  
Commonwealth's Attorney  
P.O. Box 223  
American Legion Drive  
Spotsylvania, Virginia 22553  
(703) 582-7148

Seen and agreed:

By:           /s/            
Dana L. Rust, attorney for Defendant  
McGUIRE, WOODS, BATTLE & BOOTHE  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1082

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA, ex rel.,  
Carol Amato, Commissioner of Labor  
and Industry

v.

Docket Number: 040646

The Ceco Corporation

AGREED ORDER

Comes now, the plaintiff, Carol A. Amato, Commissioner, Department of Labor and Industry, Commonwealth of Virginia, and the Defendant, by counsel, and in order to provide for the safety, health and welfare of the defendant's employees and to conclude this matter without the necessity of further litigation, it is hereby stipulated and agreed:

The defendant is before this court pursuant to §40.1-49.4(E) contesting citations issued to it by the plaintiff on August 6, 1990. The citations were issued as a result of a Virginia Occupational Safety and Health (VOSH) inspection of a construction site located at Riverfront Plaza, 901 East Byrd Street, Richmond, Virginia where the defendant was employed as a subcontractor. An inspection was initiated pursuant to a fatality which occurred at the site on February 26, 1990. Hylton Rupert Anderson, age 32, one of the defendant's employees, fell approximately 282 feet from the top of the south main elevator shaft before landing on a partially installed elevator rail.

Following a fatality investigation and a comprehensive inspection of the construction site, the Virginia Occupational Safety and Health Program (VOSH) cited the defendant for 3 serious, 4 willful, and 5 repeat violations of the Virginia Standards for Occupational Safety and Health. A penalty of \$38,000 was proposed. Ceco Corporation contested the citations and penalties.

On March 4, 1992, the contest was heard in the City of Richmond, General District Court, Civil Division. Judge William Wimbish rescheduled the case for trial for September 9, 1992. He directed that Ceco officials confer with the Commissioner of Labor and Industry to seek an agreement "to assure the Commission that Ceco will comply prospectively" with VOSH rules and regulations and "to teach a further accord as to violations and civil penalties, if any." Settlement discussions were to be initiated by April 1 and concluded by May 8, 1992.

The Commissioner met with Ceco officials on March 27 and again on April 6, 1992. Pursuant to Judge Wimbish's direction and after hearing the defendant's response to the citations, Commissioner Amato agrees to modify the Citations and Notifications of Penalty with respect to the above captioned inspection as follows:

**Citation 1, item 1--§1926.500(b)(2):** Ladderway entrance openings were not provided with a swinging gate or so offset that a person could not walk directly into the opening. On the 21st floor of the west tower, the entrance to the double cleat ladder, used to provide access to the work deck, was



not provided with a swing gate or offset to prevent persons from walking directly into the opening, exposing employees to a 13 foot fall to the concrete deck below. This violation and the proposed penalty of \$900 is deleted;

**Citation 1, item 2--§1926.500(f)(1)(iv)(b):** The top rail was not constructed to withstand a minimum of 200 pounds of pressure with a minimum of deflection. On the 20th floor of the west tower, the guardrail cable on the east side of the building deflected 10 inches. This citation is amended and corrected to read 1926.500(f)(i)(vi)(b). This violation and the proposed penalty of \$900 is deleted; and

**Citation 1, item 3--§1926.701(b):** All protruding reinforcing steel, onto and into which employees could fall, was not guarded to eliminate the hazard of impalement. On the east tower at the penthouse level, employees were working over and walking around unguarded rebar, climbing on wall forms and building a parapet wall. This violation remains serious as cited. The assessed penalty of \$600 is reduced to \$300.

Ceco Corporation was also cited for willful violations.

The Commissioner agrees to the following actions concerning those violations:

**Citation 2, item 1--§1926.25(a):** Debris was not kept clear from the following areas: On the east tower at the penthouse level, scrap rebar, lumber, wall ties and plastic were in the work area, creating tripping hazards. This violation is changed from willful to serious. The assessed penalty of \$9,000 remains as proposed.

**Citation 2, item 2--§1926.450(a)(1):** Ladders were not used to give safe access to all elevations not equipped with either permanent or temporary stairway, suitable ramp or runway. On the east tower at the penthouse level, employees were required to access a 4 ft. by 4 ft. wooden platform, suspended over the south elevator shaft, by climbing along the wall forms, exposing them to a fall distance of over 282 feet. This violation and the assessed penalty of \$9,000 are deleted.

**Citation 2, item 3--§1926.500(b)(1):** Floor openings were not guarded by standard railings and toeboards or covers specified in paragraph (f) of this section. On the east tower at the penthouse level, employees working on a parapet wall were working adjacent to floor holes 8 feet by 32 feet on the north side, 8 feet by 12 feet on the west side, 19 feet above the adjacent floor level; and 4 feet by 8 feet on the east side with a cover that left a 6 inch by 8 foot section unguarded. A fatality occurred on February 26, 1990

when an employee fell through the opening on the south side. This violation is changed from willful to serious. The assessed penalty of \$10,000 remains; and

**Citation 2, item 4--§1926.500(d)(1):** Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides. On the east tower at the penthouse level, employees were working from a 4 foot by 4 foot platform, suspended over the south elevator shaft 282 feet above the deck level, that did not have guardrails. This violation and assessed penalty of \$9,000 are deleted.

The following violations were cited as repeat. The Commissioner agrees to the following actions concerning these violations:

**Citation 3, item 1--§1926.25(a):** Debris was not kept cleared from the following areas: (a) on the west tower, floors 18 through 20 were cluttered with scrap lumber, nails and paper; (b) on the west tower, Levels B-2, B-3 and B-4, lumber and rebar were scattered in work areas and (c) in the B-hole on the north side of the east tower, supplies, form material and scrap lumber was scattered in all areas, creating tripping hazards. This violation is changed from repeat to serious. The assessed penalty is reduced from \$1,000 to \$500;

**Citation 3, item 2--§1926.150(c)(1)(viii):** Portable fire extinguishers were not inspected periodically in accordance with maintenance and use of portable fire extinguishers, N.F.P.A. Number 10A-1970. On Level B-1 of the east tower, an Amerex fire extinguisher, Model JH358743, mounted on a forklift, did not have a tag or label attached indicating the date of the annual inspection. This violation is changed from repeat to other-than-serious. The assessed penalty of \$200 is reduced to \$100;

**Citation 3, item 3--§1926.405(a)(2)(ii)(I):** Flexible cords and cables used for temporary wiring were not protected from damage. On the west tower, the black extension cord was stretched from the 20th floor to the 21st floor between a panel and sharp metal and was unprotected. This violation is changed from repeat to serious. The assessed penalty of \$400 is reduced to \$200;

**Citation 3, item 4--§1926.416(e)(1):** Worn or frayed electric cords or cables were used. On the west tower, the black extension cord on the southeast corner of the 21st floor had damaged insulation. This violation is changed from repeat to serious. The assessed penalty of \$400 is reduced to \$200;

**Citation 3, item 5a--§1926.500(d)(1):** Open sided floors or platforms, 6 feet or more above adjacent floor or ground level were not guarded by a standard railing or the equivalent on all open sides: (a) on the west tower, the north side of the 21st floor and the southeast corner of the 20th floor did not have fall protection; (b) on the 13th floor of the east tower, an employee was stripping formwork from a stair landing 73 1/2 inches above the concrete deck which did not have any guardrails, this instance is deleted; (c) on the west tower on the northwest corner of the 21st floor, an employee was working outside a guardrail without fall protection and (a) on the west tower on the east side of Level 5, an employee was working on an outrigger platform landing material without fall protection 112 feet above the adjacent ground level, this instance is deleted; and

**Citation 3, item 5b--§1926.500(d)(1):** Standard toeboards were not provided on open-sided floors or platforms 6 feet or more above adjacent floor or ground level. On the west tower, on the west side of the 21st floor, the guardrail system did not have toeboards.

The above violations (Citation 3, items 5a & 5b) are grouped because they involve similar or related hazards. These violations are changed from repeat to serious. The assessed penalty of \$1800 is reduced to \$900.

#### **TERMS AND CONDITIONS OF AGREEMENT**

1. In accordance with Title 40.1 of the Code of Virginia, and in consideration of the actions of the Commonwealth regarding the instant citations, Ceco Corporation agrees to pay a penalty of \$21,100 in lieu of the penalties originally proposed in the citations. An initial payment of \$9,200 shall be received by the Department of Labor and Industry no later than fifteen (15) days after The Ceco Corporation receives a fully executed copy of this agreement. The balance of the penalties due are to be paid over the period of one year in 12 monthly installments of \$1,000 due

by the 10th of each month, beginning in June of 1992.

2. The parties agree that all citations set forth above have become final orders of the Commissioner of Labor and Industry. The parties further agree that all such citations have been abated.

3. In consideration of the actions of the Commissioner, Ceco Corporation waives its right to contest the terms of this Agreement.

4. Ceco Corporation agrees to implement the following actions at jobsites in Virginia on which Ceco Corporation is a subcontractor, effective May 1, 1992, and continuing through April 30, 1994:

A. Ceco Corporation will increase its efforts to monitor and eliminate hazards by holding management and supervisory personnel responsible for recognizing and correcting hazardous conditions. The District Manager will approve a site specific employee safety and health plan for each Virginia worksite. The District Manager will monitor performance by visiting each Virginia site monthly to conduct a formal, written assessment of compliance with the plan. Ceco management will secure compliance with the safety and health plan through use of existing disciplinary and incentive procedures. The District Manager will forward copies of the written assessments, of problems

identified, and of corrective action taken to the Corporate Safety Director within 5 days. Copies of the assessments will be maintained by the District Manager for the term of this agreement and made available on request for review by VOSH officials.

B. Ceco Construction will provide a full time safety representative for every 100 employees or fraction thereof employed at a Virginia jobsite. When Ceco employs fewer than 100 employees at a Virginia jobsite, a safety representative will be appointed on a part-time basis depending on the size and logistics of the job. The safety representative will work with on-site supervisory personnel to oversee Ceco Corporation's safety efforts at the jobsite. Ceco will require its jobsite superintendent to allow site access to all corporate safety personnel at all times and without notice. Regular safety meetings and training will be conducted at each job site. The safety representative's duties shall include the responsibility to identify safety and/or health hazards and the authority to advise Ceco jobsite managers to eliminate and correct the hazard. The safety representative shall have the authority to stop a job and remove employees in the event of imminent danger; and

C. Ceco Corporation will incorporate the performance of safety and health functions as a mandatory, critical element to be considered in all performance assessments of its supervisory personnel, including all levels of management.

