

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

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SECRETARY OF LABOR,  
Complainant,  
v.  
BRANHAM SIGN COMPANY,  
Respondent.

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OSHRC Docket No. 98-752

***DECISION***

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

The issue in this case is whether a supervisor's failure to use fall protection was willful as the Secretary of Labor alleged.<sup>1</sup> The supervisor involved in this case failed to wear a tied-off safety harness while standing inside the basket of an aerial lift and while standing on a sign that was being erected. In both instances, he was approximately 64 feet above the ground. His employer, Branham Sign Company, Inc., a small Ohio business,<sup>2</sup> does not dispute that a tied-off safety harness was required in both instances by 29 C.F.R.

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<sup>1</sup>The Secretary elected not to file a brief in this case and stated that she relies on the judge's decision.

<sup>2</sup>The company is represented in these proceedings by Thomas Branham, Sr., company owner and president.

§ 1926.453(b)(2)(v)<sup>3</sup> and 29 C.F.R. § 1926.501(b)(15)<sup>4</sup> However, the employer contends that its supervisor's failure to use fall protection was not willful. For the following reasons, we find that the lack of fall protection was serious, not willful, and we assess a total penalty of \$6,000.

### Facts

On April 2, 1998, William Wilkerson, a compliance officer with the Occupational Safety & Health Administration ("OSHA") of the Department of Labor, observed an individual working apparently unprotected on top of a truck stop sign at the junction of U.S. Route 35 and Interstate 71 (east of Dayton and Cincinnati, Ohio). Wilkerson went to the site, identified himself to two of the employees on the ground, *i.e.*, a sign helper and the crane operator, and learned that the individual working on the sign was their supervisor, Stephen Word.<sup>5</sup> Wilkerson did not conduct an opening conference with Word until he returned to the ground approximately 15 minutes into the inspection, and Wilkerson's testimony does not indicate whether and how he identified himself to Word working 64 feet above ground. Wilkerson was wearing an OSHA hard hat that identified him as an OSHA compliance

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<sup>3</sup>The cited standard, 29 C.F.R. § 1926.453(b)(2)(v), states that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." The basket in the present case had an opening large enough for a person to fall through, which particularly concerned the compliance officer. He was also concerned that the crane holding the basket could malfunction and drop suddenly, causing the basket to lurch and throw the employee out.

<sup>4</sup>The cited standard, 29 C.F.R. § 1926.501(b)(15), states that "each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system." It is undisputed that there were neither guardrails nor safety nets at the location involved here.

<sup>5</sup>The employees Word was supervising were Jeff Danner, sign erector serviceman; Dan Kyle, sign erector serviceman; and Chad Pework, sign helper. Kyle was operating the crane that was supporting the aerial basket. Danner and Pework were "running tag lines" (lines up to the basket).

officer. Wilkerson testified that it was so noisy at the site that he had to shout to make himself heard to the sign helper and crane operator. Thus, we cannot say that Wilkerson made himself heard to Word 64 feet above ground. Nor can we find that Word knew Wilkerson was from OSHA until the opening conference that Wilkerson conducted with him on the ground.

During the approximately 15 minutes that Word was in the air, Wilkerson videotaped him either standing inside the basket of the aerial lift or on the sign he was erecting. There were safety harnesses in the company's truck at the site. However, Word did not use a tied-off safety harness on the day of the inspection.<sup>6</sup> Word told Wilkerson that on prior jobs he had given safety harnesses to employees who felt uncomfortable about working at heights. Word also testified that he himself had worn one on "very rare" prior occasions. However, in general, he worked at heights without a safety harness. Word took the position that safety harnesses are "a hazard more than a help."<sup>7</sup>

After Word came down to the ground, he and Wilkerson discussed how to anchor a safety harness to the sign. They apparently agreed that it would require further study.<sup>8</sup> Only

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<sup>6</sup> Word testified that he did not use the safety harness that Wilkerson asked the ground crew to send up to him during the first approximately 15 minutes of the inspection, *i.e.*, before the opening conference. Wilkerson testified that Word did put the safety harness on, but did not wear it properly.

<sup>7</sup>Wilkerson testified that Word indicated to him that sometimes there is no place to tie them off and sometimes they present a tripping hazard and are "just uncomfortable."

<sup>8</sup>Word questioned whether certain rods on the sign that Wilkerson pointed out were strong enough to support an employee in a safety harness. Wilkerson also suggested stringing a static line between the sign's main support posts. However, Wilkerson recognized in his testimony that an engineer would have to ascertain whether any part of the sign was strong enough. Wilkerson posited that, "if there's nothing there[,] then perhaps something needs to be installed."

