

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. :
 :
 AMERICAN WRECKING CORPORATION, :
 :
 Respondent. :

OSHRC Docket Nos.
96-1330 and 96-1331
(consolidated)

SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. :
 :
 IDM ENVIRONMENTAL CORPORATION, :
 :
 Respondent. :

DECISION AND REMAND ORDER

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

IDM Environmental Corporation (“IDM”), a company engaged in building demolition, hazardous materials clean-up, and equipment relocation, was the general contractor for the project to demolish and remove asbestos from the long-idle Steel Point power generating plant in Bridgeport, Connecticut. It had been hired by the owner of the plant, United Illuminating Company. IDM subcontracted the actual demolition work to American Wrecking Corporation (“AWC”). On February 27, 1996, an employee of AWC

was in a manlift cutting steel columns at the south wall of the plant's generator building when the wall's remaining bricks overhead and parts of its steel framework collapsed and fatally injured him.

After its investigation of the accident, the Occupational Safety and Health Administration ("OSHA") issued one citation each to IDM and AWC. Each citation contained three items respectively alleging willful violations of the same three OSHA demolition standards. Following a joint hearing, Administrative Law Judge Robert A. Yetman affirmed items 2 and 3 in each citation, and these are the only items on review.¹ For the following reasons, we affirm the violations alleged in item 2 of both citations but remand those items for credibility findings on their alleged willful characterizations. We vacate item 3 in both citations.

I. *Background*

The demolition of the southern half of the generator building involved removal of the bricks from the steel framework at the east, west, and south walls, followed by two horizontal torch cuts into the vertical steel beams. One cut would be at the three- to four-foot level, and one at the 25- to 30-foot level, which would be made from a manlift. These cuts, which sometimes did not go all the way through the beams, as well as cuts at the separation point in the roof, were made so that, when "pushed over" by a crane at a later time, the southern half of the generator building would fall in a controlled way to the west, away from the street.

After having knocked down all of the bricks from the east wall and almost all from the west wall, Frank Bartolotti, AWC's job supervisor and "person in charge" at the Steel Point site, attempted to do the same at the south wall of the generator building a "couple" of days prior to the February 27 accident. He operated a front-end loader with an attachment known as a rake to remove the bricks surrounding the steel superstructure at the south wall, which was 50 feet high. Because of the slope of the ground and the rake's maximum

¹The judge vacated item 1 in each citation, which alleged a willful violation of 29 C.F.R. § 1926.850(a), which requires that an engineering survey be made by a competent person prior to permitting employees to start demolition operations. Review was not requested nor directed on this item.

extension of about 57 feet, Bartolotti was not able to reach the bricks at the top fifteen feet. According to Bartolotti, he “may have tried [to get those bricks down] once or twice,” and agreed that he “intended to remove all the bricks” at the south wall. Yet, he left the fifteen feet of bricks at the top, in Bartolotti’s words, “[b]ecause the bricks, I felt, were stable enough and secure enough.”

The following Tuesday, February 27, AWC employee Percy Richards was in a manlift making a horizontal torch cut into the vertical steel beam designated column no. 15 at the south wall when the bricks overhead collapsed on him. When the accident occurred, the other AWC steel-cutter, Michael Taylor, was getting a ladder. Bartolotti, who was a working foreman as well as job supervisor, was in the adjacent low pressure boiler room operating heavy equipment.

II. *Item 2 in Each Citation*

Item 2 in each employer’s Citation 1 alleged willful violations of 29 C.F.R. § 1926.854(f), which provides:

§ 1926.854 Removal of walls, masonry sections, and chimneys

....

(f) In buildings of “skeleton-steel” construction, the steel framing may be left in place during the demolition of masonry. Where this is done, all steel beams, girders, and similar structural supports shall be cleared of all *loose material* as the masonry demolition progresses downward.

(Emphasis added.) Item 2 issued to AWC specifically described the allegation as:

On or about 2/27/96 while making torch cuts from a[n] aerial lift to the center columns on the south wall, workers were exposed to falling brick and other debris. The company did not remove the masonry in a manner that was safe for workers in the immediate area. The masonry was removed from the bottom of the building up, leaving portions of the wall and windows hanging unsupported.

Item 2 issued to IDM, the general contractor,² particularly charged:

While working in and around the structure, employees and sub-contractor employees were exposed to the hazard of falling brick and other debris. The

²Multiple employer worksite responsibilities are discussed in section II.B. and in note 12 *infra*.

company did not ensure the brick was removed in a manner which was safe for workers in the immediate area. The brick was removed from the bottom up, leaving portions of the upper wall and windows hanging unsupported.

To establish a violation of a specific standard, the Secretary must prove that the standard applies, the employer violated the terms of the standard, its employees had access to the violative condition, and the employer had actual or constructive knowledge of the violative condition. *E.g.*, *Hamilton Fixture*, 16 BNA OSHC 1073, 1082, 1993-95 CCH OSHD ¶ 30,034, p. 41,178 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). She must prove each element of her case by a preponderance of the evidence. *E.g.*, *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2131 & nn.16 & 17, 1981 CCH OSHD ¶ 25,578, p. 31,901 & nn. 16 & 17 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

A. Applicability and Noncompliance with Standard's Terms

In determining whether the standard applies and its terms were violated, the key issue is whether the Secretary established that bricks left at the top fifteen feet of the south wall were "loose material." To support her claim, the Secretary presented photographic and testimonial evidence.

Exhibit C-15

The Secretary introduced the photograph entered into the record as Exhibit C-15 to show, in general, the inside of the generator building looking south *after* AWC's job supervisor Bartolotti tried to take all the bricks on the south wall down and left some at the top 15 feet, but *before* the accident. The south wall, shown in the distance, comprises only a small part of the picture; most of the photograph is occupied with the east and west walls of the generator building, and the underside of the roof and its supporting steel. The Secretary's first witness, AWC's job supervisor Bartolotti, was asked at several different times during his testimony about the exhibit. After Bartolotti initially testified that he could not remember whether the bricks he left at the south wall just prior to the accident looked as they did in Exhibit C-15, the judge conditionally accepted the photograph into evidence. Later, Bartolotti expressed uncertainty about details in the photograph not concerned with

the south wall--a dark area along the east wall and a piece of equipment in the foreground. However, when the judge asked him whether, but for those minor concerns, the photo “represents the condition of the building prior to the accident,” and when the judge later asked him if the photograph would serve “as a general representation of the site at the time, after you had removed the bricks,” Bartolotti responded both times by saying: “Pretty much.” Later, while Bartolotti was still on the stand, the judge summarized and clarified as follows: “The witness has indicated that he is not certain that the photograph is an accurate depiction of the work site in every respect, but he did acknowledge that . . . it is a general representation of the work site prior to the accident. I’ll accept it on that basis. So, I’ll remove the de bene [conditional] designation on it, and accept it for the general purposes for which . . . I’ve stated.”

In his decision, the judge stated:

[E]xhibit C-15 is a photograph of the south end of the generator building and depicts the condition of the building prior to the accident. The photograph clearly depicts the bricks left in place by Bartolotti suspended from the roof of the building downwards with no support for the bricks to the right and left of vertical steel supports on the day of the accident.

We note that, while Exhibit C-15 shows that some of the bricks between columns 14 and 15 are above the channel iron, or cross beam, that runs between the two columns (marked on the photograph with an “X”), the bricks at issue are the ones shown in the photograph that are *not* supported by the channel iron, more specifically (1) the bricks between columns 14 and 15, under the channel iron; (2) the bricks to the left of steel column 14, extending outward and upward to a higher cross bar near the roof line; and (3) the bricks to the right of steel column 15, extending outward and upward to the same.

We reject AWC’s and IDM’s arguments that Exhibit C-15 was not properly authenticated. Under Rule 901(a) of the Federal Rules of Evidence, applicable to Commission proceedings under Rule 71 of the Commission’s Rules of Procedure, 29 C.F.R. § 2200.71, the authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Under Rule 901(b)(1), such authentication may be accomplished by “[t]estimony of [a] witness with knowledge . . . that

a matter is what it is claimed to be.” Bartolotti was clearly the witness with the most knowledge of what the bricks at the top of the south wall looked like because he was the one who had tried to knock them down, and he saw them again on the day of the accident when he assigned the steel cutters to work under them. Bartolotti’s testimony about the photograph, when considered in its entirety, authenticated the photograph by acknowledging that it showed the general condition of the south wall after he had made his last attempt to knock all the bricks down and before the accident occurred.

We also reject the claim by AWC and IDM that Exhibit C-15 does not accurately depict the condition of the bricks left at the top of the south wall prior to the accident. They refer to testimony by witnesses who remembered the bricks as being only above, and thus supported by, the channel iron.³ The testimony of IDM’s vice president for operations, Frank Pasalano, to which they refer, is irrelevant. It was based on his observations on February 15, 1996, more than a week before Bartolotti took down most of the bricks from the south wall. IDM field supervisor Paul Reis testified that he did not remember seeing the bricks in the three areas at issue, but his testimony was qualified with “[a]s I recall” and to the “[b]est of my recollection” and does not therefore directly conflict with Bartolotti’s testimony that the photograph was an accurate depiction. *See generally Hamilton Fixture*, 16 BNA OSHC at 1087, 1993-95 CCH OSHD at p. 41,182. Even if this testimony, and similar testimony by IDM’s health and safety officer, Marcus Gales, could be considered to conflict with Bartolotti’s testimony, we accord Bartolotti’s testimony greater weight because he was in the best position to know the condition that he created. The employers also rely on Bartolotti’s early testimony that bricks “were sitting on a steel channel.” That reliance is misplaced. Bartolotti gave that testimony before he was shown Exhibit C-15 at the hearing and closely questioned as to whether it depicted the bricks as he left them at the top of the south wall. We also emphasize that the depiction of the bricks in Exhibit C-15 is independently corroborated by the evidence showing that it was impossible to remove the remaining brick

³AWC and IDM chose not to cross-examine Bartolotti, who was the Secretary’s first witness, and they did not later call him as their own witness at the hearing.

located on either side of the columns and below the channel iron with the equipment that Bartolotti was using, given the slope of the ground. Thus, it is undisputed that the front-end loader's rake attachment could not reach high enough to remove the remaining brick. We therefore conclude that the Secretary authenticated Exhibit C-15.