D. Ceco Corporation will review and revise its corporate policies regarding fall protection and housekeeping to assure the protection of employees exposed to particular fall hazards and to assure that Ceco work areas are free of debris. The review will be completed and the revised policies and procedures implemented at all jobsites in Virginia no later than July 1, 1992. The District Manager will forward a copy of the policies and procedures to the Commissioner by July 1, 1992.

E. Ceco will revise its standard contract with prime contractors in Virginia to indicate that Ceco will not permit its employees to work in hazardous situations created by and under the control of the prime contractor or other sub-contractors. The contract will define the process Ceco will use to notify prime contractors and other sub-contractors of hazardous conditions and to assure hazard abatement before Ceco permits its employees to work. VOSH will respond promptly to Ceco complaints of unsafe conditions at a worksite in Virginia and will work with Ceco to assure hazard abatement.

F. For the period beginning May 1, 1992 and ending April 30, 1994, the District Manager will notify the Commissioner of all sites at which Ceco is working in Virginia. The District Manager will send an updated list as new sites are added within ten (10) days of such an update. The notification will include the address where Ceco is working; the name of the prime contractor; and the dates Ceco will be at the site. Ceco will

permit entry to VOSH inspectors for the purpose of conducting unannounced monitoring inspections at Ceco jobsites in Virginia. Such special monitoring inspections will not exceed four the first year and two the second year covered by this agreement. The monitoring inspections will be conducted in addition to regular General Schedule complaints or referral inspections of sites where Ceco is a sub-contractor.

G. During the term of this agreement, Ceco agrees to use the informal conference to attempt to resolve disputes with the VOSH Program. In the event that such conferences do not resolve such disputes, VOSH will promptly issue summons to assure the dispute is scheduled for a court hearing.

5. After Ceco has performed satisfactorily under this agreement for a period of six months, the Commissioner, at Ceco's request, will provide a written statement on the status of Ceco's satisfactory performance under the agreement. Such a statement will be addressed to specific prime contractors in Virginia to supplement bid documents submitted by Ceco.

#### **POSTING**

Ceco Corporation will post a copy of this Settlement Agreement for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

#### **SETTLEMENT OF CLAIMS**

THIS AGREEMENT is meant to compromise and settle the above contested claim; to assure hazard abatement; and to assure

prospective compliance with the Virginia Standards for Occupational Safety and Health. Pursuant to §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty paid by a party or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

Violations contained in this Order will be considered, for the purposes of a repeat violation(s), for a period of two years, (beginning with the date of execution of Agreed Order), so long as Ceco Corporation performs satisfactorily under the terms and conditions of this agreement. If Ceco's performance is determined to be unsatisfactory, the violations contained in this order will serve as the basis for a repeat violation for a period of three years.

**WHEREFORE**, for the reasons stated above, it is hereby **ADJUDGED, ORDERED AND DECREED** that the above citations and penalties are **AFFIRMED** as modified.

Enter: May 22, 1992

/s/  
Judge William Wimbish



We ask for this:

          /s/            
Thomas G. Shaia  
Assistant Commonwealth's Attorney  
John Marshall Courts Building  
800 East Marshall Street  
Richmond, Virginia 23219-1989  
(804) 780-8956

See and agreed to:

          /s/            
Robert D. Moran  
Law Offices  
919 18th Street, N.W.  
Suite 800  
Washington, D.C. 20006  
(202) 785-4949

FOURTH JUDICIAL CIRCUIT OF VIRGINIA  
CIRCUIT COURT OF THE CITY OF NORFOLK

December 16, 1991

Guilford D. Ware, Esquire  
Crenshaw, Ware & Martin  
1640 Sovran Center  
One Commercial Place  
Norfolk, Virginia 23510

Robert E. Frank, Esquire  
Deputy Commonwealth's Attorney  
800 East City Hall Avenue  
Norfolk, Virginia 23150

RE: Commonwealth v. Dorey Electric Company  
Docket No. 903409M11

Gentlemen:

This matter is before the court on the defendant Dorey Electric Company's motion to dismiss the indictment served on it for numerous reasons as stated in the brief filed on behalf of the defendant by counsel and in oral argument.

The Commonwealth relies on §40.1-49.4(K) of the 1950 Code of Virginia as amended which states as follows:

Any employer who willfully violates any safety or health provisions of this title or standards, rules or regulations adopted pursuant thereto, and that violation causes death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both such fine and imprisonment. If the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

The defendant argues that it is being charged with a willful criminal violation of rules promulgated by an administrative body under enabling legislation which does not provide a standard to give the Safety and Health Codes Board any guidance or provide proper control for the exercise of discretion allowed that the effect is to give unbridled discretion to the administrative agency in question and that this is an unconstitutional delegation of legislative power and violative of due process of

law. The Court is persuaded that it should dismiss the indictment for that reason and that it need not reach a decision on the defendant's other assignment of reasons for dismissal. Code §40.1-22 (5) states as follows:

"The Board, with the advice of the Commissioner, is hereby authorized to adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), and as may be necessary to carry out its functions established under this title. The Commissioner shall enforce such rules and regulations. All such rules and regulations shall be designed to protect and promote the safety and health of such employees. In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. However, such standards shall be at least as stringent as the standards promulgated by the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596). ..."

The legislature has failed to set forth a sufficient standard by which action under the delegated legislative power should be exercised in the promulgation of rules and regulations.

In the case of Chapel v. Commonwealth 197 Va. 406 (1955), a case from Norfolk, our Supreme Court at page 410 citing Thompson v. Smith, 155 Va. 367, 379, 154 S.E. 579, 71 A.L.R. 604, said as follows:

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government whether state or municipal, to determine and declare what the law shall be and the legislative branch of the government may not divest itself of this function or delegate it to the executive or administrative officers. ... The majority of the cases lay down the rule that statutes or ordinances vesting discretion in administrative officers and bureaus must lay down rules and tests to guide and control them in the exercise of the discretion granted in order to be valid; ...."

The court in Chapel further cites at page 413 language in the case of State v. Harris, 216 N.C. 746, 8 S.E. (2d) 854:

"In licensing those who desire to engage in professions or occupations as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or reusing to license persons to enter such trade or professions only when it has prescribed a sufficient standard for their guidance. (Emphasis added) 16 CJS, Constitutional Law, page 73 §138, and cases cited. Where such a power is left to the unlimited discretion of a board to be exercised without the guide of legislative standards the statute is not only discriminatory must be regarded as an attempted delegation of the legislative function offensive to both the state and federal constitution ...."

As stated above, the court is convinced that such is the case here. No adequate standard is expressed either in § 41.1-22 (5) or in 41.1-49.4 (K), (sic). To the contrary it is stated clearly in the enabling legislation that "the board shall adopt the standard ... however such standard shall be at least as stringent as the standards promulgated by the federal Occupational Safety and Health Act of 1970 ...." (emphasis Added) This legislation further says that the board may adopt rules and regulations, etc. to further protect and promote the safety and health of employees in the place of employment. The Commonwealth argues that reference to the federal act is sufficient but the court finds first, that it is the legislature and not the board which must adopt the standards, and that even if the board could so act, the language of the statute establishes only a floor with regard to the stringency of such regulations and standards but it does not define them adequately and leaves the board free to adopt almost any standards above that floor that it seems fit.

As pointed out by the defendant, the fact that the statute specifies that the rules and regulations shall be designed to "protect and promote the safety and health" of employees does not cure the defect.

"A delegation of legislative power to an administrative officer or board is not brought within the permissible limits of such designation by describing the public welfare or good as a standard for the actions of the administrative officer or board." Andrews v. Board of Supervisors, 200 Va. 637 641 (1959) (citing Panama Refining Company v. Ryan 293 U.S. 388 (1934); Connelly v. General Construction Company 269 U.S. 385 (1926)).

The case of Noblecraft Industries, Inc. v. Secretary of Labor 614 F.2d 199 (9th Cir. 1980) is instructive here regarding the provision for appropriate standards. The case basically stands

for the proposition that congress did not, by resorting to National Consensus Standards for implementation of the Federal Occupational Safety and Health Act, improperly delegate legislative and administrative power to private organizations, i.e., American National Standards Institute. The term "National Consensus Standard" is defined as any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary of Labor that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption; (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

The adoption of such standards by the legislature, or a more clearly written statute referencing particular standards and more particularly defining the limits of same, if this was the intent of the legislature, would cure the defect perceived by this court.

For all of the reasons stated then, the court finds that the power granted by the legislature in this arena has left to the board in question unlimited discretion to be exercised without the guide of sufficient standards and that the statute must be regarded as an attempted delegation of the legislative function offensive both to the state and federal constitution. This is particularly so when the legislature defines a crime and states punishment for violation of the regulations in question. I will ask that Mr. Ware prepare an appropriate order reflecting the views stated herein, and submit the same to Mr. Frank for endorsement and presentation to the court.

Very truly yours,

/s/  
John C. Morrison, Jr.  
Judge

(Entered January 16, 1992)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

COMMONWEALTH OF VIRGINIA

v. CRIMINAL DOCKET NO. 90-3409M11

DOREY ELECTRIC COMPANY

ORDER NUNC PRO TUNC

On the 12th day of November, 1991 the Commonwealth of Virginia and the defendant, DOREY ELECTRIC COMPANY, appeared by their respective counsel upon the motions to dismiss the indictment filed by the defendant, briefs filed by the defendant and the Commonwealth and argument of counsel.

UPON CONSIDERATION WHEREOF, and it appearing to the Court from the record, the briefs, evidence, arguments of counsel and for the reasons set forth in the letter opinion of this Court dated December 16, 1991 addressed to counsel for the parties that the statute under which the defendant is charged, Section 40.1-49.4(K) and Section 40.1-22(5) of the Code of Virginia 1950, as amended, (by typographical error referred to as Section 41.1) and the regulations promulgated pursuant thereto constitute an unconstitutional delegation of legislative power under the Constitutions of the United States and of Virginia; it is so ADJUDGED.

WHEREUPON it is so ORDERED that the indictment and charges against defendant, DOREY ELECTRIC COMPANY, and this case is

hereby DISMISSED with prejudice and removed from the docket of this Court.

ENTER SO NUNC PRO TUNC as of January  
6, 1992:

                  /s/                    
John C. Morrison, Jr.