Word was exposed to the fall hazard in this case. The three employees he was supervising remained on the ground assisting him by sending tools and supplies up to him.

The company had safety rules dealing with the use of safety equipment. Safety rule No. 6 required employees to use available safety equipment: “Any employee not using safety equipment provided will be warned the first time[,] [and] [f]ollowing that[,] disciplinary action will be taken.” Company safety rule No. 7 referred to “fine[s] from OSHA for not using safety equipment.” The introduction to the company rules states the following:

With the changes that are taking place in our industry, and the economic pressures we are facing today[,] we can not continue to operate as we have in the past. We want a happy and productive work environment. In order to achieve this[,] the following rules will be put into effect and will be strictly enforced.

Word testified that Branham, Sr., and Thomas Branham, Jr., the company manager who planned the jobs, “very seldom” came to job sites to monitor employee behavior. Company owner and president Thomas Branham, Sr., told Wilkerson over the telephone after the inspection that he did not monitor the employees to ensure that they actually used the safety equipment he provided. Branham testified at the hearing that he believed that the responsibility for failing to wear available protective equipment should rest on the employees.

### **Discussion**

A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). Thus, the focal point of a willful classification is the employer’s state of mind when the violation was committed. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1<sup>st</sup> Cir. 1987); *Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2062, 1991-93 CCH OSHD ¶ 29,246, p. 39,186 (No. 87-1220, 1991). The Secretary must show that the employer had a “heightened awareness”

of the illegality of the conduct at issue. *E.g.*, *Pentecost Contrac. Corp.* 17 BNA OSHC 1953, 1955, 1995-97 CCH OSHD ¶ 31,289, p. 43,965 (No. 92-3788, 1997); *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589. An employer who knows an employee is exposed to a hazard and fails to correct or eliminate the hazardous exposure commits a willful violation if the employer knows of the legal duty to act, for an employer's failure to act in the face of a known duty demonstrates the knowing disregard that characterizes willfulness. *See Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1613, 1991-93 CCH OSHD ¶ 29,673, p. 40,210 (No. 87-2007, 1992); *accord A. Schonbek & Co.*, 9 BNA OSHC 1189, 1191, 1980 CCH OSHD ¶ 25,081, p. 30,984 (No. 76-3980, 1980), *aff'd*, 646 F.2d 799, 800 (2d Cir. 1981); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD ¶ 29,617, pp. 40,103-04 (No. 86-360, 1992). Alternatively, the Secretary can establish willfulness by showing that the employer had a state of mind such that, if informed of the duty to act, it would not have cared. *Morello*, 809 F.2d at 164. The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful. *Continental Roof Sys., Inc.*, 18 BNA OSHC 1070, 1071, 1995-97 CCH OSHD ¶ 31,447, p. 44,478 (No. 95-1716, 1997); *Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,424, p. 42,089 (92-264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995).

The judge found willfulness based on the actions of Branham's supervisor Word and on Branham's failure to monitor. First, she found that supervisor Word "intentionally, knowingly and voluntarily disregarded" the requirements of the cited standards. To affirm the judge, we would have to find a heightened awareness that the cited conduct was illegal. We conclude that the record does not support such a finding. There was no showing that Word or anyone in the company was aware of *OSHA standards* requiring fall protection or that anyone made a deliberate attempt to violate them. *C.E.M Plumbing, Inc.*, 17 BNA OSHC 2080, 2081-82, 1995-97 CCH OSHD ¶ 31,242, p. 43,820 (No. 95-676, 1997). There

is no evidence of prior citations or other warnings regarding the need for safety harnesses in sign erection work. *Compare Sal Masonry*, 15 BNA OSHC at 1613-14, 1991-93 CCH OSHD at p. 40,210 (violation willful where employer was aware of safety requirements from prior citation and consciously disregarded compliance officer's advice during inspection). The Secretary did establish that one of Branham's safety rules informed its employees that failure to use required safety equipment could result in OSHA penalties. The record also shows that, although safety harnesses were provided at the site and were sometimes given to the employees, the company did not monitor to see if they were worn. Although Word knew he was not using safety equipment, an employee's disregard of a company safety rule does not automatically establish willful disregard of an OSHA requirement. *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1934, 1999 CCH OSHD ¶ 31,935, p. 47,390 (No. 94-3121, 1999). We are particularly reluctant to find willful disregard of an OSHA requirement where, as here, the company rules only refer to use of safety equipment in general and OSHA penalties in general. *Compare Morrison-Knudsen/Yonkers Contrac. Co.*, 16 BNA OSHC 1105, 1123-28, 1991-93 CCH OSHD ¶ 30,048, pp. 41,280-85 (No. 88-572, 1993) (willful violation based on employer's safety program consisting of detailed rules tracking applicable OSHA requirements). There is no other evidence here to suggest that Word had a heightened awareness that he was acting contrary to the requirements of the standard or the purposes of the Act.