Testimony of the Experts

The Secretary called two expert witnesses at the hearing on the applicability and compliance issues, and AWC and IDM called one such expert. The Secretary's expert in structural engineering was Russell Geisser, a licensed civil and structural engineer who has investigated at least twenty collapsed buildings and has testified as an engineering expert in at least one hundred cases. Geisser viewed the site, read the engineering surveys and work plans, and viewed the photographic exhibits. He testified that the bricks in the three locations on Exhibit C-15 identified above--below the channel iron and to the outer sides of the columns, with no channel iron support--were held in place by only mortar, which "has a practical value of zero" in terms of holding power. Geisser stated that these "suspended" bricks were in a "meta[]stable" condition, meaning that they were "stable to a point" but "the tiniest little thing will trigger" them to fall, such as "hitting the frame" or "vibrations from heavy equipment." When asked, in layman's terms, whether the bricks at issue could be "relied upon to stay in place," Geisser responded: "In a tensile condition? No."

The Secretary's demolition expert was Joseph Maitz. He has been engaged exclusively in demolition work since 1963, including participation in the demolition of a power plant and supervision of about sixty large demolition projects. Maitz characterized the bricks depicted in Exhibit C-15 that were located below the channel iron and on either sides of columns 14 and 15 as "[u]nstable brick," "hanging," "in an unsafe condition," and agreed that they were "in danger of falling." When asked whether having an employee make cuts into the steel columns directly below bricks configured as they were on the south wall would be considered hazardous in the demolition industry, Maitz opined that the industry would consider it hazardous, and he stated: "To me it's a potential hazard and I wouldn't -- just wouldn't put somebody there."

AWC and IDM called one expert witness, Luis Nacamuli, a consulting structural engineer, who had worked on about one hundred demolition projects. Nacamuli testified that, although not supported by the channel iron, the bricks left by Bartolotti on the south wall in the three areas in question were not hazardous to employees cutting the columns under them because the bricks were in the form of an arch, the internal stress of which, along with the mortar, would keep the bricks from falling. He considered the bricks below the channel iron and between columns 14 and 15 to be in the form of a “true arch,” while the bricks to the outside (left) of column 14 and (right) of column 15 were each “not a Roman arch, that’s for sure, but it’s an arch.” According to Nacamuli, the arches he saw in the bricks “follow a shape similar to normal arches that you’ve seen.” Nacamuli acknowledged, however, that “[i]f there were no arch,” it would “be dangerous for the employees who were cutting into 14 and 15 to be that close to bricks.”

Judge’s Decision

The judge concluded in his decision that, “[b]ased upon the evidence elicited at the hearing,” the Secretary established by a preponderance of the evidence that both AWC and IDM violated the standard. He noted that “[t]he standard clearly requires that ‘loose material’ be cleared during demolition of masonry to protect employees from the hazard of being struck by falling masonry such as, as in this case, bricks.” According to the judge, “[t]he fact that bricks were left in place over the heads of workers who were engaged in demolition activities and said bricks became loose and fell causing fatal injuries to employee Richards clearly establishes that the protection intended to be provided to employees by the standard was tragically absent in this case.”

The judge noted the testimony of Geisser and Maitz, discussed above, and he generally relied on it in finding a violation, without making any specific findings as to credibility. However, he specifically discredited Nacamuli’s testimony that a “natural [or true] arch” was created by the bricks, describing that testimony as “def[ying] logic when considered [in] light of exhibit C-15 which depicts the condition of the bricks prior to the collapse.” According to the judge, “It is clear that there is no such arch, natural or otherwise,

that could sustain the weight of the bricks.” He concluded that, “[b]ased upon the testimony and demeanor of this witness at trial, no weight is given to his testimony.”⁴

Discussion

The cited OSHA demolition standard does not define “loose,” nor has any relevant source or precedent defined the term in the context of this standard, but the dictionary defines “loose” as “not rigidly fastened or securely attached: lacking a firm or tight connection: ready to move or come apart from an attachment . . . lightly secured or made fast; *esp*: having worked partly free from attachments <a ~ tooth> . . . < ~ **masonry**> . . .” *Webster’s Third New International Dictionary* 1335 (1986) (unabridged) (emphasis added). Similarly, another dictionary defines “loose” as: “detached or detachable from its place . . . hanging partly free.” *The Concise Oxford Dictionary* 805 (9th ed. 1995). *See generally Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1482, 1991-93 CCH OSHC ¶ 29,582, p. 40,032 (No. 88-2691, 1992) (where standard did not define “adjacent,” Commission referred to dictionary definition).

The testimony of the Secretary’s expert witnesses clearly established that the bricks in the three areas were far from securely attached and were thus “loose material.” The Secretary’s structural engineering expert Geisser testified that, as shown on Exhibit C-15, the

⁴The judge also stated in his decision that Nacamuli’s “opinion that the bricks were in stable condition and could not fall totally ignores the fact that the bricks *did* fall and fatally injure an employee . . .” (Emphasis in original.) AWC and IDM argue that, because the cause of the collapse was not established, the judge erred in relying on the fact that the bricks collapsed to support finding a violation. We note that the issue in these cases is whether the cited standard was violated, not what caused the accident. Determining whether the standard was violated is not dependent on the cause of the accident. *See, e.g., Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1722 n. 8, 1999 CCH OSHD ¶ 31,821, p. 46,778 n.8 (No. 95-1449, 1999); *Baker Tank Co./Altech*, 17 BNA OSHC 1177, 1180 n.3, 1993-95 CCH OSHC ¶ 30,734, p. 42,684 n.3 (No. 90-1786-S, 1995); *Towne Construction Co.*, 12 BNA OSHC 2185, 2188 n.7, 1986-87 CCH OSHD ¶ 27,760, p. 36,310 n.7 (No. 83-1262, 1986), *aff’d*, 847 F.2d 1187 (6th Cir. 1988). Nevertheless, the circumstances of an accident may provide probative evidence of whether a standard was violated. *See, e.g., Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1116 n.1, 1986-87 CCH OSHC ¶ 27,829, p. 36,427 n.1 (No. 84-696, 1987). For purposes of this case, insofar as the judge’s decision appears to rely inappropriately on the fact an accident occurred, we do not agree with his reasoning.

bricks below the channel iron and to the outer sides of columns 14 and 15 were “stable to a point” but “the tiniest little thing will trigger” them to fall, such as “hitting the frame.” He testified that the bricks could not be relied upon to stay in place because “the mortar holding these bricks together has a practical value of zero.” This testimony was consistent with that of the Secretary’s demolition expert Maitz, who stated that the bricks at issue were “[u]nstable” and “unsafe” and agreed they were “in danger of falling.”

AWC and IDM did not directly rebut this testimony. Instead, they attack the reliability of Geisser and Maitz and rely on the testimony of Nacamuli, their expert. We find no merit in their arguments. They argue that Geisser’s testimony should not be accorded controlling weight because he had virtually no prior experience in demolition. However, at the hearing, the judge recognized Geisser’s limitations as to demolition and stated that he was considering Geisser’s testimony as that of a civil engineering expert with extensive experience in construction. The judge described the principles involved as “applica[ble] to construction and to demolition.” The record shows that the judge qualified Maitz as a demolition expert based on his extensive on-the-job experience in demolition since 1963, as a superintendent in the field for 15 years, and as a foreman before then. The employers allege that Maitz was biased because he worked for a competitor of IDM, but they do not support their allegation with any evidence, nor do they cite to any testimony by Maitz indicating bias against AWC and IDM, and we have found none.

We also reject the employers’ reliance on their expert, Nacamuli. We defer to the judge’s specific credibility determination against Nacamuli because he is the one who heard the witness and observed his demeanor. *See C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). We therefore decline to give any weight to Nacamuli’s testimony that the bricks would not fall. Moreover, we find that the Secretary’s expert, Geisser, rebutted Nacamuli’s reliance on an arch-effect. He testified that he “d[id]n’t see any arching effect” with respect to the two areas he was asked about--to the left of column 14 and the right of column 15. Nacamuli acknowledged that, if there were no arch, the bricks would be “dangerous” for employees cutting the steel columns under such bricks.

The employers also rely on the testimony of AWC supervisor Bartolotti and IDM's health and safety officer, Gales, that the bricks were held together securely not only with mortar but also with metal "clips" and wire mesh. Although in his decision the judge did not discuss this testimony, we find that it is entitled to little weight.⁵ First, Bartolotti described the metal clips as being welded onto the steel channels, which would support only the first row of bricks right under the clips and leave the majority of the bricks unsecured. Other evidence casts grave doubt on the very existence of the metal clips. The Secretary's expert, Geisser, testified that, in his many years of experience in the construction industry, he had never heard of "clips" holding bricks together. Geisser's testimony was consistent with the employers' own expert, who did not mention wire mesh or clips in his testimony. Nor were wire mesh or clips shown amidst the brick and steel beams in the photographs in evidence that represented the scene after the collapse.⁶ Furthermore, when Bartolotti was asked at the hearing whether he mentioned the wire mesh and clips in his deposition, he claimed not to remember. Bartolotti's attempt to knock down all the bricks on the south wall also undercuts his testimony that the bricks were all supported by the channel iron, or clips, mortar, and mesh.

⁵"[T]he *Commission* is the fact-finder, and the judge is an arm of the Commission for that purpose." *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976) (emphasis in original). Where the judge has failed to make necessary findings of fact, the Commission has the discretion to either remand or itself decide the facts. *See, e.g., General Dynamics Corp., Electric Boat Div.*, 15 BNA OSHC 2122, 2131, 1991-93 CCH OSHD ¶ 29,952, pp. 40,960-61 (No. 87-1195, 1993); *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD ¶ 29,673, p. 40,207 (No. 87-2007, 1992). Regarding the testimony that the employers rely on here, because we need only weigh evidence and not make credibility findings, the better course for the Commission is to make the findings. *E.g., Hamilton Fixture*, 16 BNA OSHC at 1089, 1993-95 CCH OSHD pp. 41,184-85.

⁶Insofar as the employers rely on the testimony of supervisory personnel that the bricks were all supported by a channel iron in arguing that the bricks were not "loose," that reliance is misplaced for, as we discussed above, we have found that much of the brick was not supported by the channel iron.