I ask for this:

                  /s/                    
Guilford D. Ware, Esquire  
Of Counsel for Dorey Electric Company

Seen and objected to:

                  /s/                    
Robert E. Frank, Esquire  
Of Counsel for Commonwealth of Virginia

COMMONWEALTH OF VIRGINIA  
NORFOLK GENERAL DISTRICT COURT  
811 East City Hall Avenue  
Norfolk, Virginia 23510-2772

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CIVIL DIVISION

March 17, 1992

Robert E. Frank  
Deputy Commonwealth's Attorney  
800 E. City Hall Ave., Suite 600  
Norfolk, Va. 23150

Guilford D. Ware, Esquire  
Crenshaw, Ware & Martin  
1640 Nationsbank Center  
One Commercial Place  
Norfolk, Va. 23510-2114

RE: Commonwealth of Virginia v. Dorey Electric Co.  
Docket No. V92001595

Dear Gentlemen:

Upon review of the parties' arguments, memoranda and law, the court dismisses the summons and citations issued by the Commonwealth of Virginia against Dorey Electric Company.

It is well settled under Virginia law that collateral estoppel applies when four requirements are met. Collateral estoppel precludes relitigation of issues in subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issue was necessary to the court's judgment and (4) those issues are identical to the issues raised in the subsequent suit. HMK Corp. v. Walsey, 637 F. Supp. 710 (E. D. Va. 1986), aff'd, 828 F. 2d 1071 (4th Cir. 1987), cert. denied, 484 U.S. 1009 (1988); In Re: Dalkon Shield Punitive Damages Litigation, 613 F. Supp. 1112 (Ed. Va. 1985).





VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF ROCKINGHAM

COMMONWEALTH OF VIRGINIA <u>ex rel.</u>	)	
Commissioner of Labor and Industry	)	
Plaintiff,	)	
	)	
v.	)	File # 896797
	)	
H. J. SCHNEIDER CONSTRUCTION, INC.	)	
Defendant.	)	

AGREED ORDER

Comes now the Plaintiff by counsel, the Assistant Commonwealth's Attorney for the County of Rockingham, and the Defendant, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

The parties are before this Court pursuant to Virginia Code § 40.1-49.4(E) to be heard on Defendant's contest of a Virginia Occupational Safety and Health (VOSH) Citation, arising from inspection number 105672760, and issued to Defendant by Plaintiff on February 27, 1989, for violation of two VOSH Standards of the Construction Industry.

No employee or employee representative appeared in this matter or has filed a notice of contest.

Plaintiff and Defendant agree to the following modifications of the citation at issue:

Citation 1, item 1 -- a serious violation of Section 1926.21(b)(2) of the VOSH Standards for the Construction Industry. This violation has been vacated and the proposed penalty of \$560.00 withdrawn.

Citation 2, item 1, a repeat violation of Section 1910.652(b) of the VOSH Standards for the Construction Industry. This violation has been vacated and the proposed penalty of \$1,120.00 withdrawn.

Plaintiff and Defendant have agreed, for settlement purposes, to a serious violation of Section 1926.652(g)(1), and a monetary penalty of \$280.00.

A total penalty of \$280.00 is now proposed for this citation.

Plaintiff and Defendant agree that, in consideration for Plaintiff's agreement to modify several portions of the above VOSH Citation and Notification of Penalty, Defendant withdraws its notice of contest.

Pursuant to Virginia Code §40.1-51.3:2 in the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of this chapter or any state or federal occupational safety and health standards act, the fact of the issuance of a citation, the voluntary payment of a civil penalty by a party charged with a violation, or the judicial assessment of a civil penalty under this chapter or any state or federal occupational safety and health standards act, shall not be

admissible in evidence.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the above mentioned Citation and Notification of Penalty for violations of Virginia Occupational Safety and Health Standards for the Construction Industry be modified as follows:

Citation 1, Item 1 shall be vacated.

Citation 2, Item 1 shall be vacated.

Citation 2, Item 1 shall issue as a serious violation of Section 1926.652(g)(1), with a monetary penalty of \$280.00.

The total monetary penalty shall be \$280.00.

The Clerk shall mail certified copies of this order to both parties listed below, and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

The Defendant shall be ordered to post a copy of this order for ten working days at a conspicuous place where notices to employees are usually posted.

Enter: May 15, 1990

John A. Paul  
Judge

Respectfully submitted,

          /s/            
G. Russell Stone, Jr.  
Assistant Commonwealth's Attorney  
One Court Square, Suite 350  
Harrisonburg, Virginia 22801

Seen and agreed to:

          /s/            
Gerald I. Katz, Esquire  
Karen M. Grane, Esquire  
KATZ & STONE  
8230 Leesburg Pike  
Suite 600  
Vienna, Virginia 22182  
  
Counsel for Defendant  
H. J. Schneider Construction, Inc.

VIRGINIA:

IN THE GENERAL DISTRICT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA, ex rel.  
Commissioner of Labor and Industry,  
Plaintiff

v.

File No. GV90-051137

JENSEN CONSTRUCTION, INC.  
Defendant

**DEFAULT JUDGMENT**

WHEREAS, citations were issued on June 29, 1990 to the defendant as a result of a safety inspection conducted on May 1, 1990 at 303 Atlantic Avenue, Virginia Beach, Virginia by the plaintiff, Virginia Occupational Safety and Health (VOSH), Department of Labor and Industry.

WHEREAS, On July 13, 1990 the defendant contested the following citations and proposed penalties in the amount of Six Hundred Dollars, (\$600.00), issued as a result of the inspection:

1. Citation 1, Items 1a and 1b, Title 40.1-51.1(a) of the Code of Virginia, and §1926.451(i)(8) of the VOSH Standards for the Construction Industry, cited as a Serious violation, penalty of \$350.00.
2. Citation 1, Item 2, §1926.404(b)(1)(i) of the VOSH Standards for the Construction Industry, cited as a Serious violation,

penalty of \$250.00.

3. Citation 2, Item 1, §11.3.A of the VOSH Administrative Regulations Manual, cited as an Other Than Serious violation, no penalty proposed.
4. Citation 2, Item 2, §1926.405(g)(2)(iv) of the VOSH Standards for the Construction Industry, cited as an Other Than Serious violation, no penalty is ordered.
5. Citation 2, Item 3, §1926.416(e)(1) of the VOSH Standards for the Construction Industry, cited as an Other Than Serious violation, no penalty is ordered.

WHEREAS, on January 9, 1991 the defendant filed a petition in bankruptcy in the Federal Court of the Eastern District of Virginia under the provision of 11 U.S.C. Chapter 7.

WHEREAS, 11 U.S. C. § 362(a) automatically stays all related proceedings in court against a debtor filing under Chapter 7, except that 11 U.S.C. § 362(b)(4) exempts the Commonwealth from the automatic stay and allows it to pursue enforcement of its police and regulatory authority.

#### ORDER

On February 13, 1991, came the plaintiff by counsel to be heard on defendant's contest of the Virginia Occupational Safety and Health (VOSH) citations described above. Defendant, upon

proper service of the Summons did not appear, and Plaintiff motioned for default judgment to be entered against the defendant, pursuant to §7B:9, Rules of the Supreme Court of Virginia.

The Court finds for the Plaintiff and **ORDERS** that the citations described above, be **AFFIRMED**. The Court, in recognition of the defendant's current engagement in proceedings pursuant to Chapter 7 of the Bankruptcy Code, vacates the proposed civil money penalty. For good cause shown, it is hereby **ORDERED** that the above mentioned Citations for violations of Virginia Occupational Safety and Health Standards and the Code of Virginia, as modified, become a final order of this Court.

The Clerk shall forthwith mail certified copies of this order to the defendant's Registered Agent, Mr. Albert N. Jensen, at 654 South Atlantic Avenue, Virginia Beach, Virginia 23451, and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

July 26, 1991  
Enter

Robert L. Simpson, Jr.  
Judge

Respectfully submitted,  
Mary Sue Terry  
Attorney General of Virginia

/s/  
Philip F. Koren  
Assistant Attorney General  
101 North Eighth Street  
Richmond, Virginia 23219  
(804) 786-1780



VIRGINIA:

THE GENERAL DISTRICT COURT FOR THE COUNTY OF CHESTERFIELD

COMMONWEALTH OF VIRGINIA *ex rel.* )  
Commissioner of Labor and Industry )  
Plaintiff, )  
v. ) File # V91-2385  
L. F. JENNINGS, INC. )  
Defendant. )

**AGREED ORDER**

Comes now the Plaintiff by counsel, the Assistant Commonwealth's Attorney for Chesterfield County, and the Defendant by counsel, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

1. The parties are before this Court pursuant to Va. Code § 40.1-49.4(E) (1990), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 105737852, and issued to Defendant by Plaintiff on July 27, 1990. The citations alleged the following violations of VOSH Standards for the Construction Industry:

CITATION 1

VIOLATION 1  
SERIOUS, §1926.100(a) - Employees were exposed to falling bricks and were not wearing hard hats. \$640.00 proposed civil penalty.

**VIOLATION 2a**

**SERIOUS, §1926.350(a)(1)** - One propane cylinder was stored without an attached valve protection cap.

**VIOLATION 2b**

**SERIOUS, §1926.350(a)(9)** - Four propane cylinders were not secured in an upright position. \$640.00 proposed civil penalty for 2a and 2b.

**VIOLATION 3**

**SERIOUS, §1926.451(a)(2)** - Scaffolding was erected on an unstable base of concrete block and scrap wood. \$640.00 proposed civil penalty.

**VIOLATION 4a**

**SERIOUS, §1926.451(a)(4)** - Standard guard rails and end rails were not installed on open scaffold platforms in 3 different locations.

**VIOLATION 4b**

**SERIOUS, §1926.451(d)(10)** - Standard guard rails and end rails were not installed on tubular welded frame scaffolds in 2 different locations. \$810.00 proposed civil penalty for 4a and 4b.

**VIOLATION 5**

**SERIOUS, §1926.451(a)(13)** - Access ladders or equivalent safe access was not provided for scaffolds at 3 different locations. \$640.00 proposed civil penalty.

**CITATION 2**

**VIOLATION 1**

**OTHER THAN SERIOUS, §59.1-409(B) Code of Virginia** - Employee operating backhoe in vicinity of overhead high voltage lines was not trained in accordance with statute. Enforced through §40.1-49.4(P) Code of Virginia.

**VIOLATION 2**

**OTHER THAN SERIOUS, §1926.59(e)(1)(1)** - A list of all hazardous chemicals used at the job site was not maintained by the employer.

**VIOLATION 3**

**OTHER THAN SERIOUS, §1926.59(f)(5)(i)** - Three propane cylinders were not appropriately labeled to identify their hazardous contents.

