

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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Secretary of Labor, :
Complainant, :

v. : OSHRC Docket No. **03-1756**

Richard Kenda Farms, : **EZ**
Respondent. :

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Appearances:

Sharon D. Calhoun, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Conrad C. Bishop, Jr., Esquire
The Bishop Law Firm, P.A.
Perry, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Richard Kenda Farms (Kenda Farms), a family-operated farm in Madison, Florida, utilizes farm workers to hand harvest vegetables including peppers, squash and eggplant. Because of a complaint from the Mexican Consulate regarding allegations of peonage and unsafe conditions, the Employment Standards Administration, Wage and Hour Division (W&H) of the U. S. Department of Labor initiated an investigation of Kenda Farms on June 12, 2003. The W&H investigation was made pursuant to the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801, *et seq.*), and the Occupational Safety and Health Administration's (OSHA) field sanitation standards for agriculture at 29 C.F.R. §1928.110.¹ Based on W&H's field sanitation inspection, Kenda Farms received three serious citations on September 22, 2003. Kenda Farms timely contested the OSHA citations.

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Pursuant to the Secretary of Labor's Order 5-96, the Employment Standards Administration is given authority to enforce OSHA's field sanitation standards at 29 C.F.R. § 1928.110 against agricultural employers through inspections, issuance of citations and the assessment of penalties under the Occupational Safety and Health Act (Act). 62 FR 107-111 (January 2, 1997).

The serious citations allege that on June 12, June 13, June 17, and July 1, 2003, Kenda Farms violated 29 C.F.R. § 1928.110(c)(1)(i) by failing to provide potable drinking water to farm workers in the fields; 29 C.F.R. § 1928.110(c)(1)(iii) by failing to have single use cups or fountains to dispense the potable water to the farm workers; and 29 C.F.R. § 1928.110(c)(2)(iii) by failing to locate toilets and handwashing facilities within a one-quarter mile walk of each farm worker while working in the fields. Each alleged serious violation proposes a penalty of \$2,100.

The case proceeded under EZ Trial proceedings at 29 C.F.R. § 2200.200. The EZ Trial hearing was held on March 9 to 10, 2004, in Madison, Florida. The parties stipulated jurisdiction and coverage (Tr. 5-6). The parties filed post hearing statements of position.

Kenda Farms denies the alleged violations and asserts that its farm workers were provided potable water, single use cups and the use of portable toilets and handwashing facilities while working in the fields harvesting peppers, squash and eggplant.

For the following reasons discussed, the alleged violation regarding the lack of potable water is affirmed as serious and a penalty of \$2,000 assessed. The remaining alleged violations are vacated as not supported by the record.

The Inspection

Kenda Farms is a family-operated farm in Madison, Florida, which grows and harvests vegetables including peppers, squash and eggplant. In addition to owner Richard Kenda, his daughters, Virginia Oro and Lynn Kenda, work for Kenda Farms (Tr. 319, 460-461). In June 2003, Kenda Farms had approximately 48 employees, including foremen and farm workers to hand harvest the vegetables (Tr. 70). Generally, the farm workers are apparently of South American descent who speak Spanish and little or no English.

During June 2003, Kenda Farms operated four fields. The main farm property which is owned by Kenda Farms, consists of the residence, a packing house, mechanics' shed, a single-wide trailer, other structures and a field, referred to for the purposes of this case as "Field A" (Exh. C-6).

Field A is approximately 1100 feet by 800 feet² and was used in 2003 to grow peppers (Exhs. C-13, C-14, R-13; Tr. 64, 368). In addition to its own field, Kenda Farms leased farm land to grow eggplant (Field B), squash (Field C), and zucchini (Field D) (Tr. 73-74, 77, 145, 376). Using an automobile's odometer, Field B was approximately 3/10 of a mile deep and 2/10 of a mile wide (Exh. C-15; Tr. 71). During W&H's investigation period in June through July 2003, only Fields A and B were being hand harvested by farm workers (Complainant's Brief, p. 8; Tr. 147, 245).³