Having considered all of the evidence, we conclude that the Secretary's evidence outweighs any rebuttal evidence put forth by the employers. We find that the Secretary has established by a preponderance of the evidence that the bricks in the three areas at issue, which were not cleared from the south wall, were so minimally held together that they could without difficulty become detached, and therefore were "loose material." We thus conclude that the Secretary proved by a preponderance of the evidence that the standard applies and its terms were violated.

B. *Employee Exposure or Access*

Employee exposure to the cited condition is not disputed. As the judge found, AWC employee Richards was in a manlift cutting the steel columns numbered 14 and 15 directly below the bricks left at the top of the south wall by Bartolotti when the bricks collapsed on him. Michael Taylor, another AWC employee, also had been cutting steel in that location at the south wall earlier on the day of the accident. AWC's working supervisor, Bartolotti, had been in the area below the loose bricks earlier in the day. AWC had responsibility for protecting its exposed employees. As general contractor at the multiple employer worksite, IDM was responsible for taking reasonable steps to protect the exposed employees of subcontractors. *See, e.g., Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-30, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-851, 1994). *See note 12 infra.*

C. *Employer Knowledge*

In order to establish knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the cited condition. *E.g., Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991). The knowledge of a supervisor can be imputed to the employer. *E.g., Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999).

AWC's Knowledge

The judge found that AWC had the requisite knowledge of the cited physical condition, and we agree. It is not disputed that Bartolotti was a supervisory employee in his

position as “working supervisor” and person-in-charge at the site. As a “working supervisor,” his knowledge can be imputed to AWC. *E.g.*, *Access Equipment*, 18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782. The record establishes that Bartolotti had actual knowledge that 15 feet of brick was left at the top of the south wall as depicted in Exhibit C-15. He created the condition, and he continued to work in the area through the time of the accident. He agreed at the hearing that he “intended to remove all the bricks” on that wall, and that he “tried it once or twice,” but he could not reach the top bricks on the south wall with the equipment he was using, in light of the “lay of the land.” He acknowledged that there was sufficient equipment, a crane and ball, on the site which, if used, could have reached the top bricks, but he did not use it. Based on the evidence above, we conclude that, under Commission precedent, the Secretary proved that Bartolotti had actual knowledge of the condition, and that knowledge is imputable to AWC. *See, e.g.*, *A.P. O’Horo*, 14 BNA OSHC at 2007, 1991-93 CCH OSHD at p. 39,128.

Because this case may be appealed to the Third Circuit,⁷ we consider that court’s view that to impute knowledge through a supervisor’s misconduct requires evidence that the supervisor’s conduct was reasonably foreseeable because of inadequacies in the employer’s safety program, and the employer therefore did not exercise reasonable care to prevent or detect the condition. *Pennsylvania Power & Light Co. v. OSHRC (“PP&L”)*, 737 F.2d 350, 357-58 (3d Cir. 1984). *See also Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2068, 2000 CCH OSHD ¶ 32,053, p. 48,004 (No. 96-1719, 2000). The Third Circuit expressed its agreement with the “logic” of the Commission’s view that an adequate safety program could be shown by evidence that the employer “ ‘has established workrules *designed to prevent the violation*, has adequately communicated these rules to its employees, has taken

⁷These cases can be appealed by the employers and the Secretary to the Third Circuit (employers’ principal offices in New Jersey) and the Second Circuit (violative condition in Connecticut), and by the employers to the D.C. Circuit. *See* section 11(a) and (b) of the Act, 29 U.S.C. § 660(a) and (b). Where it is clear that the case can be appealed to a particular circuit, the Commission will apply the law of that circuit. *E.g.*, *Farrens Tree Surgeons*, 15 BNA OSHC 1793, 1794-95, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992).

steps to discover violations, and has effectively enforced the rules when violations have been discovered.’ ” *PP&L*, 737 F.2d at 358 (emphasis in original) (citation omitted). The court stated that, to have an adequate safety program, employers must develop work rules and training that are “tailored to their respective operations” and “reasonably respond to their particular working conditions and safety needs.” *Id.* at 358, 359. According to the court, the employer can be excused from responsibility for the acts of its supervisors by rebutting the Secretary’s prima facie showing that its safety program was deficient as to training, steps to discover supervisory violations, or enforcement of the safety program. *Id.*; see *Kerns*, 18 BNA OSHC at 2069-70, 2000 CCH OSHD at p. 48,004.

In these cases the evidence shows that Bartolotti’s conduct was foreseeable because AWC did not have workrules “designed to prevent the violation” and did not provide adequate training to its supervisors. Bartolotti’s testimony indicated that he had considerable discretion to decide how to proceed with the various demolition activities. He testified that he was familiar with OSHA standards in general, but he was not questioned about the standard cited here. The record shows that he had many years of experience in demolition, but merely having experienced employees does not relieve an employer of the obligation to train its employees and to have work rules designed to prevent OSHA violations. *E.g.*, *Hackney, Inc.*, 16 BNA OSHC 1806, 1811, 1993-95 CCH OSHD ¶ 30,486, p. 42,116 (No. 91-2490, 1994), citing *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1640, 1991-93 CCH OSHD ¶ 29,689, p. 40,258 (No. 88-2012, 1992), *aff’d*, 20 F.3d 938 (9th Cir. 1994). There is no evidence in the record that AWC had work rules or policies specifically addressing the demolition procedures that are fundamental to its business, much less a rule specifically requiring that loose masonry be cleared from steel framework as demolition progresses downward. AWC’s work rules in the record address general safety concerns, like ladders, platforms, and communication about hazardous materials, and its toolbox safety topics addressed only general construction loss prevention topics rather than demolition procedures or safety. Because AWC provided no guidance, it was left to Bartolotti’s sole discretion to determine how to proceed in attempting to demolish the masonry walls. In these circumstances, Bartolotti’s decision to leave the remaining bricks at the top of the south wall

instead of using the available crane to remove them was foreseeable.

Bartolotti's decision to assign employees to cut steel under the overhead material was likewise foreseeable. Bartolotti testified that it was a "joint decision" between himself and Richards, who sometimes was also a working foreman. The record indicates that AWC did not give any specific guidance to its supervisors regarding how to decide whether it was safe to allow employees to cut steel columns under those conditions. Ira Pollack, AWC's vice president, testified that, when using the "precut method"--cutting the steel columns in preparation for pushing over the building--"[w]e look at the structure, we look at the steel, we make sure that the steel is cross-braced, and then we go in and make our cuts." Pollack testified that the precut method had been used by AWC on "[o]ver a hundred" other demolition projects, but there is no evidence of any more specific guidance to be given to the supervisor "look[ing] at the structure." Because AWC's policy does not, like the standard, prohibit cutting steel directly below loose bricks, AWC did not take reasonable care to prevent the violation. We therefore conclude that the violation was foreseeable, and we conclude that the Secretary has proven that AWC had knowledge, through its supervisor Bartolotti, of the violative condition.⁸

IDM's Knowledge

The judge also found that IDM had the requisite knowledge, and we agree. Both IDM's field supervisor, Reis, and its safety director, Gales, walked through the area underneath the bricks a number of times during the day as part of their inspection duties, and they did so on the days when Bartolotti left the bricks at the top of the south wall. Both Reis and Gales admitted seeing the top of the south wall with the brick left by Bartolotti.

Reis, who was in charge of day-to-day operations at the site and the coordination of the subcontractors, testified that he saw that everything had been removed except for bricks at the top of the south wall. He testified that because he "found that peculiar," he questioned Bartolotti, who responded that the bricks had sufficient support. Reis testified that he

⁸In finding that AWC had knowledge of the violation, the judge relied on IDM Safety Director Gales' warning given at a safety meeting attended by Bartolotti the morning of the accident. For the reasons discussed in the next section, we do not rely on that warning.

deferred to Bartolotti because “he was the expert.” Reis acknowledged that Bartolotti had told him that he tried to get all the bricks but could not because the ones left at the top of the south wall were too high for his equipment.

IDM health and safety officer Gales testified that he conducted walk-through inspections of the site six or seven times a day to see if there were any unsafe working conditions. Gales testified that he had observed the bricks left at the top of the south wall, and he was aware that the condition had been there for two or three days. According to Gales, when he asked Bartolotti about the bricks the day before the accident, Bartolotti responded that there was no problem because of the angle iron and “metal flash” around them.⁹

Based on this evidence, we conclude that Reis and Gales knew, or could have known with the exercise of reasonable diligence, of the violative condition. As supervisors, their knowledge can be imputed to IDM. *See, e.g., A.P. O’Horo*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991).

Concerning the additional showing that the Third Circuit requires, we conclude that the conduct of Reis and Gales was foreseeable because IDM did not take reasonable measures to address the condition in light of its role as general contractor at this site and its experience as a demolition company on other projects. Reis acknowledged, when questioned

⁹In addition to relying on Gales’ observation of the bricks during his walk-through inspections, the judge stated that “Gales conducted a safety meeting and warned attendees of the danger of falling bricks and concrete from the sides of the buildings.” The judge does not mention in his decision, however, that Gales claimed that the bricks he was referring to were not the ones that Bartolotti left at the top 15 feet of the south wall. Gales testified that the warning was due to high winds over the prior weekend that blew roofing material, primarily tar paper, off the roof and onto the area below. (Gales’ daily log notes that high winds blew “roofing materials” in the area.) Gales explained that, because the wind “blew off that much tar paper, there could have been some pieces of chipped concrete or bricks” at the roof line that also became dislodged. Gales testified that he mentioned brick and concrete because if he told them that tar paper was falling off the sides the workers are “not going to pay much attention to it.” We are unable to determine whether the judge considered Gales’ explanation in concluding that Gales’ warning pertained to falling brick on the south wall. In any event, we do not rely on the warning to establish IDM’s knowledge of the cited condition.

by the judge at the hearing, that there are “[n]o” circumstances under which employees working immediately under the bricks as configured in Exhibit C-15 could do so safely.¹⁰ Yet, when Reis observed those bricks and questioned Bartolotti about them, he deferred to Bartolotti as the expert. This deferral to Bartolotti when Reis, and to a lesser extent Gales, could reasonably have been expected to detect and abate the violation is indicative of a company that has abdicated the safety responsibilities it had by virtue of its supervisory authority and control over the worksite.¹¹ See *Centex-Rooney*, 16 BNA OSHC at 2129-30, 1993-95 CCH OSHD at p. 42,410; *Blount International Ltd.*, 15 BNA OSHC 1897, 1899, 1991-93 CCH OSHD ¶ 29,854, p. 40,749 (No. 89-1394, 1992).