**VIOLATION 4**

**OTHER THAN SERIOUS, §1926.59(f)(5)(ii)** - Three propane cylinders and a diesel fuel tank were not marked with the appropriate hazard warning.

VIOLATION 5

OTHER THAN SERIOUS, §1926.59(g)(1) - Employer did not have a material safety data sheet (MSDS) for concrete.

VIOLATION 6

OTHER THAN SERIOUS, §1926.59(b) - Employees had not received information on several hazardous chemicals in their job site: propane, diesel fuel, and concrete.

VIOLATION 7

OTHER THAN SERIOUS, §1926.150(c)(1)(i) - Employer did not have an appropriate fire extinguisher available inside a protected building area

VIOLATION 8

OTHER THAN SERIOUS, §1926.150(c)(1)(ii) - Three portable fire extinguishers did not have a record of periodic inspection or maintenance.

VIOLATION 9

OTHER THAN SERIOUS, §1926.151(a)(3) - Smoking was not prohibited by use of a NO SMOKING sign in the vicinity of a diesel fuel tank.

VIOLATION 10

OTHER THAN SERIOUS, §1926.152(c)(5) - Outdoor storage area for flammable diesel fuel was not kept free of combustible wood material.

VIOLATION 11

OTHER THAN SERIOUS, §1926.152(d)(2) - An appropriate portable fire extinguisher was not located within 25 to 75 feet from a diesel fuel tank.

VIOLATION 12

OTHER THAN SERIOUS, §1926.500(e)(1) - Two wooden stairways adjacent to office and storage trailers were not equipped with mid rails.

VIOLATION 13

OTHER THAN SERIOUS, §1926.500(e)(1)(iii) - Two wooden stairways adjacent to office and storage trailers were not equipped with standard railings.

VIOLATION 14

OTHER THAN SERIOUS, §1926.501(k) - Two wooden stairways did not have uniform steps, varying 7 to 11 inches high.

VIOLATION 15

OTHER THAN SERIOUS, §1926.602(a)(9)(i) - A Highlander lift truck did not have an operable horn.

VIOLATION 16

OTHER THAN SERIOUS, §1926.602(c)(1)(vi) - Employer's

operation of a Highlander lift truck did not comply with an ANSI standard that requires forks to be lowered before machines are left unattended.

Regarding Citation 2, Violation 11, the employer had a fire extinguisher located within 13 feet from a diesel fuel tank. The total proposed penalty for all violations was Three Thousand Three Hundred and Seventy Dollars, (\$3,370.00).

2. No employee or employee representative appeared in this matter or has filed a notice of contest.

3. Plaintiff and Defendant hereby agree that, in consideration for Plaintiff's amendment of the above VOSH Citations, Defendant withdraws its notice of contest to the violations and penalty as amended below. The Plaintiff and Defendant agree to the following amendments of the citations at issue:

CITATION 1

VIOLATION 1

SERIOUS, §1926.100(a): This violation remains as issued and the civil penalty of \$640.00 is reduced to \$320.00.

VIOLATION 2a

SERIOUS, §1926.350(a)(1): This violation is amended to an Other Than Serious violation, and no civil penalty is assessed.

VIOLATION 2b

SERIOUS, §1926.350(a)(9): This violation is amended to an Other Than Serious violation, and no civil penalty is assessed.

VIOLATION 3

SERIOUS, §1926.451(a)(2): This violation and the proposed penalty is vacated.

VIOLATION 4a

SERIOUS, §1926.451(a)(4): This violation and violation 4b

below are combined into two instances in violation of § 1926.451(a)(4).

VIOLATION 4b

SERIOUS, §1926.451(d)(10): This violation is combined with 4a above and cited under the single subsection § 1926.451(a)(4). The combined civil penalty of \$810.00 is reduced to \$405.00.

VIOLATION 5

SERIOUS, §1926.451(a)(13): This violation and the proposed penalty is vacated.

CITATION 2

VIOLATIONS 1 THROUGH 16

OTHER THAN SERIOUS, All violations in Citation 2, cited Other Than Serious, remain as issued with no civil penalty assessed.

Pursuant to Va. Code § 40.1-51.3:2 (1990), in the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of this chapter or any state or federal occupational safety and health standards act, the fact of the issuance of a citation, the voluntary payment of a civil penalty by a party charged with a violation, or the judicial assessment of a civil penalty under this chapter or any state or federal occupational safety and health standards act, shall not be admissible in evidence.

4. Defendant agrees to remit to the Department of Labor and Industry, at 205 North Fourth Street, Richmond, Virginia 23219, the civil penalty of Seven Hundred and Twenty-Five Dollars, (\$725.00), as assessed in paragraph 3 above, no later than fifteen days after notification of entry of this Agreed Order.

5. This Agreed Order shall be posted by the Defendant with the original citations for ten (10) working days at a conspicuous place, or where notices to employees are normally posted.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the Virginia Occupational Safety and Health Citations and proposed penalties as amended above, be AFFIRMED and become a final order of this Court in accordance with Va. Code § 40.1-49.4(E), (1990).

The Clerk shall mail certified copies of this Agreed Order to the parties listed below, and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

Enter: September 16, 1991

Timothy J. Hauler  
Judge

We ask for this,

COMMONWEALTH OF VIRGINIA, ex rel. CAROL A. AMATO  
Commissioner of Labor and Industry

By:                   /s/                    
T. Leslie Lindsey, Jr.  
Assistant Commonwealth's Attorney  
Court House, P. O. Box 25  
Chesterfield, Virginia 23832  
(804) 748-1221

Seen and agreed:

By:                   /s/                    
Karen M. Grane, attorney for Defendant  
KATZ & STONE  
Suite 600, 8230 Leesburg Pike  
Vienna, Virginia 22182  
(703) 761-3000

VIRGINIA:

IN THE GENERAL DISTRICT COURT OF THE COUNTY OF CHESTERFIELD

COMMONWEALTH OF VIRGINIA, *ex rel.*  
Commissioner of Labor and Industry,

v.

File No. V91-9714

L. F. JENNINGS, INC.

Inspection Number: 112374020

**AGREED ORDER**

Comes now the plaintiff, the Commonwealth of Virginia, by counsel, and the defendant, in order to provide for the safety, health and welfare of the defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed as follows:

The parties are before this Court pursuant to §40.1-49.4(E) of the Code of Virginia, to be heard on defendant's contest of citations issued by plaintiff on May 5, 1991. These citations allege serious and other-than-serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry.

The following violations were cited as serious and other-than-serious. In consideration for the actions of the defendant set forth below, the plaintiff agrees to take the following actions concerning the violations:

1. A. The following items are affirmed:

**Citation 2, Item 1, Other-than-serious - §1926.59(h)**

Employees were not provided information and training as specified in 1926.59(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area.

No civil penalty was assessed.

**Citation 2, Item 2, Other-than-serious - §1926.59(h)(1)(iii)**

Employees were not informed of the location and availability of the written Hazard Communication Program, including the required lists of Hazardous chemicals and Material Safety Data Sheets.

No civil penalty was assessed.

**Citation 2, Item 3, Other-than-serious - §1926.150(c)(1)(viii)**

Portable fire extinguishers were not inspected periodically in accordance with maintenance and use of portable fire extinguishers, N.F.P.A. No. 10A-1970.

No civil penalty was assessed.

**Citation 2, Item 4, Other-than-serious - §1926.403(b)(2)**

Listed, labeled or certified equipment was not installed and used in accordance with instructions included in the listing, labeling, or certification.

No civil penalty was assessed.

**Citation 2, Item 5, Other-than-serious - §1926.403(h)**

Each service, feeder and branch circuit was not legibly marked at its disconnecting means or overcurrent device to indicate its purpose, nor located and arranged so that the purpose is evident.

No civil penalty was assessed.



**Citation 2, Item 6, Other-than-serious -  
§1926.405(a)(2)(ii)(1)**

Flexible cords and cables used for temporary wiring were not protected from damage.

No civil penalty was assessed.

**Citation 2, Item 7, Other-than-serious -  
§1926.500(b)(8)**

Floor hole(s) were not guarded by a standard railing and toeboard or a floor hole cover of standard strength and construction secured against accidental displacement.

No civil penalty was assessed.

B. The following items are reduced to other-than-serious with a reduction in penalty.

**Citation 1, Item 1, SERIOUS - §1926.403(i)(2)(i)**

Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contacts by cabinets or other forms of enclosures, or by any of the following means: (A) location in a room, vault or similar enclosure that is accessible only to qualified persons; (B) by partitions or screens so arranged that only qualified persons will have access to the space within reach of the live panels; (C) by location on a balcony, gallery or platform so elevated and arranged as to exclude unqualified persons; (D) by elevation of 8 feet or more above the floor or other working surface and so installed as to exclude unqualified persons.

The civil money penalty of \$810.00 proposed is reduced to \$270.00.

**Citation 1, Item 2a, SERIOUS - §1926.450(a)(9)**

The side rails of ladders did not extend more than 36 inches above landing(s).

This violation and item 2b were grouped. The proposed civil money penalty of \$360.00 is reduced to \$180.00.

**Citation 1, Item 2b, SERIOUS - §1926.450(a)(10)**

Portable ladder(s) in use were not tied, blocked or otherwise secured to prevent their being displaced.

**Citation 1, Item 4, SERIOUS - §1926.500(f)(1):**  
Guardrails did not consist of top rail, intermediate rail, toeboard, and posts, and did not have a vertical height of approximately 42 inches from upper surface of top rail to floor, platform, runway or ramp level.

The proposed civil money penalty of \$720.00 is reduced to \$360.00.

C. The following citation is affirmed with a reduced penalty.

**Citation 1, Item 3, SERIOUS - §1926.451(d)(10)**

Standard guardrails and toeboards were not installed at all open sides and on ends on tubular welded frame scaffolds more than 10 feet above the floor or ground.

The proposed civil money penalty of \$630.00 is reduced to \$470.00.

2. Defendant has abated the above violations.
3. Defendant agrees to pay the penalty of \$1280.00 within fifteen (15) days of the entry of this Order.
4. The defendant agrees to provide to the Department, within thirty (30) days of the entry of this order, a letter outlining what combination of work practices, training and other methods they will use to avoid the reoccurrence of the electrical, guardrail, ladder and floor guarding violations found in this investigation.
5. The defendant agrees to require its foremen, who supervise work involving guardrail, to attend a training session on guardrail safety within one year from the entry of the final order, and submit evidence

of such training to the Director of Occupational Safety Enforcement within thirty days of the training.