The judge also found that Word's actions demonstrated plain indifference to safety because he failed to use the safety harness Wilkerson offered him in the first 15 minutes of the inspection. The judge apparently assumed that Word knew then that Wilkerson was an OSHA compliance officer, but as we noted earlier, that has not been shown. Wilkerson did not identify himself to Word as an OSHA compliance officer until Word came down from

the sign, and there is no evidence that Word knew that Wilkerson was an OSHA compliance officer until then.<sup>9</sup>

Finally, the judge held that owner/president Branham's failure to monitor the use of safety equipment demonstrated plain indifference to employee safety. The failure to monitor employee use of safety equipment amounts to a lack of diligence that supports a finding of constructive knowledge in this case. However, Branham's lack of diligence in failing to monitor does not establish willfulness. *See Marmon Group, Inc.*, 11 BNA OSHC 2090, 2092, 1984-85 CCH OSHD ¶ 26,975, p. 34,643 (No. 79-5363, 1984). Unlike *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2160-61, 1993-95 CCH OSHD ¶ 30,636, at p. 42,476 (No.

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<sup>9</sup>Even if we were to assume that Word knew he was being addressed by a compliance officer, we would not be able to find this violation willful. The Commission has only based willful violations on failure to heed compliance officers' warnings in cases where it was clear from the record that the employer had a heightened awareness of the illegality of its conduct and had sufficient time after receiving the warning to decide whether to comply. *See Calang Corp.*, 14 BNA OSHC 1789, 1791-92, 1987-90 CCH OSHD ¶ 29,080, pp. 38,870-71 (No. 85-319, 1990) (compliance officer gave advice regarding trenching requirements in morning before work began, but found noncompliance in afternoon); *A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1019-20, 1986-87 CCH OSHD ¶ 27,786, p. 36,342 (No. 83-1189, 1987) (compliance officer instructed employer regarding fall protection requirements four months before inspection giving rise to willful charge); *D.A. & L. Caruso, Inc.*, 11 BNA OSHC 2138, 2142, 1984-85 CCH OSHD ¶ 26,985, p. 34,694 (No. 79-5676, 1984) (compliance officer explained trenching requirements approximately four months before inspection giving rise to willful charge). The Commission has also carefully considered the factual circumstances. Failure to heed a warning after learning of a standard does not necessarily make the violation willful. "Certainly an employer is entitled to have a good faith opinion that his conduct conforms to regulatory requirements in a given factual situation." *C.N. Flagg & Co., dba Northeastern Contrac. Co.*, 2 BNA OSHC 1539, 1541, 1974-75 CCH OSHD ¶ 19,251, p. 23,027 (No. 1409, 1975) (factual disagreement regarding nature and stability of soil in trench). Here, according to Wilkerson's testimony, Word stated after the opening conference that he generally does not wear a safety harness because "sometimes there's no place to tie off to." It became apparent as they discussed possible ways to tie off to the sign involved here that locating an anchorage point strong enough to support the requisite weight would require consultation with an engineer.

90-1747, 1994), where the Commission based plain indifference on failure to follow the particular procedure and program outlined in the applicable OSHA standard, and *Morrison-Knudsen/Yonkers Contrac.*, 16 BNA OSHC at 1123-28, 1991-93 CCH OSHD at pp. 41,280-85, where the Commission based plain indifference on failure to provide the required equipment and facilities the applicable OSHA standard requires on the job,<sup>10</sup> Branham provided the required safety equipment and had a safety rule requiring its use. This case is also distinguishable from *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,483 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997), where the Commission found plain indifference because the employer delegated “carte blanche” authority to abate a hazard to employees and “took no action at a managerial level to develop any abatement procedures.” In sum, we cannot characterize Branham’s failure to monitor the work in the field as plain indifference.<sup>11</sup> We therefore conclude that although Branham violated the cited standards, those violations were not shown to be willful in nature.