IDM asserts that it established that it had an adequate safety program because it conducted daily safety inspections to uncover unsafe working conditions and conducted weekly safety meetings for all the subcontractors at the site. However, IDM does not refer to any evidence showing that it had a rule or policy that addressed this hazard, much less evidence that it took reasonable steps to discover violations of the rule and to enforce the rule. See *PP&L, supra*. As noted above, the experience of IDM’s supervisors does not excuse the employer from its obligation to comply with OSHA standards and to have work rules designed to prevent the violation. *E.g., Hackney, Inc.*, 16 BNA OSHC at 1811, 1993-95 CCH OSHD at p. 42,116. IDM does not refer to any evidence that it took reasonable steps to discover safety violations committed by its supervisors, or that its safety policy was consistently enforced. Given IDM’s failure to rebut the Secretary’s showing, we conclude that IDM, through its supervisors, Reis and Gales, had knowledge of the violative

¹⁰Because IDM itself is a company engaged in demolition work, Maitz’s testimony that a reasonable demolition contractor seeing the condition at issue here would have considered it hazardous to permit employees to work would apply to IDM as well as AWC.

¹¹The record indicates that Gales could stop the job if there was a “gross [unsafe] practice,” and prevent unsafe conditions by taking such actions as stopping employees from going into restricted areas, or notifying Bartolotti or Reis of the area of concern and suggesting that Bartolotti either take down all the bricks that posed a hazard or agree not to have any employees working under them. Reis could have taken similar action.

condition.¹²

For the reasons above, we conclude that the Secretary has established the requisite knowledge of the violative condition regarding AWC and IDM.

D. Willfulness

A violation is willful if it is committed with intentional, knowing, or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety. *E.g.*, *A. Schonbeck & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981);¹³ *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1305 (D.C. Cir. 1978); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992) (consolidated). “A willful violation is differentiated by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference.” *E.g.*, *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD

¹²IDM argues on review that it is not responsible for the violation that AWC created based on the multiple employer worksite doctrine, which provides that a general contractor may be responsible for violations created by other contractors involved in a common undertaking unless it can establish that it took the necessary steps to assure compliance. *See Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199, 1975-76 CCH OSHD ¶ 20,690, p. 24,784 (No. 3694, 1976); *see also Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032, 1038 (2d Cir. 1975). IDM raised this affirmative defense in its answer. The judge stated in his decision that “[n]either party has contested multi-employer responsibility,” and he considered IDM and AWC to have “conceded” responsibility in their post-hearing briefs, which did not address the issue. Even assuming that the defense is before us now, IDM did not establish it. As discussed above, there is no evidence that IDM acted with reasonable diligence by, for example, notifying AWC of its concern or preventing employees from working under the hazardous condition. IDM, itself a company engaged in demolition work, failed to show that it took reasonable steps to prevent or detect and abate the violations in light of its supervisory authority and control over the worksite. *See, e.g., Centex-Rooney*, 16 BNA OSHC at 2130, 1993-95 CCH OSHD at p. 42,410; *Blount International*, 15 BNA OSHC at 1899, 1991-93 CCH OSHD at p. 40,749.

¹³As discussed above, the parties may appeal these cases to the Third Circuit, which has worded its test for willfulness as an “obstinate refusal to comply” with safety and health requirements, but considers that test as “differ[ing] little from” the one used by the Commission and most circuits. *Universal Radiator Mfg. Co. v. Marshall*, 631 F.2d 20, 23 (3d Cir. 1980), *quoted in George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1982, 1995-97 CCH OSHD ¶ 31,293, p. 43,978 (No. 93-984, 1997).

¶ 27,893, p. 36,589 (No. 85-355, 1987). The willful state of mind of a supervisor can be imputed to his or her employer. *E.g.*, *Tampa*, 15 BNA OSHC at 1539, 1991-93 CCH OSHD at p. 40,101. No finding of malicious or bad intent is necessary to establish willfulness. *E.g.*, *Anderson Excavating*, 17 BNA OSHC 1890, 1891 n.2, 1995-97 CCH OSHD ¶ 31,228, p. 43,787-88 n.2, *aff'd*, 131 F.3d 1254 (8th Cir. 1997). Willfulness may depend on “the totality of the circumstances,” or multiple factors, none of which by themselves would warrant a finding for or against willfulness. *Id.* at 1893, 1995-97 CCH OSHD at p. 43,791.

A violation is not willful if the employer had a good faith opinion (that is, a belief that was reasonable as to a factual matter or interpretation under the circumstances) that the violative conditions conformed to the requirements of the cited standard. *E.g.*, *Williams*, 13 BNA OSHC at 1259. Neither is a violation willful “if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the employer’s efforts are not entirely effective or complete.” *Valdak*, 17 BNA OSHC 1135, 1139, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1455 (8th Cir. 1996).

After correctly noting in his decision the law on the issue of willfulness, the judge stated that the “record is replete” with evidence “strongly supporting” the conclusion that AWC and IDM had, “at the least, a ‘heightened awareness’ of the existence of the hazards alleged.” We find, however, that the judge’s decision does not provide a sufficient basis for his conclusion that the item 2 violation by each employer was willful. Despite his claim that the record is “replete” with evidence, he refers to very little evidence, and it is not clear that the evidence he does mention shows heightened awareness. Without appropriate credibility resolutions, we cannot determine whether AWC or IDM were plainly indifferent to their employees’ safety, or simply mistaken about the dangers involved. In these circumstances, we remand these cases to the judge to reevaluate the evidence, as set forth below, and reconsider whether citation item 2 in each case was a willful violation.

With respect to AWC, the key issue, in light of other evidence in the case, is the truthfulness of Bartolotti’s testimony that he “felt [the bricks] were stable enough and secure enough.” If it is determined that Bartolotti testified truthfully that he thought the bricks were secure enough so that employees could safely cut the steel columns holding them up, we

cannot find that AWC had the requisite heightened awareness of the hazard. Conversely, if it is determined that Bartolotti appreciated that the working conditions were hazardous, that would be evidence of willfulness. The judge, however, did not make credibility assessments with respect to Bartolotti's testimony.

The judge cites Bartolotti's attendance at the safety meeting at which Gales warned of the "danger of falling bricks in that area" as evidence that both Bartolotti and Gales knew of the hazard. But because the judge has not explicitly discredited Gales' testimony that the warning referred to bits of brick dislodged with the tar paper that was blown off the roof (see note 9 *supra*), rather than the fifteen feet of bricks on the south wall, we are reluctant to accept this as evidence of heightened awareness on the part of AWC or IDM. If Gales' warning was, in fact, a warning about tar paper, the judge has not pointed to any evidence that Gales had actual knowledge of the hazard posed by the loose bricks. The judge cited evidence of Gales' constructive knowledge of the hazard--his daily safety inspections of the area--but Gales' testimony that he remembers that the bricks were supported by a channel iron casts some doubt on his actual knowledge. The judge made no specific credibility determination regarding that testimony, and we are reluctant to infer that he did so implicitly. He also did not refer to the relevant testimony of IDM's Field Supervisor Reis, who, when asked by the judge if there could be circumstances under which employees could safely work immediately under the brick, responded, "No." Nor did the judge address Reis' credibility regarding his testimony that, although he saw the brick, it was not as depicted in Exhibit C-15.

For the reasons above, we conclude that the judge's willful discussion is incomplete because he has not made clear findings to support his conclusion that AWC and IDM were plainly indifferent to employee safety with regard to item 2.

In the "Penalty" section at the end of his decision, the judge found that "[t]he attitude displayed by high level management personnel [for both AWC & IDM] during their testimony was arrogant and callous with little or no concern expressed for the safety of employees." The judge gave no indication that he intended this finding to apply beyond his discussion of the lack of "good faith" as a penalty factor under section 17(j) of the Act, 29

U.S.C. § 666(j). Even if this could be construed as a credibility determination regarding the employers' states of mind, it could stand only as to the one manager he named and quoted, IDM's vice president, Frank Pasalano. See *P & Z Co.*, 6 BNA OSHC 1189, 1191-92, 1977-78 CCH OSHD ¶ 22,413, p. 27,024 (No. 76-431, 1977); *Evansville Materials, Inc.*, 3 BNA OSHC 1741, 1742, 1975-76 CCH OSHD ¶ 20,187, p. 24,046 (No. 3444, 1975). Further, the basis for the judge's finding is conclusory--the judge's reliance on the fact an accident occurred as negating the managers' "insist[ence] that the condition of the bricks was stable and safe" from their viewpoints. See generally *Access*, 18 BNA OSHC at 1722 n. 8, 1999 CCH OSHD at p. 46,778 n.8, and other cases cited in note 4 *supra*.

As noted above, the Commission is the fact finder, and the judge is an arm of the Commission for that purpose. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d at 834. Where the judge has failed to make necessary findings of fact, the Commission has the discretion to either remand or itself decide the facts. See, e.g., *General Dynamics*, 15 BNA OSHC at 2131, 1991-93 CCH OSHD at pp. 40,960-61. While the Commission has the authority to make factual findings where the judge has not, it ordinarily will prefer that the judge make such determinations, especially where matters involving specific credibility findings bearing on such issues as willfulness or knowledge are at issue. E.g., *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066, 2000 CCH OSHD ¶ 32,175, p. 48,607 (No. 98-866, 2000) (remand for credibility determinations on employer knowledge and, if violation found, findings on willfulness); *Able Contractors, Inc.*, 5 BNA OSHC 1975, 1978, 1977-78 CCH OSHD ¶ 22,250, p. 26,783 (No. 12931, 1977) (remand for findings of fact and credibility determinations on willfulness where judge gave only summary conclusion). This is because the judge is the one who has "lived with the case, heard the witnesses, and observed their demeanor." *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD at p. 27,099. The judge has the obligation of fairly considering the *entire* record and adequately explaining his or her findings. See, e.g., *Asplundh Tree Expert Co.*, 6 BNA OSHC 1951, 1954, 1978 CCH OSHD ¶ 23,033, p. 27,841 (No. 16162, 1978) (remand where judge failed to mention all the relevant testimony of witnesses and did not make credibility determinations). Even where (as arguably could be the case here) implicit findings as to willfulness could be read

into the judge's decision, based on the decision as a whole, the Commission has remanded the case for the judge to explain on what evidence he based these implicit findings, and for him to make the necessary credibility determinations. *Able Contractors*, 5 BNA OSHC at 1978, 1977-78 CCH OSHD at p. 26,783.