6. The defendant further agrees to require its foremen to conduct, for the three years immediately following the date of this agreement, informal safety training meetings, at least quarterly on the subject of guardrail safety at each worksite where the defendant uses guardrail. The defendant shall prepare records of each meeting, to include the date and time of the meeting, employees in attendance and a general description of the subject of the meeting.
7. For the first year after entry of the final order, the defendant agrees to send to the Director of Occupational Safety Enforcement records of each quarterly guardrail safety training meeting.
8. The defendant agrees to expressly waive its right to deny access to any VOSH Compliance Safety and Health Officer to its construction worksites for a period of one year from the effective date of this order.
9. The defendant further understands that VOSH compliance inspections will be conducted on a reasonable, but unannounced basis.
10. The defendant agrees to comply with all applicable VOSH laws, standards and regulations on its worksites in

Virginia.

11. The defendant agrees to post a copy of this Agreed Order for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

THIS AGREEMENT is meant to compromise and settle the above contested claims. Pursuant to Virginia Code §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED, AND DECREED that Citation 1, item 3 is AFFIRMED as a serious violation and Citation 1, items 1, 2a, 2b, and 4 and Citation 2, items 1 through 7 are AFFIRMED as other-than-serious violations and become a final order of this Court in accordance with Va. Code §40.1-49.4(E)

Let the Clerk forthwith transmit certified copies of this Order to all counsel of record and to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street,



VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF FAIRFAX

COMMONWEALTH OF VIRGINIA ex rel.  
Commissioner of Labor and Industry

v.

Docket No. 91-25448

LANDCRAFT CONSTRUCTION COMPANY

Inspection Number: 105688329

AGREED ORDER

Comes now the plaintiff, the Commonwealth of Virginia, by counsel, and the defendant pro se, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed as follows:

The parties are before this Court pursuant to Virginia Code § 40.1-49.4(E) to be heard on Defendant's contest of citations issued by plaintiff on June 29, 1989. These citations allege serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry.

The following violations were cited as serious. The parties agree to take the following actions concerning the violations:

1. The following citations are affirmed:

Serious Citation 1, Item 1a: §1926.652(b)

The sides of the trench in unstable or soft material which were more than 5 feet in depth, were not shored, sheeted, braced, sloped, or otherwise supported in accordance with Tables P-1 and P-2.

Serious Citation 1, Item 1b: §1926.651(i)(1)

Excavated or other material was not effectively stored or retained at least 2 feet or more from the edge of the excavation which employees were required to enter.

The alleged violations (1a, 1b) have been grouped because they involved similar or related hazards that may increase the potential for injury resulting from an accident.

A civil money penalty of \$420.00 was proposed for these violations.

2. Defendant agrees to pay \$420.00 to the Commonwealth of Virginia within fifteen (15) days of the entry of this order.
3. The defendant agrees to expressly waive its right to deny access to any VOSH Compliance Safety and Health Officer to its construction worksites for a period of one year from the effective date of this order. The defendant further understands that VOSH compliance inspections will be conducted on a reasonable, but unannounced basis.
4. The defendant agrees to comply with all applicable VOSH laws, standards and regulations on its worksites in Virginia.

5. The defendant agrees to post a copy of this Agreed Order for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

THIS AGREEMENT is meant to compromise and settle the above contested claims. Pursuant to Virginia Code §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED, AND DECREED that Citation 1, items 1a and 1b are AFFIRMED as serious violations and become a final order of this Court in accordance with Va. Code §40.1-49.4(E)



Let the Clerk forthwith transmit certified copies of this Order to counsel of record, to Defendant and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

Enter: August 16, 1991

D. P. McDonough  
Judge

I ask for this:

/s/  
William D. Pickett  
Assistant Commonwealth's Attorney  
County of Fairfax  
Court House  
4110 Chain Bridge Road  
Fairfax, Virginia 22030  
Counsel for Plaintiff

Seen and agreed:

/s/  
Frank Leone, President  
for Landcraft Construction Company pro se  
P. O. Box 30021  
Alexandria, Virginia 22031

COMMONWEALTH OF VIRGINIA  
31st Judicial District of Virginia  
9311 Lee Avenue  
Manassas, Virginia 22110

September 20, 1991

Department of Labor and Industry  
c/o Rhea Sprowls  
Assistant Commonwealth's Attorney  
9311 Lee Avenue  
Manassas, Virginia 22110

Long Masonry of Virginia, Inc.  
c/o/ James A. Overson  
8253J Backlick Road  
Newington, Virginia 22122

FINDINGS OF FACT

1. On October 27, 1989 and on July 4, 1990 Long Masonry of Virginia, Inc. (hereinafter Defendant) was cited and penalized for Virginia OSHA Standards Section 1926.451 (a)(13) alleging that an access ladder or equivalent safe access to scaffolds was not provided; and for violating OSHA Standards 1926.451(d)(10) alleging that standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than ten feet above the ground or floor.
2. No November 12, 1990, Stephen Small, an off-duty inspector for the Department of Labor and Industry (hereafter Plaintiff) was driving in the vicinity of Opitz Blvd. and Route #1 in Prince William County Virginia. He looked over to a jobsite being performed by the Defendant and saw three persons on the second tier of scaffolding at a height estimated by the inspector to be in excess of 10 feet. At that point the inspector took pictures which were introduced as Plaintiff's #1 which showed three men on the second tier of scaffolding, showed them doing masonry work, showed that there were no toeboards or guardrails, and showed that there was no ladder (or) other means of access to the top of the scaffolding other than climbing the sides of the scaffold.
3. The construction site in question involved placing brick on a sign out in the open and accessible to the public at large.

4. The inspector proceeded onto the construction site, identified himself to the employees on the scaffolding, informed them that the scaffolding was not in compliance with OSHA regulations, and asked them to step down. The inspector asked who the immediate employer or foreman was and was informed that it was Donald Toney. The inspector at that point measured the scaffolding and found the height to be 11 feet 8 inches on the east end and 13 feet 11 inches on the west end. He interviewed the employees then attempted to find Mr. Toney. The Defendant's evidence shows that the inspector walked within six feet from Mr. Toney and that Mr. Toney knew who the inspector was and why he was there. Mr. Toney never approached the inspector, never asked him to leave or to obtain a search warrant, and, it would appear from the evidence, Mr. Toney left the area so that he could not be approached by the inspector.
5. The inspector also talked with Mr. Fravel, the project supervisor on the sight (sic), and there is no evidence that Mr. Fravel asked the inspector to leave or to get a search warrant.
6. The Defendant presented evidence as to the corrections made after the previous violations, including reprimands for the foremen, safety classes for the employees, and more intensive safety and instructional classes for the foremen and supervisors. The Defendant's evidence also indicated that the guardrails, ladder and toeboard had been in use at this sight (sic), however, the work was virtually completed except for the final six bricks and the dismantling of the scaffolding had already begun which including removing the guardrails, toeboards and access ladder.

#### CONCLUSIONS OF LAW

ISSUE #1: Whether having workers on scaffolding in excess of 10 feet without guardrail and toeboards and without a ladder or other means of access violated the standards of the Virginia Occupational Safety and Health Standards. The allegations clearly violate Section 1926.451(a) (13) and Section 1926.451(d) (10) of the Virginia Occupational Safety and Health Standards. The evidence introduced shows clearly that the scaffolding was in access (sic) of 10 feet, that no guardrails or toeboards or ladder or other means of access were present. The Defendant argues that the job was essentially accomplished and the scaffolding was in the process of being dismantled so that there was no requirement for the guardrails, toeboards, or means of access. While this may or may not be true during the process of dismantling scaffolding, the evidence is clear that the work had not been concluded and that three workers were still on top of the scaffolding performing their duties in laying the final six bricks. The provisions of the OSHA Standards are there to

protect workers specifically in this situation. If the Defendant chooses to start the process of dismantling the scaffolds before the work is completed, they do so at their own risk.

ISSUE #2: Was the inspector required to have consent or in the alternative get a search warrant in order to conduct the inspection of this construction sight (sic). The inspector did not enter into the field office of the Defendant or ask to inspect reports or other office files. He sighted that anyone passing by could have sighted which was men working on a scaffolding out in the open without a ladder, guardrail or toeboards. The United States Supreme Court has refused to extend the Fourth Amendment to sight seen in "the open field." Air Pollution Variance Board vs. Western Alfalfa, 416 US 861, 40 L Ed. 2d 607 (1974). There is no expectation of privacy in this situation other than what is provided by statute in Section 40.1-49.8 of the Code of Virginia, as amended. That statute allows a search at reasonable times of any factory, plant, establishment, construction sight (sic), or other area, work place, or environment where work is performed by an employee of an employer, with the consent of the owner, operator, or agent in charge of such work place. The Defendant is neither the owner, the operator, or the agent of the owner in charge and therefore, is without standing to object to any statutory entitlement as provided in Section 40.1-49.8. Even were it to be determined that the Defendant was entitled, in this situation to the protections provided by the statute, it is clear by the evidence that the foreman or agent of the Defendant, upon seeing the inspector, never approached him, and in fact appears to have taken steps to insure that he himself would not be approached by the inspector. The Defendant's agent cannot purposely place himself in a position where consent cannot be given and then try to hide behind protection of the statute.

ISSUE #3: Whether the penalties assessed for the alleged violations were proper. The Defendant has been cited for this same violation on two other occasions. This is the third violation within a 13 month period. The Plaintiff's calculation of the penalties involved were neither arbitrary nor without basis-in-fact. A formula process was used so that the penalties imposed could be consistent and are clearly warranted for the violations alleged.

WHEREFORE it is hereby ORDERED that the appeal by Long Masonry of Virginia, Inc. of the penalties assessed against them in the amount of \$2,520.00 each by the Department of Labor and Industry is denied and that judgment for the penalties totalling \$5,040.00 be entered in favor of the Department of Labor and Industry against Long Masonry of Virginia, Inc.

Entered this 23rd day of Sept., 1991

Lon E. Farris  
Judge

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE CITY OF HOPEWELL

COMMONWEALTH OF VIRGINIA, ex rel.  
COMMISSIONER OF LABOR & INDUSTRY,  
Plaintiff,

v.

File No. V91-220

METRIC CONSTRUCTORS, INC.  
Defendant.

FINDINGS OF FACT

Citation and Item No.