### **Penalty**

The judge assessed \$21,000 for the willful violations that we find were serious rather than willful. In assessing penalties under § 17(j) of the Act, the Commission considers the

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<sup>10</sup>Among other things, the employer in *Morrison-Knudsen* did not have the proper facilities for cleaning and storing respirators to protect the employees from day-to-day accumulations of lead. 16 BNA OSHC at 1124, 1991-93 CCH OSHD at pp. 41,281-82. Also, in disregard of its own safety program specifying that only approved respirators should be used, the employer fitted together components of two different respirator brands and could not establish that they met the requirements for approved respirators. 16 BNA OSHC at 1115-16, 1118-19, 1991-93 CCH OSHD at pp. 41,272, 41,275-76. The safety program required protective clothing, but the employer did not provide it. 16 BNA OSHC at 1119-20, 1991-93 CCH OSHD at p. 41,277.

<sup>11</sup>In general, an owner/president’s decision not to go to job sites to see whether employees are complying with company safety rules does not necessarily bear on willfulness unless there is no other company official to undertake the duty, which is the case here, where Branham and his son are the only company officials to fill these roles.

gravity of the violations, the size of the company, its history of compliance with the Act and its good faith. We find that the gravity of the violations was high. As Wilkerson testified, there was a strong possibility that an accident could result in death because of the 64-foot height involved here. According to Wilkerson, the sign Word was standing on was an unstable working surface because it was curved and subject to vibrations. The basket of the aerial lift had an opening Word could fall through when he bent down for tools.

The company only employed 12 employees and therefore was small in size. The company did not have a history of prior violations. According to Wilkerson, two inspections OSHA once planned did not take place because of policy restrictions on general inspections for small employers. Although a complaint inspection was carried out in 1978, it did not result in citations, insofar as this record shows. On balance, we believe that a penalty of \$6,000 for the violations involved here is appropriate for this small employer. As the Commission stated in *Quality Stamping Prod., Inc.*, 16 BNA OSHC 1927, 1929, 1993-95 CCH OSHD ¶ 30,516, p. 42,189 (No. 91-414, 1994), “[t]he purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply another cost of doing business, are keyed to the amount an employer appears to require before it will comply.”

### Order

Items 1 and 2 of Citation 2 are affirmed as serious violations and a penalty of \$6,000 is assessed.

\_\_\_\_\_/s/  
 Thomasina V. Rogers  
 Chairman

\_\_\_\_\_/s/  
 Gary L. Visscher

Dated: May 15, 2000

Commissioner

WEISBERG, Commissioner dissenting:

Unlike my colleagues, I would find, based upon all the facts and circumstances, that the company's violation of sections 1926.453(b)(2)(v) and 1926.501(b)(15), involving fall protection, was correctly characterized by Judge Rooney as willful.

A violation is willful if it is committed with intentional, knowing, or voluntary disregard for the the requirements of the Act or with plain indifference to employee safety. *See e.g. Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891 n.3, 1995-97 CCH OSHD ¶ 31,228, p. 43,788 n.3 (No 92-3684, 1997), *aff'd*, 131 F.3d 1254 (8th Cir. 1997). The Sixth Circuit, the jurisdiction in which this case arises, has held that willful means "action taken *knowledgeably* ... in disregard of the action's legality" and that "a showing of evil or malicious intent is not necessary to establish willfulness." *Empire-Detroit Steel v. OSHRC*, 579 F.2d 378, 384-385 (6th Cir. 1978) (emphasis added); *see Donovan v. Capital City Excavating Company, Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (foreman's good faith belief that trench was safe inapplicable to determination of willfulness).

In my view, the record supports the willful characterization found by the judge based on supervisor Word's knowledgeable and conscious disregard of fall protection requirements, and imputing the supervisor's willful state of mind to the employer as a result of the employer's lax enforcement of its safety program.