We therefore remand these cases to the judge who has heard them to determine whether the Secretary has established that the violation in each employer's item 2 was willful, based on his evaluation of all the relevant evidence in the record on willfulness. This evaluation would include, in addition to appropriate findings of fact, credibility determinations based on the demeanor of the witnesses on the stand. *See P & Z Co.*, 6 BNA OSHC at 1191-92, 1977-78 CCH OSHD at p. 27,024 (not enough for judge "to imply that he has mentally considered the evidence," rather judge's "decision must show on its face what evidence has been considered").

III. *Item 3 in Each Citation*

Item 3 in the citation issued to each employer alleged a willful violation of 29 C.F.R. § 1926.859(g), which provides:

During demolition, continuing inspections by a competent person shall be made as the work progresses to detect hazards resulting from weakened or deteriorated floors, or walls, or loosened material. No employee shall be permitted to work where such hazards exist until they are corrected by shoring, bracing, or other effective means.

Each employer's citation, as amended by the Secretary's motion granted by the judge following the hearing, described the alleged violation as follows:

On or about February 27, 1996 employees were allowed to work inside the building to perform hand cuts on the structural members of the building[]were exposed [to] the hazards of falling, collapsing materials. Employees were subject to injury from falling materials from a deteriorated roof, from debris on the roof (including sheet metal, shards of broken glass, bricks, etc.), which debris could have fallen through holes in the roof or over the sides of the roof, and from columns on the west and south areas of the generator building, which columns had been cut but were not supported in any way.

To establish a violation, the Secretary must prove by a preponderance of the evidence

that the standard applies, the employer violated the terms of the standard, its employees had access or were exposed to the violative condition, and the employer had knowledge of the violative condition. *E.g., Hamilton Fixture*, 16 BNA OSHC at 1082, 1993-95 CCH OSHD at p. 41,178.

AWC's job supervisor, Bartolotti, and IDM's safety director, Gales, indicated in their testimony that debris, such as roofing material, shards of metal and glass, or bricks, was present throughout the roof area. According to the Secretary, loosened material could have fallen either (1) through holes in the roof or (2) over the sides of the roof. Most of the evidence presented at the hearing on this item concerned holes caused by deterioration of the roof, and particularly one hole that Bartolotti described as about ten-foot square above the west wall toward the south end. Bartolotti testified that he and Gales had the area directly underneath that roof hole "roped off" several times. Gales testified about "taping off" the "whole area" of the Turbine Building floor because of the potential for brick and concrete "coming off the side." Gales also testified that he had "roped off" the area below the steel-cutters to protect other employees from the hazard of the cut-off "pipes dropping down."

The judge found that "Bartolotti recognized the potential for debris falling from the roof and 'roped off' certain areas." He further found that Bartolotti directed Richards and Taylor to work "in the areas previously 'roped off' to cut vertical steel columns." The judge concluded that Bartolotti ordered the steel-cutters to work in the zone of danger without any protection.

We find that the Secretary has failed to prove employee access or exposure to the cited condition. Regarding the roof holes, we agree with AWC's assertion on review that there was no showing that any roof holes were so situated as to be over AWC's steel-cutters, Richards and Taylor. The evidence indicates that the largest hole, the one that was the subject of the most discussion, was over the south end of the west wall. Yet, the record shows that Richards and Taylor were working in the center of the south wall, which the exhibits in evidence indicate would not place them under that hole. The Secretary did not establish that any other AWC employees or any IDM employees would be exposed to debris falling through that roof hole.

As for the hazard of materials falling over the edge of the roof, there was no evidence that roofing material fell to the inside of the building where the steel-cutters were working, even though the walls were comprised of open steel framework.¹⁴ In fact, IDM's health and safety director, Gales, testified that there was no evidence of loosened roofing material on the inside of the building. Nor was there evidence establishing exposure of other AWC employees or any IDM employees to any materials falling from the roof. Even assuming that, as Gales testified, there were pieces of brick and concrete falling from the roof line, Gales' testimony does not establish exposure as to this item.

For the reasons above, we conclude that the Secretary failed to prove employee access or exposure.¹⁵ We therefore vacate each employer's item 3.¹⁶

IV. *Order*

For the reasons above, we vacate item 3 issued to each employer. We affirm the merits of item 2 issued separately to AWC and IDM, and we thus find that each employer violated section 1926.854(f). However, we set aside the judge's holding as to the willfulness of each of these items, and we remand these cases to the judge to review the record and make

¹⁴We also note that the photographs of the roof entered into evidence depict a parapet wall around the perimeter of the roof that would appear to somewhat restrict material from "falling" off the roof.

¹⁵Because we dispose of this item based on employee access, we need not reach the employers' argument that the second sentence of the standard, concerning employee exposure to a hazard, cannot be applied without first showing a violation of the first sentence of the standard--that no continuing inspections by competent persons had been established. We would note that the language of the standard would appear to unambiguously provide that the two sentences impose two separate duties, one not premised on the other.

¹⁶Our decision to vacate this item based on the evidence in the record renders moot the pending Motion to Supplement the Record filed by IDM, in which AWC joined. That motion is therefore denied.

credibility determinations necessary to resolve the issue of whether the violation found in each employer's item 2 was willful, as alleged. It is so ordered.

/s/

Thomasina V. Rogers
Chairman

/s/

Ross Eisenbrey
Commissioner

Dated: December 20, 2001

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	OSHRC
	:	Docket No. 96-1330
v.	:	96-1331
	:	
AMERICAN WRECKING CORPORATION, and	:	
IDM ENVIRONMENTAL CORPORATION,	:	
	:	
Respondent.	:	

Appearances:

Paul J. Katz, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Joseph W. Rufolo
JW Rufolo & Associates, Inc.
Edison, NJ
For Respondent American Wrecking

Joseph P. Paranac, Jr., Esq.
Jasinski & Paranac
Newark, NJ
For Respondent IDM Environmental

Before Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under §10 (c) of the Occupational Safety and health Act of 1970, 29 U.S.C. §651, *et seq* (“the Act”) to review citations issued by the Secretary of Labor pursuant to §9(a) of the Act and proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

Following a fatal accident at the Steel point power plant in Bridgeport, Connecticut, an

inspection of the work site was conducted from February 27, 1996 to August 13, 1996. On August 15, 1996, the Secretary issued citations to Respondents American Wrecking Corporation (“American Wrecking”) and IDM Environmental Corp. (“IDM”) alleging willful violations of the Act. The Secretary proposed a penalty of \$126,000 as to Respondent American Wrecking, and a penalty of \$147,000 as to Respondent IDM. A timely notice of contest was filed by both Respondents and, on September 28, 1996, the Secretary filed two separate complaints with this Commission incorporating the alleged violations set forth in the citations. The Respondents jointly stipulated that the Commission has jurisdiction over this matter. At the request of the parties the cases of American Wrecking and IDM were consolidated for trial (Tr.4-5).

Neither party has contested multi-employer responsibility at the work site as applied to IDM as the general contractor or American Wrecking as a subcontractor. In general, the multi-employer construction work site affirmative defense is applicable to an employer that neither creates nor controls the hazardous condition and, under certain circumstances, may be relieved of liability for exposing its employees to the hazard. However, an employer that does create or control a hazardous condition, is obligated to protect not only its own employees, but those of other employers as well. *Flint Engineering & Construction Co.*, 15BNA OSHA 2052-55 (citations omitted)(No. 90-2873,1992) The record reflects that both IDM and American Wrecking employees were exposed to the hazardous conditions alleged by the Secretary. As a subcontractor, American Wrecking has made no showing that it neither created nor controlled the hazard or that it made realistic efforts under the circumstances to protect its employees. 15 BNA OSHA at 2055; *Anning-Johnson Company*, 4 BNA OSHA 1193, 1198-99 (Nos.3694 & 4409, 1976) Typically, the general contractor, as in this case, has sufficient control over the worksite to create a duty under section 5(a)(2) of the Act to either “comply fully with the standards or take the necessary steps to assure compliance.” 4 BNA OSHA at 1199. Where an employer is in control of an area, the Secretary need only show “that the area of the hazard was accessible to the employees of the cited employer *or those of other employers engaged in a common undertaking.*” 15 OSHA 2055 (emphasis in original)(citing *Brennan v. OSHRC*, 513 F.2d 1032, 1038 (2d Cir. 1975)) As the general contractor, IDM participated with American Wrecking in developing the work plan, held the demolition permit for the site, surveyed the work site for safety hazards, and had the authority to stop work if a dangerous practice was observed. In addition, although American Wrecking did not have its own safety officer on site, its supervisor, Mr. Bartolotti, did interact with IDM’s safety officer on a daily basis concerning safety matters. Accordingly, as conceded by the parties in their respective post hearing briefs, each Respondent

is a responsible party for those alleged violations for which the secretary sustains her burden of proof.

BACKGROUND

The parties entered into a written stipulation of facts as follows:

1. This matter involves the demolition of an energy producing plant (“Steel Point”) at Bridgeport, Conn.
2. The parties stipulated to the jurisdiction of the OSHRC.
3. The Respondents stipulate that they are employers engaged in commerce within the meaning of the Act.
4. The energy plant herein was owned by United Illuminating Company. Construction of the plant began in the 1920's, with added structures thereafter.
5. The owner hired Respondent IDM Environmental as the general contractor for the project in question. IDM has a primary office and place of business in New Jersey.
6. Respondent IDM Environmental hired several sub-contractors, including American Wrecking Corporation to work on the project in question. American Wrecking Corporation has a primary office and place of business in New Jersey.
7. The man in charge of the project on site for IDM was Paul Reis.
8. The man in charge of the project on site for American Wrecking was Frank Bartolotti.
9. Two American Wrecking employees on this project included Percy Richards and Michael Taylor.
10. On February 27, 1996, employee Richards worked in the projects Generator structure.
11. An accident occurred at the area of the generator structure on February 27, 1996. Employee Percy Richards was killed in this accident.