After receiving a complaint from the Mexican Consulate alleging peonage and unsanitary field conditions, W&H investigators Joan Prado (lead investigator), Luis Aponte, Charles Bryan and Mercedes Herrera initiated an investigation of Kenda Farms on June 12, 2003 (Tr. 43-44, 53). The investigators held an opening conference with Richard Kenda and his daughter, Virginia Oro, and were then driven around Field A and Field B. The investigators were not allowed to go into the fields or interview workers in the fields (Tr. 46-47, 61, 79, 147). On June 13, 2003, investigators Prado and Aponte returned to interview some workers off Kenda Farms' property. Prado also drove around farms (Tr. 48, 80, 154-155). On June 17, 2003, the investigators interviewed more workers who had been terminated for allegedly not signing immigration I-9 forms (Tr. 80, 157, 191). On July 1, 2003, the W&H investigators returned to Kenda Farms to hold a closing conference. Richard Kenda did not allow them to do an abatement inspection (Tr. 80, 159).

As a result of W&H's investigation of Kenda Farms' compliance with OSHA's field sanitation requirements, serious citations were issued for failing to provide potable drinking water, single use drinking cups, portable toilets and handwashing facilities to farm workers harvesting vegetables.

Discussion

The Secretary has the burden of proving a violation.

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Using her automobile's odometer, investigator Prado measured Field A as 3/10 (1,584 feet) of a mile deep and 4/10 (2112 feet) of a mile wide (Tr. 64, 153).

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At the time of the investigation, no hand harvesting was being performed on Field C, which was newly prepared, or Field D, which had already been harvested (Tr. 73-74, 77). Kenda Farms also leased another farm in Madison County which grew squash, but it was unknown to W&H and was not a part of the investigation (Tr. 45, 377, 379-380).

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

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Kenda Farms does not dispute the application of OSHA's field sanitation to its farm operations. Kenda Farms is an agricultural employer within the meaning of § 1928.110(b) in that it owns and operates a business as an agricultural establishment in Madison, Florida, which uses paid employees in the production of food. The workers hired by Kenda Farms are engaged in agricultural activities by hand harvesting vegetables including peppers, squash and eggplant (Tr. 47, 81).

Also, there is no dispute that Kenda Farms utilized more than 11 employees on any given day in its hand harvesting operations in the fields. *See* § 1928.110(a). According to investigator Prado, Kenda Farms' payroll records showed approximately 48 employees during the period of W&H's investigation (Tr. 70). Richard Kenda identified the farm workers as employed by Kenda Farms (Tr. 81). Investigator Prado counted approximately 15 to 25 farm workers in Field A on June 12 and 15 workers in Field B on July 1, 2003 (Tr. 132, 152, 159).

The citations issued by W&H allege the violations to have occurred on four specific dates: June 12, June 13, June 17 and July 1, 2003. The record, based on the testimony of investigator Joan Prado and Kenda's daughter Virginia Oro, establishes that farm workers cut peppers in Field A on June 12, June 13 and July 1, 2003 (Tr. 148, 400-401). In Field B, the farm workers harvested eggplant on June 17 and July 1, 2003 (Tr. 149, 401).

If the alleged violations regarding the lack of potable water, single use cups, toilets, and handwashing facilities are established, there is also no dispute regarding employees' exposure and Kenda Farms' knowledge of the conditions. The farm workers began their work in the fields around 7:00 a.m. and worked until late afternoon or evening around 9:00 p.m. each day (Exhs. C-2, p. 6, C-3 thru C-5, C-8, C-9; Tr. 84, 410, 465, 486, 499). *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No 90-2148, 1995) (either actual exposure or a showing that it was reasonably foreseeable that employees would have access to the violative conditions is sufficient).

With regard to employer's knowledge, Richard Kenda or his field supervisors, including his son-in-law Fidencio Oro, was regularly in the fields overseeing the work of the farm workers. They were clearly aware of the conditions in the fields (Tr. 81-82, 89, 400). *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (a supervisory employee's actual or constructive knowledge of the violative conditions is imputed to an employer).

Kenda Farms argues that the farm workers while in the fields were provided potable drinking water, drinking cups, portable toilets and handwashing facilities as required by OSHA's field sanitation standards. It asserts that potable drinking water and individual cups were available and readily accessible. It also claims that portable toilets and handwashing facilities were provided within a reasonable distance from where the farm workers harvested vegetables in the fields.

Alleged Violations

Potable Drinking Water - §1928.110(c)(1)(i)

The citation alleges that Kenda Farms failed to provide on the dates cited potable drinking water which was readily accessible to farm workers while in the fields harvesting vegetables. Section 1928.110(c)(1)(i) provides that: "Potable water shall be provided and placed in locations readily accessible to all employees."