- A. 1-1a & b The Court finds that appropriate personnel protection equipment was not afforded employees where they were exposed to hazardous conditions:
1. At a wastewater pit, there was no safety or protection equipment where the employees were working next to a 16 to 35 ft. deep pit.
  2. Employees were not provided with fall protection while working on the roof of a pumphouse. The employees were exposed to a fall of at least 9 ft.
  3. That a stepladder of 8 ft. was being used for access to the roof of a 9 ft. pumphouse, thereby exposing employees to a 9 ft. fall to the ground.
- B. 1-3 That employees were adjacent to rebars at the wastewater pit and rebars were not protected. The Court further finds that the chance of being injured by a fall onto the rebars was slight.
- C. 2-1 Court finds that the Commonwealth did not prove by a preponderance of the evidence that debris was not kept clear from the fabrication area.
- D. 2-2 The Court is of the opinion that the Commonwealth, by a preponderance of evidence, did not prove that a 5 gallon Eagle gas can came within the Occupational Safety & Health Standards.
- E. 2-3 Court finds that there was no protective cap

on the acetylene gas cylinder, however, the cylinder was stored away from the work area in a safe holding mechanism. The Court finds no violation.

- F. 2-4 The Court finds that the steps to the engineer's trailer did not consist of four or more risers, therefore did not come within the Occupational Safety & Health Standards.
- G. 2-5 The Commonwealth did not prove that the employees were exposed to danger of moving ground, therefore, because of lack of proof, this violation is dismissed.
- H. 3-4 Commonwealth proved by a preponderance of the evidence that the extension cords were fastened with staples and hung with nails or suspended by wires. However, the defendant, Metric, did not install these extension cords as they had an electrical contractor wire the trailer. Metric relied on the expertise of the electrical contractor.
- I. 3-5 Court finds that there was an opening in the wood deck, however, the location of same was such that no type of guard rail or protection was necessary.
- J. 3-6 Court finds that excavated material was not stored or retained at least 2 ft. from the edge of the excavation which employees were required to enter. Court finds that even though the material was stored within 2 ft. of the edge, there was no safety hazard.
- K. Court finds that the defendant, Metric, had an adequate safety program for its employees and enforced same.

#### FINDINGS OF LAW

The Court, for reasons stated above, does hereby find that the defendant, Metric, is not in violation of the following Citations and Item Numbers and thereby dismisses same: 2-1, 2-2, 2-3, 2-4, 2-5, 3-4, 3-5, & 3-6.

Court finds that Citation & Item Numbers 1-1a & b and 1-3 are not repeat violations.

Court finds that Citation & Item Numbers 1-1a & b are serious violations which may cause serious injury or death to employees and accordingly fines the defendant, Metric, \$1,000.00 for violation of same.

The Court finds that Citation & Item Number 1-3 is an other than serious violation with the slight chance of injury to an employee and assesses a fine of \$200.00.

John C. Baker  
John C. Baker, Judge

November 4, 1991

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA, *ex rel.*  
Commissioner of Labor and Industry,

v.

File No. V91-2021

OMEGA INTERIORS, INC.

Inspection Number: 112372552

**AGREED ORDER**

Comes now the plaintiff, the Commonwealth of Virginia, by counsel, and the defendant, in order to provide for the safety, health and welfare of the defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed as follows:

The parties are before this Court pursuant to Va. Code §40.1-49.4(E), to be heard on defendant's contest of citations issued by plaintiff on February 22, 1990. These citations allege serious, repeat, willful and other-than-serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry.

The following violations were cited as serious, repeat, willful and other-than-serious. In consideration for the actions of the defendant set forth below, the plaintiff agrees to take the following actions concerning the violations:



1. The following citations are affirmed:

Serious Citation 1, Item 1: §1926.500(b)(1)

Floor openings were not guarded by standard railings and toeboards or covers as specified in paragraph (f) of this section.

The penalty for this violation is \$600.

Serious Citation 1, Item 2: §1926.500(d)(1)

Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides.

The penalty for this violation is \$700.

Willful Citation 2, Item 2: §1926.451(d)(10)

Standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground or floor.

The penalty for this violation is \$8000.

Other-than-serious Citation 4, Item 1:

§1926.150(c)(1)(i)

A fire extinguisher, rated not less than 2A, was not provided for each 3,000 square feet of the protected building area, or major fraction thereof.

No penalty was proposed for this violation.

2. The following violation is reduced to a repeat violation.

Willful Citation 2, Item 1: §1926.451(a)(13)

An access ladder or equivalent safe access to scaffold(s) was not provided.

The penalty for this violation originally set at \$8000 is reduced to \$3,200.

3. The following violation is reduced to other-than-serious

Repeat Citation 3, Item 1: §1926.59(e)(1)

Employer did not maintain at the workplace a written hazard communication program which describes how the criteria in 1926.59(e),(f),(g) and (h) will be met.

The penalty for this violation originally set at \$200 is vacated.

4. Defendant has abated the above violations.
5. With respect to the penalty payment of \$12,500, the parties agree as follows:
  - a. The defendant, upon execution of this Agreed Order shall pay to the plaintiff the initial sum of \$3,125 in partial payment of the penalties assessed for the above citations in the following manner: a check, money order, or cash in the amount of \$200 shall be paid to the plaintiff within fifteen (15) days of the effective date of this Order. The remaining \$2,975, in similar form, shall be paid in no more than thirty-five (35) equal payments of \$85, each payable on the first day of each month for the next thirty-five (35) successive months.
  - b. Should the defendant, during the period January 1, 1992 to December 31, 1994, violate any of the sections of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry which formed the bases for the citations set forth above, it shall pay a second partial payment of the total penalties assessed, in the amount of \$3,125, in the manner and schedule

described in paragraph 5a above, upon the final determination (Order) of the Commissioner of Labor and Industry or the final determination (Order) of a court of competent jurisdiction that the defendant has again violated any of the sections mentioned above.

c. A third partial payment of the total penalties in the amount of \$3,125 shall be paid by the defendant, in the manner and schedule described in paragraph 5a above, upon the final determination (Order) of the Commissioner of Labor and Industry or the final determination (Order) of a court of competent jurisdiction that, subsequent to the repeat violations referred to in paragraph 5b above, the defendant has again violated any of the sections of VOSH standards which form the bases of the citations set forth above.

d. A fourth partial payment of the total penalties in the amount of \$3,125 shall be paid by the defendant, in the manner and schedule described in paragraph 5a above, if it fails to provide the safety program as required by paragraph 10 or the quarterly training reports as required by paragraph 15.

6. It is expressly understood by the defendant that the penalty payments referred to in paragraphs 5a through 5d, above, are in addition to and separate from any

penalties which may be proposed or assessed for the subsequent repeat violations which trigger the partial payments addressed above.

7. It is expressly understood and agreed by the parties that failure to comply with the terms of this Agreed Order or failure by the defendant to make a penalty payment in a timely manner as agreed herein, constitutes a breach of this Order. The responsibilities and duties of defendant under this Agreed Order over and above its responsibilities and duties under applicable law and regulation, shall cease on and after December 31, 1994, so long as all penalty amounts due plaintiff have been paid in full. In the event penalty payments are owed or are being paid to plaintiff on the above date, the responsibilities and duties of defendant under this Agreed Order shall continue until all such amounts have been paid in full and no further penalty amounts are due. At that time, the remaining amount of the penalty which has not yet become due and payable to plaintiff as a result of subsequent violations is waived by the plaintiff.
  
8. Any breach of this Order shall mean that all unpaid amounts become due and payable 15 days following the breach.

## II. TERMS AND CONDITIONS OF AGREED ORDER

9. The defendant agrees to consider Occupational Safety and Health as one of its corporate top priorities.
  
10. Within six months of the date of this Agreed Order the defendant shall develop and implement a written safety and health program acceptable to the plaintiff, which establishes policies and procedures for recognizing, and protecting employees from safety and health hazards. Within three months of the date of this Agreed Order the defendant shall provide at least four modules of its safety training program, an outline of the entire program and the written materials which accompany it. The program shall specifically address each of the scaffolding related violations listed in the citations affirmed by this order. At a minimum, this program shall address the following subjects:
  - (a) management commitment to and employee involvement in safety;
  - (b) worksite analysis;
  - (c) hazard recognition, prevention and control; and,
  - (d) safety and health training.
  
11. The safety and health program referred to above shall list and discuss the respective responsibilities of management, supervisors, and employees with respect to safety on the job. Authority and responsibility must

be given to supervisors and lead men for the enforcement of safety and health rules. When unsafe work or hazardous conditions likely to cause serious injury or death are observed, such work shall be stopped and corrective action immediately taken to abate the condition(s) prior to resuming work.

12. The defendant agrees to initiate within the above written safety and health program, an internal system of employee discipline to enforce defendant's and plaintiff's safety and health rules and regulations. At a minimum, that system must provide for progressively severe penalties culminating in the defendant's option of removal of the offending employee from his or her employment upon the occurrence of a third violation. The system shall apply equally to all defendant's employees, including management employees.
13. The safety and health program shall emphasize hazard recognition, prevention and control. Hazards which are detected shall be corrected in a timely manner.
14. The defendant agrees to institute a policy whereunder new employees will receive a preliminary safety and health indoctrination prior to initiating any duties of employment at the business. In addition, a further system of training on basic jobsite safety and health

for all new employees within thirty (30) days of the employee's initial employment shall be established to complete the new employee's initial safety and health indoctrination. This employee training shall include a discussion of company safety and health rules and the general hazards associated with the defendant's industry. The defendant shall also institute bi-weekly safety and health discussions of hazards and corresponding safety practices for all employees employed at the business. As a part of said meetings, employees shall be encouraged to notify defendant, without reprisal, of any unsafe condition(s) encountered. Defendant shall then address such concerns within a reasonable period of time. Defendant shall identify and discuss accidents and "near miss" accidents, their causes, and means of prevention, with employees at the bi-weekly meetings.

15. The defendant agrees to forward documentation of the bi-weekly safety and health meetings, and the training accomplished to the Director of Safety Enforcement, Department of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, Virginia 23219, on a quarterly basis, beginning on December 1, 1991 and continuing thereafter for a minimum of one year. On December 1, 1992, upon application of the defendant, the Commissioner shall

determine whether the defendant shall thereafter be required to continue sending such documentation. If the defendant is so required, the time period will be specified at that time, and the defendant will be notified of the decision of the Commissioner in writing.

16. While this Agreed Order is in effect, the defendant agrees to conduct periodic monitoring of its business to determine that its employees and its supervisors are in compliance with VOSH regulations, (especially regulations dealing with scaffolding hazards), and with the company's safety and health program, which shall require adequate protection for all exposed employees. Employees, management, or others who conduct this monitoring shall assure that hazards to which personnel are exposed are recognized, prevented and controlled.