The Steel Point plant was a large complex of buildings operated collectively as a power generating plant at Bridgeport Connecticut. The plant had been idle for a considerable period of time and its owner, United Illuminating Company (UI), contracted with IDM, as general contractor, to demolish the plant. Demolition commenced on May 8, 1995 with asbestos removal. During mid May 1995, IDM subcontracted the actual demolition work to American Wrecking corporation. That company began work during June 1995 and completed the job within twelve months. IDM vice president Harrigan testified that IDM had previously subcontracted work to American Wrecking five to seven times (Tr. 626) IDM was engaged in the

business of environmental remediation, such as the clean up of asbestos and hazardous wastes, the dismantling of buildings, and plant relocation (Tr.621-22), and employed approximately 100 employees at the time of the inspection (Tr.622). American Wrecking is in the demolition business, with 30 or 40 employees (Tr.31). During February of 1996, American Wrecking had 20 to 25 employees including Percy Richards, the worker killed in the accident (Tr. 42). Employee Richards was a foreman and designated as a competent person on the site (Tr. 154).

DISCUSSION

As a result of its inspection, the Department of Labor issued the following citations as to each Respondent.

Citation 1 Item 1

As to IDM, the citation item reads:

29 CFR 1926.850(a) The employer did not have written evidence that an engineering survey was performed by a competent person to determine the conditions of the framing floors and walls and the possibility of unplanned collapse of any portion of the structure prior to permitting employees to start demolition operations:

The employer did not conduct an engineering analysis, including calculations, to determine adverse effects on support columns, exposing sub-contractor and their own employees to the hazard of building collapse while conducting demolition activities in and around the structure.

As to American Wrecking, the citation item reads:

29 CFR 1926.850(a): An engineering survey was not performed by a competent person to determine the conditions of the framing floors and walls and the possibility of unplanned collapse of any portion of the structure prior to permitting employees to start demolition operations:

Prior to February 27, 1996 workers were exposed to serious physical harm and death where the company did not conduct adequate engineering analysis, including calculations, prior to removing the two south center columns to determine adverse effect on these support columns.

Section 1926.850(a) provides:

“Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.”

Prior to the start of the project, several documents were prepared. A survey of the site was prepared by Braun Engineering Associates dated August 15, 1994 (Ex.C-1) This document, entitled “Structural Condition Survey for Steel Point Station” consists of thirty four pages and represents the written report of the inspection conducted by Braun Engineering of the power plant, The introduction and scope of work and limitations section of that report, in pertinent part, are as follows;

“Braun Engineering Associates, P.C. has been retained by the United Illuminating Company (UI) to perform a visual structural evaluation of the existing conditions of the Steel Point Power Station located at:

Steel Point Station
East Main Street
Bridgeport, Connecticut

The above noted facility is a steam cycle electric generating power plant, for which construction started prior to 1920, and was last operated in 1983. It is substantially abandoned, and is slated for demolition in the immediate future.

The inspection report shall serve to exhibit the findings of a visual inspection of the structural conditions found at the facility, with the intention of identifying insofar as is possible areas that are of questionable condition prior to the start of asbestos and other hazardous materials removal work being performed preparatory to equipment salvage and demolition of the station.

2.0 SCOPE OF WORK AND LIMITATIONS

The intent and purpose of this inspection is to identify, insofar as is visually practical, measures that may be taken to avoid risks to the conduct of asbestos and other hazardous materials removal work. The observations and recommendations presented are reflective that this work is planned to be undertaken in preparation for equipment salvage efforts and demolition of the power station planned to occur in the immediate future.”

The report describes the conditions of the roof areas, exterior walls, windows, precipitators and interior plant areas and lists specific unsafe conditions and recommendations for safely working in those areas during demolition. This comprehensive report was given to IDM and American Wrecking. In addition, American Wrecking prepared an engineering survey dated April 27, 1995 (Ex. C-2). This report consists of three pages and is a brief description of the work site and the manner in which the demolition is to be accomplished. A demolition work plan laying out the phases of demolition was also developed by IDM and American Wrecking (Ex. C-5). Both Respondents viewed the work plan as a “road map” for the demolition including

a description of the means and method for demolition (Tr.70, 752-53,1060).

IDM vice president, James Harrigan, testified that at the request of United Illuminating, he and an IDM engineer inspected the work site early in 1994 as part of the bid process to develop a “technical approach” to the completion of the job (Tr. 628,631,639,655) American Wrecking also inspected the site during the bidding process (Tr. 660-61).

The complex was originally planned to be demolished in five phases. The first phase set for demolition was the distribution building. (Tr. 76). The second phase set for demolition was the generator building. The low pressure boiler area, medium pressure boiler, and high pressure boiler constituted the third, fourth, and fifth phases, respectively. (Tr. 77). IDM vice president Harrigan testified that the sequence of demolition was determined by the amount of asbestos abatement in each building. (Tr. 669) The distribution building and the turbine generator area contained the least amount of asbestos and were, therefore, scheduled for demolition first. (Tr. 669-70). Harrigan also testified that, as indicated in the Braun report, they had considered alternative demolition sequences, such as demolishing Phase 3 first. (Tr.671). When American Wrecking began to remove materials from the generator area, they discovered transite, a form of asbestos. (Tr. 705-06). Based on the discovery of the unanticipated asbestos, demolition of the generator area was postponed. In order to avoid idle time for their employees, American Wrecking was able to repair and activate a crane that was present in the structure, and began to dismantle the turbines in the generator (Tr.171-73,711).

Although the first phase actually demolished was the distribution building, Phase 3 (the low pressure boiler area) and Phase 4 (the medium pressure boiler area) were demolished before demolition began on Phase 2, the generator area (Tr. 112). IDM vice president Harrigan testified that each of the buildings was independently supported, and changing the order of demolition would not effect the stability of the buildings. (Tr. 670-71). The initial demolition report called for the roof of the generator building to be demolished before the building was demolished. (C-1 at 4.2.2) However according to IDM vice president Harrigan, since the overhead crane was operational, and the generators were dismantled, there was no need to remove the roof (Tr.715). This was also considered a better alternative since the tar paper on the roof contained asbestos. As such, dropping the roof created additional clean-up (Tr.716). Harrigan testified that before the final decision to alter the order of demolition was made, he and IDM vice-president Frank Pasalano, and American Wrecking president Bill Spector and vice-president Ira Pollack inspected the site (Tr.728-29). They determined that they could separate the low pressure boiler from the turbine areas without endangering the structural integrity of the turbine building (Tr.732-33).

The decision to leave the roof on the building was made by American Wrecking supervisor Bartolotti, IDM field supervisor Reis, American Wrecking vice president Pollack, and IDM vice president Harrigan (Tr.175-76).

The issue to be resolved regarding the violation alleged by the Secretary as to both respondents is whether the actions of the Respondents complied with the requirements of the standard cited; that is, was an engineering survey satisfying the requirements of the standard completed and is there written evidence that the survey was performed? The meaning of the standard was addressed by the Review Commission in *Ed Miller and Sons Inc.* 1974-75 CCH OSHD ¶ 18,409 (July 31, 1974). In *Miller*, the firm's vice president, who was experienced in demolition activities, visually surveyed the structure to be demolished on two separate occasions. Based upon these inspections, the firm determined the sequences of demolition and a written memorandum was prepared and signed confirming that the inspections, as described above, had been conducted. On these facts the Commission stated. "[W]e find on the record that Respondent's survey was adequate and had been performed by a competent person. Since Respondent had written evidence that it had conducted the required survey, we vacate this item of the citation" *id* at 22,461. Thus, according to the Commission, there is no requirement that the actual survey be in writing.¹⁷ *Accord: Cleveland Wrecking Company* 1978 CCH OSHD ¶ 22,851; *abdo S. Allen* 1971-73 CCH OSHD 16,227; *Dore Wrecking Co.* 1971-73 CCH OSHD ¶ 15,254; *L.E.B. Corp* 1979 CCH OSHD ¶ 23,416.

The Secretary acknowledges that the so called Braun Survey (Ex. C-1) and the three page analysis prepared by American Wrecking's Pollack "may constitute an adequate engineering analysis for the job as set forth in Respondents' demolition work plan" (Post hearing brief at pg.4). In addition the Secretary concedes that the cited standard "does not place a continuing burden on employees to amend or update the engineering analysis for each change required on demolition jobs" (*id* at pg. 4,5). Nevertheless, the Secretary strenuously argues that both Respondents violated the intent of the standard by failing to conduct a new survey when the order of demolition was changed from the sequence set forth in the original work plan. According to complainant, the "*raison d'etre*. of the standard is to inspect the structure in light of the work to

¹⁷ In his dissent, Commissioner Cleary pointed out that the engineering survey was not in writing. Therefore, the actions of the Respondent failed to "achieve the obvious purpose of the standard, which is to permit those engaged in the demolition to have the benefit of the survey." *Miller Supra* at 22,462

be done, to anticipate hazards and to protect employees from injury” (id at pg. 17). By significantly altering the sequence of demolition, Respondents, in effect, nullified the value of the initial survey to the point where it was rendered useless. Thus, according to the Secretary, no engineering survey was conducted for the work actually performed by Respondents’ employees,

The Secretary’s counsel advances a clever argument as to what the standard *should* require as opposed to the actual requirements that employers must comply with based upon the plain language of the standard and as interpreted by case law. In this case, as conceded by the Secretary, the multiple inspections and reports compiled prior to the commencement of demolition activities fully complied with the requirements of the standard. Moreover, the findings of those inspections were properly recorded in written form and, in at least one instance (the Braun Report), in detail. The fact that the order of demolition was altered does not affect these findings. The record supports the conclusion that it is a common occurrence during demolition activities to change the original demolition plan as the need arises. Moreover, as in this case, it is not possible to anticipate all problems that may occur as the work progressed. It is apparent that the demolition standards contemplate frequent alterations in the original work plan and requires that “continuing inspections by a competent person shall be made as the work progresses to detect hazards...” § 29 CFR 1926.859(g). Thus, the Secretary seeks to prove too much under the cited standard.