"Potable water" is defined as "water that meets the standards for drinking purposes of the state or local authority having jurisdiction or water that meets the quality standards prescribed by the U.S. Environmental Protection Agency's National Interim Primary Drinking Water Regulations, published in 40 C.F.R. Part 141." § 1928.110(b).

There is no dispute that water was provided on the days cited. However, complainant argues that according to some workers, the water tasted bad and had sand in it, was not cold, and was not provided until the workers had been harvesting in the fields for several hours (Complainant's Brief, p. 20).

Despite complainant's assertion as to the quality of the water and lack of ice, the record fails to establish that the water provided to the farm workers was not potable water. Although some worker statements indicate that the water was dirty, contained sand, had a bad taste, and smelled bad

(Exhs. C-4, C-5, C-8 thru C-11; Tr. 83-84, 125-126), the Secretary did not have tests performed on the water or show that it failed to meet local or state standards (Tr. 294). None of the workers stated that they did not drink the water or that they became sick from drinking the water. There is no showing that Kenda Farms failed to provide other than city/county tap water or acceptable well water for drinking purposes.

Further, the worker interview statements taken by W&H were specifically contradicted by complainant's witnesses who were deposed for trial. E. Perez testified that the water was "clean" and brought in a big thermos (Exh. C-1, p. 18). M. Perez testified that "it was clear water" (Exh. C-2, p. 13). It is also noted that the farm workers who testified at the hearing for Kenda Farms were not asked about the quality of the water. However, they did state that the water contained ice (Tr. 411, 498, 505). Lynn Kenda testified that she filled the water containers with water and ice each morning (Exh. R-11; Tr. 466). There was an ice cooler in the shop which was regularly filled by an ice company (Exh. R-10; Tr. 469).

The record shows that the drinking water was brought to the fields, usually in 10-gallon Gatorade containers located on the packing trailer (Exhs. C-1, p. 18, R-11, R-13; Tr. 385, 424, 462). The trailer was placed alongside the farm workers so that when they emptied a bucket of cut vegetables at the trailer, the worker could get a drink of water (Tr. 340). The Secretary does not dispute that the Gatorade containers of drinking water were readily accessible to the farm workers as required by § 1928.110(c)(1)(i) (Tr. 83-84).

However, the record shows that potable water was not available and readily accessible to the farm workers for all hours of hand harvesting in the fields. Section 1928.110(c)(1)(i) requires that the potable water be provided and placed in locations readily accessible to all employees. The purpose of the standard is to ensure that drinking water is provided to workers while hand harvesting. If drinking water is not available for all hours of hand harvesting, it is not provided and readily accessible as required.

Kenda Farms does not dispute that hand harvesting is hard, hot work particularly in north Florida in June and July. As shown by the photographs, hand harvesting is physical labor performed in an open field subject to direct sunlight with high temperatures and humidity. Section 1928.110(c)(4)(ii) requires employers to inform each farm worker to "drink water frequently and

especially on hot days.” Investigator Prado recorded a 98-degree temperature at 1:35 p.m. on July 1 at Field B. She also characterized June 12, 13 and 17 as hot days. Prado identified the potential hazards associated with a lack of drinking water to include cramps, heat exhaustion and heat stroke (Tr. 85, 87, 135-136).

The Secretary’s employee interview statements indicate that the drinking water was not available in the fields until 10:00 a.m. or 11:00 a.m. The workers had been working since 7:00 a.m. (Exhs. C-4, C-5, C-7, C-8, C-9).⁴ The workers’ statements are consistent with trial depositions of two brothers (Exhs. C-1, p. 16-17, 35, C-2, p. 12-13). Also, the farm workers who testified for Kenda Farms stated that drinking water was brought to the field one hour after they had started harvesting activities, and sometimes there was not enough (Tr. 415, 434, 491, 501, 508).

Only Kenda’s daughters testified that the drinking water was taken to the fields before 7:00 a.m. because it was prepared at 6:00 a.m. to make sure that it was on the trailer when the workers started harvesting (Tr. 384, 466). Because of the inconsistency with the testimony of other witnesses and their obvious interest in the outcome of the case, the daughters’ testimony on this issue is not given weight.