### **III. REQUIREMENTS FOR A WARRANT**

17. The defendant expressly waives its right to require an inspection warrant to be issued in order for plaintiffs to gain access to defendant's place of business, during the pendency of this order, and further understands that compliance inspections of employer's place of business will be conducted by plaintiff's inspectors on



a reasonable, but random and unannounced basis.

#### IV. POSTING

18. The employer shall post a copy of this Agreed Order for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

THIS AGREEMENT is meant to compromise and settle the above contested claims. Pursuant to Va. Code §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED, AND DECREED that Citation 1, items 1 and 2, Citation 2, items 1 and 2, Citation 3 item 1, and Citation 4, item 1 are AFFIRMED as AMENDED herein as serious, willful, repeat, and other-than-serious violations and become a final order of this Court in accordance with Va. Code §40.1-49.4(E)

Let the Clerk forthwith transmit certified copies of this Order to all counsel of record and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

Enter: December 31, 1991

Robert P. Beaver  
Judge

I ask for this:

/s/  
Seward McGhee  
Assistant Commonwealth's Attorney  
County of Hanover  
General District Courts Buildings  
P.O. Box 470  
Hanover, Virginia 23069  
Counsel for Plaintiff

Seen and Agreed:

/s/  
David R. Kettering, pro se  
President  
Omega Interiors, Inc.  
5575 Oakdale Road, Suite 1-A  
Mableton, Georgia 30059-2865

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY OF ARLINGTON

COMMONWEALTH OF VIRGINIA ex rel. )  
Commissioner of Labor and Industry )  
Plaintiff, )  
v. ) File # V90-71677  
OTIS ELEVATOR COMPANY )  
Defendant. )

AGREED ORDER

Comes now the Plaintiff, by counsel, the Assistant Commonwealth's Attorney for Arlington County, and the Defendant by counsel, and in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

1. The parties are before this Court pursuant to Va. Code §40.1-49.4(E), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 10571276, and issued to Defendant by Plaintiff on May 26, 1989. The citations alleged the following violation of the VOSH Standards for the Construction Industry:

Willful Citation 1, Item 1

Title 40.1-51.1.(a), Code of Virginia: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees.

A penalty of \$7,200 was proposed.

2. No employee or employee representative appeared in this matter or filed a notice of contest.

3. Plaintiff and Defendant agree that, in consideration for Plaintiff's vacating of the above VOSH Citation, Defendant withdraws its notice of contest to the violations and penalty.

4. This Agreed Order shall be posted by the Defendant with the original citations for ten (10) working days at a conspicuous place, or where notices to employees are normally posted.

5. Pursuant to Va. Code §40.1-51.3:2 (1990), in the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of the chapter or any state or federal occupational safety and health standards act, the fact of the issuance of a citation, the voluntary payment of a civil penalty by a party charged with a violation, or the judicial assessment of a civil penalty under this chapter or any state or federal occupational safety and health standards act, shall not be admissible in evidence.

WHEREFORE, upon the agreement of the parties, it is hereby ORDERED that the Virginia Occupational Safety and Health Citation

and proposed penalty, as listed above, be VACATED and that this Agreed Order become a final order of this Court in accordance with Va. Code §40.1-49.4(E).

The Clerk shall mail certified copies of this Agreed Order to the Parties listed below, and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

Enter: 8-15-91

Hon. F. E. Thomas  
Judge

We ask for this:

COMMONWEALTH OF VIRGINIA, ex rel. CAROL A. AMATO  
Commissioner of Labor and Industry

/s/  
Theophani K. Stamos  
Assistant Commonwealth's Attorney  
County of Arlington  
Court House  
1400 North Courthouse Road  
Arlington, Virginia 22201  
(703) 358-4410

Seen and agreed:

/s/  
W. Scott Railton  
Reed, Smith, Shaw & McClay  
1200 18th Street, N.W.  
Washington, D.C. 20036  
(202) 533-5974

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE CITY OF HARRISONBURG

**COMMONWEALTH OF VIRGINIA, ex rel.**  
Commissioner of Labor and Industry,

v.

File No. V91-1215

**R. E. LEE & SON, INC.**

Inspection Number: 112383963

**AGREED ORDER**

Comes now the plaintiff, the Commonwealth of Virginia, by counsel, and the defendant, in order to provide for the safety, health and welfare of the defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed as follows:

The parties are before this Court pursuant to Va. Code §40.1-49.4(E), to be heard on defendant's contest of citations issued by plaintiff on November 20, 1990. These citations allege violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry.

In consideration for the actions of the defendant set forth below, the plaintiff agrees to take the following actions concerning the violations:

1. The following citations are affirmed:

Citation 1, Item 1: §1926.451(a)(13)

An access ladder or equivalent safe access to scaffold was not provided.

The penalty for this violation, originally \$600, is reduced to \$400.

Citation 1, Item 2: §1926.28 (a)

Appropriate personal protective equipment was not worn by employees in all operations where there was exposure to hazardous conditions.

The penalty for this violation, originally \$600, is reduced to \$400.

2. Citation 2, Item 1: §1926.451(d)(10) is amended to a violation of Va. Code §40.1-51.1(a).

The penalty for this violation, originally \$1200, is reduced to \$800.

3. Defendant has abated the above violations.
4. Defendant agrees to pay the penalty of \$1,600 within fifteen (15) days of the entry of this Order.
5. The defendant agrees to require its foremen, who supervise work involving scaffolding, to attend a training session on scaffolding safety within one year from the entry of the final order, and submit evidence of such training to the Director of Occupational Safety Enforcement within thirty days of the training.
6. The defendant further agrees to require its foremen to conduct for the three years immediately following

the date of this agreement, informal safety training meetings, at least two times a month, for the benefit of defendant's employees, and to prepare records of each meeting, to include the date and time of the meeting, employees in attendance and a general description of the subject of the meeting. At least quarterly for the first year, one of these safety meetings shall be on the subject of scaffolding safety at each worksite where the defendant uses scaffolding.

7. For the first year after entry of the final order, the defendant agrees to send to the Director of Occupational Safety Enforcement records of each quarterly scaffolding safety training meeting.
8. The defendant agrees to comply with all applicable VOSH laws, standards and regulations on its worksites in Virginia.
9. The defendant agrees to post a copy of this Agreed Order for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

THIS AGREEMENT is meant to compromise and settle the above contested claims. Pursuant to Va. Code §40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty



under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED, AND DECREED that Citation 1, items 1 and 2 and Citation 2, Item 1 are AFFIRMED and become a final order of this Court in accordance with Va. Code §40.1-49.4(E)

Let the Clerk forthwith transmit certified copies of this Order to all counsel of record and to the Commissioner of Labor and Industry, Powers-Taylor Building, 13 South Thirteenth Street, Richmond, Virginia 23219.

Enter: December 10, 1991

John A. Paul  
Judge



VIRGINIA:

THE GENERAL DISTRICT COURT OF THE COUNTY OF HANOVER

COMMONWEALTH OF VIRGINIA <u>ex rel.</u>	)	
Commissioner of Labor and Industry	)	
Plaintiff,	)	
	)	
v.	)	Case No. V91-2562
	)	
WHITING-TURNER CONTRACTING CO.	)	
Defendant.	)	

AGREED ORDER

Comes now the Commissioner of Labor and Industry (Plaintiff) by counsel, Seward M. McGhee, Assistant Commonwealth's Attorney for Hanover County, and the Whiting-Turner Contracting Company (Defendant) by counsel, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

1. The parties are before this Court pursuant to Va. Code Ann. § 40.1-49.4.E (1991 Supp.), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 112374020, and issued to Defendant by Plaintiff on June 4, 1991. The citations alleged the following violations of VOSH Standards for the Construction Industry:

**SERIOUS VIOLATIONS**

1-1a § 1926.20(b)(2) - The employer did not observe a requirement that frequent and regular inspections of the job site be conducted by a competent person designated by the employer.

- 1-1b        **§ 1926.500(f)(1)** - In three areas around the work site employees were working near open-sided floors and floor openings, where there was no intermediate rail (mid rail) protecting the openings.
- 1-1c        **§ 1926.500(f)(1)(i)** - In six areas around the work site employees were working near open-sided floors and floor openings, where the 1/2 inch wire cable used as guard rail (top rail) deflected 10 inches at each location. For the grouped violations 1-1a through 1-1c a single penalty of \$630.00 was proposed.
- 1-2        **§ 1926.405(b)(1)** - Unused openings in a circuit breaker box located on the first floor of the work site were not closed, exposing employees to inadvertent contact with electrical lines exceeding 120 volts. A civil penalty of \$630.00 was proposed for this violation.
- 1-3        **§ 1926.701(b)** - Employees were working around exposed reinforcing steel which was protruding from the side of an excavated area, and whose ends were not guarded to protect against impalement. A civil penalty of \$360.00 was proposed.

#### **REPEAT VIOLATIONS**

- 2-1        **§ 11.3(A) of the VOSH Administrative Standards Manual** - The employer had not posted anywhere on the work site a Job Safety and Health Notice informing employees of their rights regarding safety and health concerns at the work site. A civil penalty of \$200.00 was proposed.
- 2-2        **§ 1926.59(f)(5)(ii)** - The employer did not label a 5 gallon red safety can containing a hazardous chemical, to inform employees of its contents and the hazard of its contents. A civil penalty of \$200.00 was proposed.
- 2-3        **§ 1926.350(a)(9)** - Two compressed gas oxygen cylinders, located adjacent to the employer's tool trailer were not secured to prevent them from falling over, exposing nearby employees to possible rupture and explosion. A civil penalty of \$200.00 was proposed.
- 2-4a        **§ 1926.404(b)(1)(i)** - Employees were using a 100 foot yellow extension cord carrying at least an 110 volt charge, which did not protect employees by means of a ground fault circuit interrupter.
- 2-4b        **§ 1926.404(b)(1)(ii)** - Employer's portable generator, used to energize an electric power saw, did not employ a ground fault circuit interrupter to protect employees from electrical shock. For the grouped violations 2-4a and 2-4b a single penalty of \$1,200.00 was proposed.

- 2-5        § 1926.404(f)(6) - The electrical plug of a Black & Decker portable power saw was missing a grounding pin, exposing employees to a possible shock or injury. A civil penalty of \$200.00 was proposed.
- 2-6        § 1926.416(e)(1) - At two areas the electrical extension cords energizing portable power tools had damaged insulation, exposing employees to possible shock or injury. A civil penalty of \$400.00 was proposed.
- 2-7        § 1926.500(b)(8) - At two areas in the commercial structure floor holes were not guarded or covered, presenting a fall hazard to nearby employees. A civil penalty of \$200.00 was proposed.