Based upon the record, it is concluded that both Respondents complied with the provisions of the cited standard, Therefore as to both Respondents, the alleged violations of 29 CFR 1926.850 (a) are vacated.¹⁸

Citation 1. Item 2

As to IDM, the citation item reads:

29 CFR 1926.854 (f): Structural-Steel frames that were left standing during demolition of the masonry wall(s) were not cleared of masonry wall and/or debris as the demolition of the wall progressed.

SITE, GENERATOR BUILDING: While working in and around the structure, employees and sub-contractor employees were exposed to the hazard of falling brick and other

¹⁸ The Secretary filed a motion in limine, dated April 10, 1997, seeking to disallow documentation or testimony relating to an updated demolition work plan submitted by Respondent IDM. (Ex. RIDM-25) Since the Respondents have satisfied their duty under the standard cited through their initial work plan, the Secretary’s motion regarding the “updated” plan is deemed moot.

debris. The company did not ensure the bricks were removed in a manner which was safe for workers in the immediate area. The brick was removed from the bottom up, leaving portions of the upper wall and windows hanging unsupported.

As to American Wrecking, the citation item reads:

29 CFR 1926.854(f): Structural-Steel frames that were left standing during demolition of the masonry wall(s) were not cleared of masonry and/or debris as the demolition of the wall progressed.

SITE, GENERATION BUILDING: On or about 2/27/96 while making torch cuts from an aerial lift to the center columns on the south wall, workers were exposed to falling bricks and other debris. The company did not remove the masonry in a manner that was safe for workers in the immediate area. The masonry was removed from the bottom of the building up, leaving portions of the wall and windows hanging unsupported.

Section 1926.854(f) provides:

“In buildings of “skeleton-steel” construction, the steel framing may be left in place during the demolition of masonry. Where this is done, all steel beams, girders, and similar structural supports shall be cleared of all loose material as the masonry demolition progresses downward.

“A couple of days” prior to the February 27, 1995 accident (Tr.119), American Wrecking’s working foreman, Frank Bartolotti, operated a front end loader with an attachment known as a rake to remove exterior bricks surrounding the steel superstructure of the generator building. By use of the rake as well as the sloped condition of the ground, Bartolotti was able to remove all of the bricks on the west and east sides of the building. Although he intended to remove all of the bricks attached to the south side of the building, Bartolotti was unable to reach the upper level of bricks with the equipment available to him. Accordingly, he left approximately 15 feet of bricks suspended at the top of the south wall. Complainant’s exhibit C-15 is a photograph of the south end of the generator building and depicts the condition of the building prior to the accident. The photograph clearly depicts the bricks left in place by Bartolotti suspended from the roof of the building downward with no support for the bricks to the right and left of vertical steel supports on the day of the accident. Percy Richards, an employee of American Wrecking, was assigned to cut steel beams numbered fourteen and fifteen at the south wall of the generator building. These cuts were to be made directly below the bricks which had been left at that location by Mr. Bartolotti. Mr. Richards was in a manlift and engaged in the act of cutting the steel members when the bricks overhead collapsed inflicting fatal injuries.

The Secretary called two expert witnesses to testify regarding the alleged violation listed above. Mr. Russell F. Geisser is a professional engineer and has been a licensed civil and structural engineer since 1954. (Tr.227,228). He is listed in the “Who’s who in Engineering”

and has investigated 20-30 collapsed buildings in the past. He has testified as an expert in engineering in at least one hundred cases. He personally viewed the site of the collapse in this case; read the engineering surveys and work plans, and viewed the photographs, including the exhibit C-15. Mr. Geisser testified that the only thing holding the bricks in place in exhibit C-15 is the mortar between the bricks. The holding power of mortar has a practical value of zero. Moreover, it would take very little to dislodge the bricks such as hitting the steel columns, vibrations from heavy equipment or high winds (Tr. 254). Even if the bricks were partially supported by a channel iron between the steel columns, there was a hazard of the bricks falling because of the minimal tensile strength of the mortar and the fact that bricks were clearly unsupported on either side of the steel columns (Tr.255).

The second expert called by the Secretary, Mr. Joseph Maitz, has been engaged exclusively in demolition work since 1963. He is currently a job superintendent for Manfort Brothers, a Company engaged in the demolition business. He has personally participated in the demolition of a power plant and has supervised the demolition of large projects approximately 60 times during the previous ten years (Tr.298-300). Mr. Maitz has extensive hands on experience in the demolition business. He heard the relevant testimony regarding the condition of the bricks as well as the work activity of employee Richards. Maitz testified that the condition of the bricks constitutes a recognized hazard in the demolition industry and he would not allow anyone to work below the bricks (Tr.320-321).

Respondent's expert, Mr. Luis Nacamuli is a consulting structural engineer and has worked on approximately one hundred demolition projects. He is the principle employee of Nacamuli Associates, an engineering consulting firm, and has personally completed seventy engineering assignments for demolition projects (Tr.1148-1152). Mr. Nacamuli visited the work site after the accident, interviewed employees, reviewed the engineering surveys and work plans and viewed photographs of the work area. Mr. Nacamuli testified that the bricks left by Mr. Bartolotti on the south wall of the generator building could not fall because of the "natural arch" that had been created (Tr. 1181-1184). Moreover, the natural arch in conjunction with the mortar between bricks would prevent the bricks from falling (Tr.1184). Thus, in Mr. Nacamuli's opinion, the bricks could not fall even if the employees were cutting the steel columns presumably holding the bricks (Tr. 1180). This expert's opinion that the bricks were in a stable condition and could not fall totally ignores the fact that the bricks *did* fall and fatally injure an employee engaged in cutting the steel columns. Furthermore, Mr. Nacamuli's testimony that a "natural arch" was created defies logic when considered light of exhibit C-15 which depicts the

condition of the bricks prior to the collapse. It is clear that there is no such arch, natural or otherwise, that could sustain the weight of the bricks. Based upon the testimony and demeanor of this witness at trial, no weight is given to his testimony.

Based upon the evidence elicited at the hearing, it is concluded that the Secretary has established by a preponderance of evidence that both Respondents violated the standard as alleged. The standard clearly requires that “ loose material” be cleared during demolition of masonry to protect employees from the hazard of being stuck by falling masonry such as, as in this case, bricks. The fact that bricks were left in place over the heads of workers who were engaged in demolition activities and said bricks became loose and fell causing fatal injuries to employee Richards clearly establishes that the protection intended to be provided to employees by the standard was tragically absent in this case. Moreover, IDM’s safety officer, Marcus Gales, conducted walk through inspections of the site six or seven times a day (Tr. 90) and he observed the condition of the bricks on the south wall of the generator building that collapsed (Tr.925). On the morning of the fatality, Mr. Gales conducted a safety meeting and warned the attendees of the danger of falling bricks and concrete from the sides of the buildings (Tr.923). Mr. Bartolotti attended that meeting (Tr.922). Thus, responsible representatives of both Respondents knew or should have known of the existence of the hazards of falling bricks at the south side of the generator building. Accordingly, this item is affirmed as to both Respondents.

Citation 1. Item 3

As to IDM and American Wrecking, the citation item reads:
SITE, GENERATOR BUILDING: On or about February 27, 1996 employees were allowed to work inside the building to perform hand cuts on the structural members of the building, were exposed the hazards of falling collapsing materials. Employees were subject to injury from falling materials from a deteriorated roof, from debris on the roof (including sheet metal, shards of broken glass, bricks, etc.), which debris could have fallen through holes in the roof or over the sides of the roof, and from columns on the west and south areas of the generator building, which columns had been cut but were not supported in any way.¹⁹

Section 1926.859(g), the provision cited as to both respondents, provides:

“During demolition, continuing inspections by a competent person shall be made as the work

¹⁹ The Secretary sought to amend the language of Citation 1, item 3 as to both Respondents by motion dated May 20, 1997. Said motion was granted by an order dated June 11, 1997.

progresses to detect hazards resulting from weakened or deteriorated floors, or walls, or loosened material. No employee shall be permitted to work where such hazards exist until they are corrected by shoring, bracing, or other effective means.”

For this alleged violation, the Secretary asserts that debris on the roof of the generator building was subject to being dislodged and falling in the building where employees were working. In support of this allegation, the Secretary points to the description of the roof area in the so-called “Braun” engineering report (Exhibit C-1) That report noted that “ there is debris, such as sheet metal parts, shards of broken glass, bricks and similar debris that must be cleared off the roof areas to prevent same from being blown off the building or from falling through the building . A significant concern is that of debris laying on top of bird screens that cover skylight openings at the flat roof areas” (Ex C-1 at pg. 4). At page 5 of that report, the engineering firm stated:

The roof above the Turbine Hall, particularly at the south end has significant areas of storm damaged (blown off) roof membranes that will result in rapid deterioration of the decking (Photo No.5). We observed cracks in the rock deck and some holes. Extreme care must be exercised while working on this roof surface, since the condition of the roof deck is poor, and many unsafe areas appear to exist. A major hole in this roof surface exists above Unit No.2 Generator (Photos NO. 6 and 7). Loose and hanging pieces of roof deck should be removed. This hole should be protected with 3/4" exterior plywood or metal deck that is securely fastened using coarse thread roofing screws, and covered with roofing felt and plastic roof cement sealing same to the roof surface (approximately 250 square feet).

It is well established on this record that the debris was not removed as recommended by the engineering survey. Although Mr. Bartolotti, American Wrecking’s working foreman, recognized the potential for debris falling from the roof and “ roped off” certain areas (Tr.284), he did not clear away the debris as recommended (Tr.187). Moreover, Bartolotti directed two employees, the deceased Richards and another employee, Taylor, to work in the generator building in the areas previously “ roped off” to cut vertical steel columns. Bartolotti testified that he had read the Braun report, understood the report and was aware of the debris on the roof. Nevertheless, he ordered employees to work in the zone of danger without any protection. Furthermore, Mr. Bartolotti attended a safety meeting on the morning of February 26, 1996 where the danger of falling bricks and concrete was raised by safety director Marcus Gales, (Tr.197-200). (see Ex C-16). In addition, Mr. Gales, who maintained a written log of his daily job inspections, (Ex RIDM 31) made the following notation on February 26, 1996, the day before the fatal accident:

“0900 walked outside area high winds over the weekend blew roofing material in area east side of Turbine... (unreadable word) crew picking up roofing material place in ply.” The following day, the day of the accident, Gales made the following notations at 0730: “ workers in work area starting work. Walked work site. Checked in back of Turbine area for any falling roofing material non²⁰ worker working, Turbine area precutting beams for demo of Turbine roof.” (Ex RIDM-31 at pgs 7,8,9)

Based upon the foregoing, it is concluded that the Secretary has established that both Respondents allowed employees Richards and Taylor to work in the Turbine area (Generator Building) where they were exposed to the hazards of being injured by falling debris from the roof of the building. Accordingly this item is affirmed as to both Respondents.