The failure to have the water available for all working hours violates the standard. Section 1928.110(c)(1)(i) specifically requires that drinking water “be provided” and “readily accessible” to all employees. This is to ensure that drinking water is available throughout the workers’ hand labor activities in the field and not waiting one to four hours before being able to drink water. In *Contractors Welding of Wester New York Inc.*, 15 BNA OSHC 1249 (No. 88-1847, 1991), *remanded due to settlement*, 15 BNA OSHC 1874 (1992), the Review Commission concluded that the use of the word “provide” in a standard was not ambiguous and that it was commonly understood to mean “furnish” or “make available.” In this case, the water was not furnished or made available for several hours after the farm workers began their hand harvesting activities.

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Exhibits C-1 and C-2 are trial depositions of brothers and former farm workers of Kenda Farms. Exhibits C-3, C-4, C-5 and C-18 are considered admissions under Federal Rules of Evidence, Rule 801(d)(2). Exhibits C-7, C-8, C-9, C-10, C-11 and C-19 were taken after the employees were no longer employed by Kenda Farms and, therefore, were accepted as hearsay statements which are admissible under EZ Trial proceedings, and are accorded weight based on their consistency with other evidence.

A serious violation of § 1928.110(c)(1)(i) is established. To find a violation “serious” under § 17(k) of the Act, 29 U.S.C. §666(k), the Secretary must show that there was a substantial probability of death or serious physical harm as a result of the violative condition and the employer knew or should have known, with the exercise of reasonable diligence, of the presence of the violative condition. In determining substantial probability, the likelihood of an accident is not an issue. The Secretary need only show that an accident is possible, and the result of the accident would likely be serious physical harm or possibly death. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Although water was eventually brought to the field, workers had already engaged in hard physical labor under hot and humid conditions for one to four hours without access to drinking water. The lack of water may cause cramps, dehydration, heat stroke or other serious health effects (Tr. 87, 90). Kenda Farms supervisors were in the fields throughout the day and aware of the lack of water. In fact, farm foreman/overseer Fidencio Oro, son-in-law to Richard Kenda, sold sodas to the workers for 75 cents each (Tr. 375, 400).

A penalty of \$2,000 is reasonable for a serious violation of § 1928.110(c)(1)(i).⁵ In excess of 15 farm workers were exposed to the lack of water for one to four hours each day while performing hard physical labor in direct sunlight and more than 90-degree temperatures. Kenda Farms is given credit for size and history. Kenda Farms employs approximately 48 employees. The harvesting work, however, is seasonal. In terms of history, Kenda Farms has no record of previous OSHA violations during the preceding three years (Tr. 214). Kenda Farms is not entitled to credit for good faith because it was uncooperative during the W&H inspection and made no showing of a safety program.

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Under § 17(j) of the Act, 29 U.S.C. § 666(j), the Review Commission has authority to assess civil penalties “giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.”

Single-Use Cups - §1928.110(c)(1)(iii)

The citation alleges that Kenda Farms failed to provide single use cups or fountains to dispense potable water to farm workers while in the fields harvesting vegetables. Section 1928.110(c)(1)(iii) provides that: “The water shall be dispensed in single-use drinking cups or by fountains. The use of common drinking cups or dippers is prohibited.”

The record on this issue is fact specific and contradictory. W&H Investigators Prado and Aponte testified that they did not observe individual cups or fountains for drinking water in the fields (Tr. 92, 150, 158, 308-309). However, the investigators were not allowed to go into the fields (Tr. 61, 200). From their interviews with farm workers, the investigators understood that cups were provided on June 12, the first day of their inspection (Tr. 91, 253, 283). Other than on June 12, the worker interview statements indicated that single use cups were not provided (Exhs. C-4, C-7, C-8, C-11). The farm workers stated that they drank water from cut soda cans or cut out squash (Exhs. C-5, C-8, C-11, C-18). The worker interview statements are supported by the trial depositions of two brothers who also stated that cups were not provided (Exhs. C-1, p. 19, 28, C-2, p. 13-14).

Kenda Farms, however, asserts that single use cups were provided to the farm workers in the fields. Richard Kenda’s daughters, Virginia Oro and Lynn Kenda, testified that paper/plastic cups were in place next to the “Gatorade” water container (Tr. 356, 462, 465). Lynn Kenda who works on the trailer in the fields testified that although paper cups were available, she has seen workers not use the cups. Instead, the workers cut out a squash to use as a cup (Tr. 472).