**OTHER THAN SERIOUS VIOLATIONS**

- 3-1        § 1926.51(c)(1) - Throughout the facility the employer did not provide washing facilities for its employees.
- 3-2        § 1926.250(a)(3) - In the employer's tool trailer the employer did not maintain the aisles clear of obstructions.
- 3-3        § 1926.500(f)(1) - At an open sided floor on the second level of the commercial building, the guardrail (top rail), and intermediate rail (mid rail), were not installed at the correct height to prevent employees from falls and injuries
- 3-4        § 1926.500(f)(5)(ii) - Over a floor opening on the second level of the commercial building, the plywood cover was not secured to prevent accidental displacement.

The total proposed penalty of \$4,220.00 was determined according to provisions of the VOSH Field Operations Manual, and calculated according to the severity of the violations, the duration of exposure, and the previous history of the employer.

2. No employee or employee representative appeared in this matter or has filed a notice of contest.

3. Defendant withdraws its notice of contest to the violations and penalty as amended below. The Plaintiff and Defendant agree

to the following amendments of the citations at issue:

**SERIOUS VIOLATIONS**

- 1-1a        § 1926.20(b)(2) - This item is vacated.
- 1-1b        § 1926.500(f)(1) - This item remains as issued.
- 1-1c        § 1926.500(f)(1)(i) - This item remains as issued, with a civil penalty for the grouped items 1-1b and 1-1c of \$630.00.
- 1-2        § 1926.405(b)(1) - The item is amended to an Other-Than-Serious, with a civil penalty of \$315.00.
- 1-3        § 1926.701(b) - This item is amended to an Other Than Serious, with a civil penalty of \$180.00.

**REPEAT VIOLATIONS**

- 2-1        § 11.3(A) of the VOSH Administrative Standards Manual - The item remains as issued, and the civil penalty is vacated.
- 2-2        § 1926.59(f)(5)(ii) - This item remains as issued, with a civil penalty of \$200.00.
- 2-3        § 1926.350(a)(9) - This item and the proposed penalty is vacated.
- 2-4a       § 1926.404(b)(1)(i) - This item is vacated.
- 2-4b       § 1926.404(b)(1)(ii) - This item remains as issued, with a civil penalty of \$600.00.
- 2-5        § 1926.404(f)(6) - This item and the proposed penalty is vacated.
- 2-6        § 1926.416(e)(1) - This item and the proposed penalty is vacated.
- 2-7        § 1926.500(b)(8) - This item and the proposed penalty is vacated.

**OTHER THAN SERIOUS VIOLATIONS**

- 3-1        § 1926.51(c)(1) - This item remains as issued.
- 3-2        § 1926.250(a)(3) - This item is vacated.
- 3-3        § 1926.500(f)(1) - This item remains as issued.

3-4            § 1926.500(f)(5)(ii) - This item remains as issued.

Based on the above amendments, the total civil penalty is amended to \$1,925.00.

4. Defendant agrees to remit to the Commissioner of Labor and Industry, at 13 South Thirteenth Street, Richmond, Virginia 23219, the civil penalty of One Thousand Nine Hundred and Twenty-Five Dollars, (\$1,925.00), as assessed in paragraph 3 above, no later than fifteen days after notification of entry of this Agreed Order. A check or money order shall be made payable to "Commonwealth of Virginia."

5. The Defendant agrees that in all future projects involving multiple contractors and sub-contractors, wherever Defendant's employees are exposed to safety and health hazards which are created or controlled by other employers, contractors, or sub-contractors, Defendant shall hereafter take affirmative steps to (1) recognize the hazard, (2) inform and warn its employees of the hazard, (3) remove the hazard or use alternative means to protect Defendant's employees, (4) alert the responsible contractor and the general contractor to have the hazard removed, and (5) in extreme circumstances, remove the Defendant's employees from the area of the hazard.

6. Defendant specifically agrees to hereafter observe and apply the requirements of VOSH Standard for the Construction Industry § 1926.404(b)(1)(i), requiring the employer's provision of either

ground-fault circuit protection (GFCI's) or an assured equipment grounding program for all non-permanent electrical wiring, including any electrical power source which is provided through a 120 volt extension cord. (Refer to letter of April 18, 1991, attached as Appendix A).

7. This Agreed Order shall be posted by the Defendant with the original citations for ten (10) working days at a conspicuous place, or where notices to employees are normally posted.

8. Pursuant to Va. Code Ann. § 40.1-51.3:2 (1990 Repl. Vol.), in the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of this chapter or any state or federal occupational safety and health standards act, the fact of the issuance of a citation, the voluntary payment of a civil penalty by a party charged with a violation, or the judicial assessment of a civil penalty under Chapter 3 of Code § 40.1, or any state or federal occupational safety and health standards act, shall not be admissible in evidence.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the Virginia Occupational Safety and Health Citations and proposed penalties as amended above, be AFFIRMED and become a final order of this Court in accordance



with Va. Code Ann. § 40.1-49.4.E, (1991 Suppl.).

The Clerk shall mail certified copies of this Agreed Order to the parties listed below, and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.

Enter: May 4, 1992

Robert P. Beaver  
Judge

We ask for this:

By: /s/

Seward M. McGhee  
Assistant Commonwealth's Attorney  
General District Court House, P. O. Box 470  
Hanover, Virginia 23069  
(804) 537-6185

Seen and agreed:

By: /s/

S. Sadiq Gill, attorney for Defendant  
WRIGHT, ROBINSON, McCAMMON, OSTHIMER & TATUM  
411 East Franklin Street, 4th Floor  
Richmond, Virginia 23219  
(703) 761-3000

**OCCUPATIONAL HEALTH**

**PART III**

-----  
VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE CITY OF RICHMOND

**COMMONWEALTH OF VIRGINIA, ex rel.**  
Commissioner of Labor and Industry,

Plaintiff,

v.

Docket No. 91-36455

**N. W. MARTIN AND BROTHERS, INC.**

Defendant.

Inspection Number: 105738322

**AGREED ORDER**

Comes now the plaintiff, the Commonwealth of Virginia, at the relation of the Commissioner of Labor and Industry, by counsel, and the defendant, by counsel, ("the parties") in order to provide for the safety, health and welfare of the defendant's employees and to conclude this matter without the necessity for further litigation, it is hereby stipulated and agreed as follows:

The parties are before this Court pursuant to §40.1-49.4(E) of the Code of Virginia, to be heard on defendant's contest of a citation issued by plaintiff on May 11, 1990. This citation alleges other-than-serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the

Construction Industry.

The following violations were cited as other-than-serious. In consideration for the actions of the defendant set forth below, the plaintiff agrees to take the following actions concerning the violations:

1. The following violations are affirmed:

Other-than-Serious Citation, Item 2: §1926.58(e)(1)

Employer did not establish a regulated area in work areas where airborne concentrations of asbestos exceeded or could reasonably be expected to exceed the permissible exposure limit prescribed in paragraph (c) of this section.

No penalty was proposed for this violation.

Other-than-Serious Citation, Item 3: §1926.58(f)(2)(i)

Employer did not perform initial monitoring at the initiation of each asbestos job to accurately determine the airborne concentration of asbestos to which employees may have been exposed.

No penalty was proposed for this violation.

Other-than-Serious Citation, Item 4: §1926.58(h)(1)(i)

Employer did not provide respirators, or did not ensure their use in work operations such as maintenance and repair activities, or other activities for which engineering and work practice controls were not feasible.

No penalty was proposed for this violation.

Other-than-Serious Citation, Item 5: §1926.58(j)(2)(i)

The employer did not establish an area adjacent and connected to the regulated area for decontamination of employees contaminated with asbestos.

No penalty was proposed for this violation.

Other-than-Serious Citation, Item 6: §1926.58(1)(2)

Asbestos waste, scrap, debris, bags, containers, equipment, or contaminated clothing consigned for disposal were not collected and disposed of in sealed, labeled, impermeable bags or other closed, labeled, impermeable bags or other closed, labeled, impermeable containers.

No penalty was proposed for this violation.

Other-than-Serious Citation, Item 7: §1926.58(n)(5)(i)

Upon written request, the employer did not make all records required to be maintained by this section available to the Assistant Commissioner or Director for examination and copying.

No penalty was proposed for this violation.

2. The plaintiff agrees that this order and the citation affirmed by it will not be used by it as a basis for issuing repeat violations in future enforcement proceedings or actions pursuant to Title 40.1 of the Code of Virginia.
3. The defendant agrees to either test, for asbestos, samples taken from all roofs it contracts to remove, repair or rebuild or obtain written documentation from the owner or previous contractor that the roof does not contain asbestos; this requirement will be in effect for a period of two years from the entry of this order. Documentation of such testing shall be in the form of either prior tests or manufacturers' specifications on the materials as originally installed or subsequently repaired. Mere conclusory affidavits that the material is not asbestos will not suffice.

4. Notwithstanding the above, no asbestos testing or written documentation will be required under this order for maintenance or repair operations one hundred (100) square feet or less in size, or in emergency repair situations. No asbestos testing or written documentation will be required when the defendant is performing work on residential buildings. The definitions for "asbestos", "friable" and "residential buildings" as contained in the Department of Labor and Industry's "Regulation for Licensed Asbestos Contractor Notification, Asbestos Project Permit Fees", effective March 1, 1991 shall apply to this order.
5. The defendant agrees to maintain records of testing and confirmation described above for a period of one year from the date of removal and make such records available to the plaintiff upon request.
6. The defendant agrees to comply with all applicable VOSH laws, standards and regulations on its worksites in Virginia.
7. The defendant agrees to post a copy of this Agreed Order for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.

THIS AGREEMENT is meant to compromise and settle the above contested citations. Pursuant to Va. Code §40.1-51.3:2, the fact

of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ADJUDGED, ORDERED, AND DECREED that Citation 1, items 2 through 7 are AFFIRMED as other-than-serious violations and become a final order of this Court in accordance with Va. Code §40.1-49.4(E)

Let the Clerk forthwith transmit certified copies of this Order to all counsel of record and to the Commissioner of Labor and Industry, Post Office Box 12064, Richmond, Virginia 23241.

Enter: August 20, 1991

William L. Wimbish  
Judge

I ask for this:

Seen and Agreed:

/s/  
Thomas G. Shaia  
Asst. Commonwealth's Attorney  
City of Richmond  
John Marshall Courts Building  
800 East Marshall Street  
Richmond, VA 23219-1998  
Counsel for Plaintiff

/s/  
Dana Rust, Esq.  
McGuire, Woods, Battle & Boothe  
One James Center  
Richmond, VA 23219  
Counsel for Defendant

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