WILLFULNESS

The Secretary has alleged that the violations, as affirmed above, are willful violations within the meaning of section 17(a) of the act. Although not defined in the Act, “willful” has been defined by the Courts as “ conscious and intentional disregard of the conditions,” deliberate and intentional misconduct,” utter disregard of consequences” and other similar descriptions. *See Brock v. Morello Brothers Construction, Inc.*, 809 F.2d 161 (1st Cir. 19887). In order to establish a willful violation, it is necessary to determine the “ state of mind” of the employer at the time of the violation. The standard of proof requires that the Secretary produce evidence establishing the Respondent displayed an intentional disregard for the requirements of law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements of the statute. *A. Schenbek and Company v. Donovan*, 646 F.2d 799,800 (2nd Cir. 1981);*Morello Brothers Construction supra* at 164; *Georgia Electric Co. V. Marshall*, 595 F.2d 309, (5th Cir. 1979). Willful violations are distinguished by a heightened awareness of illegality-of the conduct or conditions-and by a state of mind-conscious disregard or plain indifference.” *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶ 27,893. The tenth Circuit has determined that an employer’s failure to comply with the safety standard under the Act is “ willful” if done knowingly and purposely by an employer who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to the requirements. *United States v. Dye Construction Co.*, 510 F.2d 78,81 (10th Cir. 1975).

²⁰ Gales testified that he meant to write the word “none” (Tr. 932-933).

Complainant's burden to establish a willful violation has been defined by the Commission as follows:

To establish that a violation was willful, the Secretary bears the burden of providing that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp.*, 13 BNA OSHC 1249,1256-57, 1986-87 CCH OSHD ¶ 27,893, p.36,589 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Hern Iron Works, Inc.*,16 BNA OSHC 1206, 1215, 1993 CCH OSHD ¶ 30,046, p. 41,256 (No. 89-433,1993). A violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one- whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule was reasonable under the circumstances. *General Motors Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39, 168 (No. 82-630, 1991).

Secretary of Labor v. S.G. Loewendich and Sons,16 BNA OSHC 1954, 1958 (1994).

Although an employer's good faith belief that alternative protection measures are superior to the requirements of a safety standard will not relieve that employer of a finding of a willful violation, *Secretary of Labor v. Trinity Industries, Inc.*, 16 BNA OSHC 1670, 1673, (11th Cir. 1994), the Review Commission has held that "[a] willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete" (citations omitted), *Secretary of Labor v. Keco Industries, Inc.*, 13 BNA OSHC 1161, 1169 (1987). In other words, an employer who knowingly and in good faith substitutes its own safety measures to provide employee protection in place of the requirements of a standard may be found in willful violation of the standard; however an employer who seeks, in good faith, to comply with the standard and fails may not be found to have willfully violated the Act.

This record is replete with evidence strongly supporting the conclusion that both Respondents possessed, at the least, a "heightened awareness" of the existence of the hazards alleged. First, with respect to the bricks left in place which became dislodged and fatally injured Mr. Richards, it is clear that Mr. Bartolotti intended to remove all of the bricks on the wall of the generator building. However, because he was unable to reach the bricks left in place with equipment available to him, he made no effort to remove the bricks by other means before directing employees to work underneath the bricks. This coupled with the fact that IDM's safety director warned Bartolotti and other attendees at his safety meeting the morning of the accident to be aware of the danger of falling bricks in that area, supports the conclusion that Bartolotti had

a “heightened awareness” of the hazard and failed to remove said hazard before exposing employees to the zone of danger. Moreover, safety director Gales failed to ensure that the hazard was removed during his multiple walk through safety inspections conducted each day. Mr. Gales observed the hazardous conditions and failed to take any action to eliminate the hazard.

With respect to the debris left on the roof, it is clear that both Respondents were aware of the hazardous conditions as described in the Braun report, *supra*, and failed to take any action to remove said hazardous conditions. Moreover based upon the “totality of circumstances” see Anderson Excavating and Wrecking Company 1997 CCH OSHD ¶ 31,228 (Jan 1997) surrounding this violation as described *above* both Respondents possessed a “heightened awareness” of the existence of the violations and were plainly indifferent, at the least, to their responsibilities to eliminate the hazards. Accordingly, items 2 and 3 of the citations issued to both Respondents are affirmed as willful violations.

PENALTY

Section 17(j) of the act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer’s business, gravity of the violation, good faith and prior history of violations. In *Secretary of Labor v. JA. Jones Construction Company*, 15 BNA OSHC 2201 (1993), the commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033 (No. 88-2681, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247), 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128,1132, 1981 CCH OSHD ¶25,738 p. 32, 107 (No. 76-2644, 1981).

With respect to item 2 of each citation, it is clear on this record that a high gravity factor existed at the work site. The fact that the hazardous condition, which was allowed to exist, resulted in a fatal injury is a significant factor that must be given great weight. Moreover, the condition was allowed to exist over a period of days despite warnings of the danger of falling bricks. A high gravity factor also must be applied to item 3 of each citation. Despite clear warnings in the Braun report, nothing was done by either Respondent to remove hazards that had a high potential to seriously injure exposed employees. With respect to the size of each Respondent and prior history, it is concluded that there is insufficient evidence in this record to warrant a reduction in penalty based upon either of those factors.

As stated previously, the Commission has held that the penalty factors may be accorded various weight depending upon the factors present in each case. There is no doubt that the gravity factor must be accorded great weight in this matter. However, based upon the demeanor of the management representatives for both Respondents who testified in this matter, it is clear that the good faith factor, or the lack thereof, is of primary importance to be considered in insuring that the tragic event which lead to the issuance of the citations will not be repeated. The attitude displayed by high level management personnel during their testimony was arrogant and callous with little or no concern expressed for the safety of employees. Despite overwhelming evidence that a hazardous condition existed at the work site which resulted in the death of an employee, each member of upper management who testified insisted that the condition of the bricks was stable and safe. The following exchange with IDM's vice president, Frank Pasalano, exemplifies the callousness exhibited by each of the upper management witnesses:

MR. PARANAC: Assuming that C-15 depicts the condition on the day of the accident on February [27]th, in your opinion, based on your demolition experience, would it have been safe to place a worker underneath those bricks.

WITNESS: Yes

MR. PARANAC: Why.

WITNESS: Because these bricks had a channel on the bottom of them. They were tied in to clips.

JUDGE YETMAN: But the bricks fell, sir.

WITNESS: I know the bricks fell, your Honor, but he asked me a question. I think you could put someone underneath there and they were tied in.

JUDGE YETMAN: But somebody went under there and [was] killed?

WITNESS: Yes, they were. That doesn't mean it wasn't safe. How the guy got killed, I don't know. (Tr.893).

The attitude displayed by upper management personnel for both firms at the hearing reflects little or no concern for the safety of employees. Accordingly, the maximum penalty of \$70,000 is assessed as to items 2 and 3 of each citation as an incentive to each Respondent to ensure future compliance with safety standards at their respective work sites.

FINDING OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made above. *Fed. R Cir. P. 52(a)*. All proposed finding of fact inconsistent with this decision are hereby denied.

CONCLUSION OF LAW

1. Respondent, American Wrecking Corporation is engaged in a business affecting commerce and has employees within the meaning of Section 3 (5) of the Act.

2. Respondent, IDM Environmental Corporation, is engaged in a business affecting commerce and has employees within the meaning of Section 3 (5) of the Act.

3. Respondent, American Wrecking Corporation, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of Respondent American Wrecking Corporation and the subject matter of this proceeding as it relates to said Respondent.

4. Respondent, IDM Environmental Corporation, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of Respondent IDM Environmental Corporation and the subject matter of this proceeding as it relates to said Respondent.

5. At the time and place alleged Respondent American Wrecking Corporation was not in violation of the standard set forth at 29 CFR 1926.850(a) (Citation Item 1)

6. At the time and place alleged, Respondent American Wrecking Corporation, was in violation of the standard set forth at 29 CFR 1926.854(f) and said violation was willful within the meaning of the Act, (citation Item 2)

7. At the time and place alleged, respondent American Wrecking Corporation, was in violation of the standard set forth at 29 CFR 1926.859(g) and said violation was willful within the meaning of the Act (citation item 3)

8. At the time and place alleged, Respondent IDM Environmental Corporation was not in violation of the standard set forth at 29 CFR 1926.850(a) (citation item 1).

9. At the time and place alleged Respondent IDM Environmental Corporation was in violation of the standard set forth at 29 CFR 1926.854(f) and said violation was willful within the meaning of

the Act (citation item 2).

10. At the time and place alleged, Respondent IDM Environmental Corporation, was in violation of the standard set forth at 29 CFR 1926.859(g) and said violation was willful within the meaning of the Act (citation item 3).

ORDER

1. As to Respondent AMERICAN WRECKING CORPORATION:

- (a) willful citation No.1, item 1 is vacated
- (b) willful citation No.1, item 2 is affirmed and a penalty in the amount of \$70,000 is assessed.
- (c) willful citation No.1, item 3 is affirmed and a penalty in the amount of \$70,000 is assessed.

2. As to the Respondent IDM ENVIRONMENTAL CORPORATION:

- (a) willful citation No.1, item 1 is vacated.
- (b) willful citation No.1, item 2 is affirmed and a penalty in the amount of \$70,000 is assessed.
- (c) willful citation No.1, item 3 is affirmed and a penalty in the amount of \$70,000 is assessed.

SO ORDERED

_____/s/
ROBERT A. YETMAN
Judge, OSHRC

Dated June 8, 1998
Boston, MA