The daughters’ testimony was supported by four farm workers (Garcia, Lopez-Perez, Vaquero, Hermenegildo), who testified that paper/plastic cups were available during June 2003. Garcia testified that disposable glasses/cups were provided and that she never drank from soda cans or used a cut squash because it tasted “pretty bad” (Tr. 411, 415-416). Rosales testified that glasses were provided, but sometimes they were not there because workers had thrown them away. Therefore, she brought her own glass. Rosales stated that Fidencio sometimes did not bring cups, and workers used soda cans or cut-out squash (Tr. 425, 434-435). However, Rosales only worked on July 1, 2003, the last day of the investigation (Tr. 424). Lopez-Perez, who worked on June 12, 13, 17 and July 1, 2003, testified that glasses/cups were provided but some workers did not want to

drink out of them so the glasses laid around (Tr. 486, 490-491). Vaquero, whose job included bringing water to the fields, testified that glasses were furnished (Tr. 499, 503). Hermenegildo testified that there were “throw-away” cups available, but sometimes they blew away and workers drank water from cut soda cans (Tr. 505, 508-509).

The record fails to support the Secretary’s claim that Kenda Farms failed to provide single use cups for drinking water in the fields. The W&H investigators were not permitted in the fields and were not in a position to see if single use cups were available. The interview statements taken by W&H are contradicted by the testimony of several workers called by Kenda Farms. Unlike the interview statements, however, the workers who testified were sequestered, under oath, and subject to cross-examination. The witnesses’ testimony is given more weight than the signed worker interview statements taken by W&H which lacked specificity, were not verbatim, and were not subject to cross-examination. The investigators agreed that the interview statements were general and did not identify specific dates or field locations (Tr. 105, 150, 187). It is also noted that the interview statements were taken by W&H on June 13 when it is undisputed that cups were provided on June 12. A second group of interview statements were taken on June 17 after the workers were terminated on June 16, 2003 (Tr. 91, 184, 166, 172, 191). The two trial depositions offered by the Secretary were from brothers who had been terminated for not signing immigration Form I-9. Also, their testimony is not specific as to dates or field locations (Exhs. C-1 p. 25, C-2 p. 5; Tr. 191).

The alleged violation is not established.

Portable Toilets and Handwashing Facilities
§1928.110(c)(2)(iii)

– The citation alleges that Kenda Farms failed to locate toilets and handwashing facilities within a one-quarter mile walk from each farm worker while in the fields harvesting vegetables. Section 1928.110(c)(2)(iii) provides that:

Toilet and handwashing facilities shall be accessibly located and in close proximity to each other. The facilities shall be located within a one-quarter-mile walk of each hand laborer’s place of work in the field.

The standard requires that the toilet and handwashing facilities be located within a one-quarter mile (1,320 feet) walk of each worker in the field hand harvesting. According to Oro, Field

A's rows of peppers were approximately 1,100 feet by 800 feet (Tr. 64, 368). Using her automobile odometer, CO Prado measured Field A as 3/10 of a mile (1,584 feet) deep and 4/10 of a mile (2112 feet) wide (Tr. 64, 153). A meter reader for the electric cooperative estimated that Field A was 30 acres, or approximately three or four, 100-yard football fields (Tr. 457). Described as slightly smaller, Field B, which was used for growing eggplants, was approximately 3/10 of a mile (1,584 feet) deep and 2/10 of a mile (1056 feet) wide according to Prado's odometer (Tr. 71, 396).

There is no dispute that toilet and handwashing facilities needed to be accessibly located to the farm workers in Fields A and B on June 12, 13, 17 and July 1, 2003. During their investigation, Prado and Aponte did not see any portable bathrooms while driving around the perimeters of Fields A and B (Tr. 97, 111, 158, 241, 243). However, from their interviews of farm workers, they determined that portable bathrooms were available on June 12 in Field A (Tr. 97, 108, 283).

The worker interview statements taken by W&H indicated that portable bathrooms were not available to workers except on June 12 (Exhs. C-3, C-5, C-8, C-10, C-18). As discussed, however, the interview statements were taken only on June 13 and June 17 after the workers were terminated on June 16, 2003 (Tr. 166, 172). Also, since portable bathrooms were available on June 12, the worker statements do not necessarily indicate that portable bathrooms were removed for June 13, June 17 and July 1, 2003 (Exhs. C-3, C-7, C-8, C-10). The workers stated that the bathrooms, when available, were dirty and they never had soap, water or paper towels (Exhs. C-3, C-5, C-7, C-8, C-9, C-10, C-18). The two brothers who were deposed stated there were no bathrooms in the fields to use and there was no place to wash their hands (Exhs. C-1 p. 13, 16, C-2 p. 7). However, they also said that bathrooms were available for approximately one week, but they did not use them because they were dirty (Exhs. C-1, p. 37, C-2, p. 8). E. Perez stated the walk to the bathroom from the far end of the field was over one-quarter mile (Exh. C-1, p. 16). However, M. Perez stated that he had to walk 100 meters (327 feet) to the bathroom (Exh. C-2, p. 9).

Kenda Farms asserts that portable bathrooms and handwashing facilities were available to the farm workers harvesting in the fields. Kenda Farms had purchased six portable toilets in 2002 for \$2,400 (Exh. R-7; Tr. 330-331). Daughter Virginia Oro testified that two port-a-johns were located at the bottom half of Field A, along with a barrel for hand washing on June 12, 13, 17 and July 1, 2003 (Tr. 322). She also testified that a port-a-john and a barrel were in the center of

Field B (Tr. 372-374). She stated that soap and paper towels were provided on June 12, 13, 17 and July 1 (Tr. 345). Oro's testimony was supported by her sister, Lynn Kenda (Tr. 467, 469, 471). A meter reader for the electric cooperative, testified he observed the portable toilets in Field A during the second week of June 2003. He has been reading the meters once a month for six years (Tr. 438-439, 451-452, 456). The meter reader also observed a portable toilet in Field B (Tr. 448).

The farm workers who testified supported Kenda Farms' assertions. Garcia testified that portable bathrooms were provided in the fields she worked, as well as soap and towels (Tr. 410, 412, 416-417). She also testified that in Field A, she would use bathrooms in the mechanic shop or pack house. She said the bathrooms were clean, but she seldom used them (Tr. 416-417). Rosales testified that there were portable bathrooms and places to wash their hands, but there was no soap or paper towels (Tr. 426). She stated the bathrooms were less than a quarter of a mile, which she could walk to in less than five or ten minutes. She stated, however, that sometimes she was lazy and would use the bushes (Tr. 428). Lopez-Perez testified that portable bathrooms and places to wash hands were in the fields while he was working (Tr. 485, 488, 492). He said that it took him eight to ten minutes to walk to the bathrooms (Tr. 492-493). Vaquero testified that in June 2003 when he worked in the fields, there were portable bathrooms (Tr. 498). Hermenegildo also stated that clean portable bathrooms were in the fields (Tr. 506).

The record fails to support the Secretary's claim that farm workers did not have access to bathroom and handwashing facilities while working in Fields A and B on June 12, 13, 17 and July 1, 2003. The W&H investigators could not go into the fields. The interview statements taken by W&H are contradicted by the farm workers who testified. The farm workers testified that portable toilets and handwashing facilities were in the fields. The record also fails to show that the workers had to walk more than one-quarter mile to the facilities.⁶

More weight is afforded the testimony of the farm workers who were sequestered, testified under oath, and were subject to cross-examination. The farm workers expressed no concern for their jobs with Kenda Farms as a result of testifying (Tr. 417, 495, 504, 510). In comparison, the worker

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Kenda Farms does not claim an exception under § 1928.110(c)(2)(iv) where due to terrain, it is not feasible to locate facilities within one-quarter mile. The facilities can be located at the point of closest vehicular access. The record does not show that it was infeasible to locate the toilets within a one-quarter mile walk of workers in the field.

interview statements taken by W&H were not verbatim, did not allow for cross-examination, and the individuals could not be judged on credibility

The alleged violation is not established.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Serious Citation, alleging a violation of § 1928.110(c)(1)(i), is affirmed as serious and a penalty of \$2,000 is assessed.
2. Serious Citation, alleging a violation of § 1928.110(c)(1)(iii), is vacated and no penalty is assessed.
3. Serious Citation, alleging a violation of § 1928.110(c)(2)(iii), is vacated and no penalty is assessed.

/s/ Ken S. Welsch

KEN S. WELSCH
Judge

Date: April 20, 2004