It is well established that the state of mind of a supervisory employee, the supervisor's knowledge and conduct, may appropriately be imputed to the employer for purposes of finding that the violation was willful. *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070,1071, 1995-97 CCH OSHD ¶ 31,447, p. 44,478 (No. 95-1716, 1997); *Conie Construction Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-264, 1994), *aff'd* 73 F.3d 382 (D.C. Cir. 1995); *Tampa Shipyards*, 15 BNA OSHC

1533, 1537, 1541, 1991-93 CCH OSHD ¶ 29,617, pp. 40,100, 40,103 (No. 86-469, 1992). Willful conduct by an employee in a supervisory capacity constitutes *a prima facie* case of willfulness against the employer. *V.I.P. Structures*, 16 BNA OSHC 1873, 1875, 1993-95 CCH OSHD ¶ 30,485, p. 42,109 (No. 91-1167, 1994). However, whether a supervisor's willful conduct should be imputed to the employer depends on the quality of the employer's safety program. A finding of willfulness based on imputing a supervisor's willful state of mind to the employer is negated by evidence of the employer's good faith efforts to implement an effective safety program designed to prevent the kind of violation that occurred. *See L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063-64, 1995-97 CCH OSHD ¶ 31,262, pp. 43,890-91 (No. 94-1546, 1997) (Commission declined to impute foreman's willful state of mind because of employer's good-faith efforts to implement effective safety program), *rev'd and remanded on other grounds*, 134 F.3d 1235 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 404 (1998). A willful classification is not justified where the employer made a good faith effort to comply with the requirement of the standard or to eliminate the hazard even though the effort was not entirely effective or complete. *Keco Industries*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987).

OSHA compliance officer Wilkerson observed supervisor Word approximately 64 feet above the ground, while working on top of a sign that was being erected and while inside the basket of an aerial lift, without a tied-off safety harness. Word, who has been with the company for eight to ten years, testified that he generally worked at heights without a safety harness. According to Word, he "rarely" wore a safety harness because he considered them uncomfortable and more of a hazard than a help. Word did not use a safety harness at any time on the day of the inspection. When Word called down for some tools to be sent up, the compliance officer instructed the erection crew employees on the ground (none of whom were wearing hard hats, for which the company was also cited) to send him a safety harness

as well. However, Word refused to use the safety harness and continued to work without fall protection.

The judge found that “Word was fully aware of what the standard required.” That finding is supported by evidence in the record showing that Word knew that sign work presents fall hazards, he knew that fall protection was required, he was aware that the employer provided safety harnesses which were in the truck, he was aware that the employer had a safety rule requiring employees to wear safety equipment, and he had instructed at least some of the employees on his jobs to use safety harnesses. Thus, based on Word’s knowledge and conduct, I agree with the judge’s finding that Word knowingly, intentionally, and voluntarily disregarded the fall protection standard requirements.

The Commission has held that a willful violation is differentiated from a serious violation by a “heightened awareness” of the illegality of the conduct or conditions and by a state of mind, i.e., conscious disregard or plain indifference for the safety and health of employees. *See L.R. Willson and Sons, Inc.*, 17 BNA OSCH at 2063, 1995-97 CCH OSHD at p. 43,890. Thus, heightened awareness is *something more* than mere knowledge. It is, in effect, knowledge *plus*.

In reversing Judge Rooney, my colleagues conclude that there was no heightened awareness to support a willful violation. My colleagues note that “[t]here was no showing that Word or anyone in the company was aware of OSHA *standards* requiring fall protection or that anyone made a deliberate attempt to violate them,” and cite *C.E.M Plumbing Inc.*, 17 BNA OSHC 2080, 2081-82, 1995-97 CCH OSHD ¶ 31,242, p. 43,820 (No. 95-676, 1997). This holding is contrary to the judge’s specific finding that “Word was fully aware of what the standard required.” *C.E.M. Plumbing*, which my colleagues appear to rely on, is easily distinguishable. In *C.E.M.*, which involved a trenching standard, the Commission’s holding that the violations were not willful was based on the judge’s finding that the company president, though generally familiar with soil types and available safety measures, was not familiar with specific OSHA regulations, was unaware of OSHA soil classifications, and

completely misunderstood OSHA sloping and shoring requirements. In the instant case, however, although Word might not have been familiar with sections 1926.453(b)(2)(v) and 1926.501(b)(15), he was, as found by the judge, “fully aware of what the standard required.” My colleagues also note that there is no evidence that the company received prior citations or other warnings regarding the need for safety harnesses in sign erection work. Are my colleagues suggesting that supervisor Word, who had been with the company eight to ten years and who instructed employees under his supervision to use safety harnesses, was not aware that sign work presented fall hazards and that fall protection was required on this job?

In a literal sense, from his vantage point, Word had a 64-foot height[ened] awareness that he was working without the required fall protection. Word was working approximately 64 feet above the ground, on top of a sign that was curved and subject to vibrations, without using a tied-off safety harness. In my view, that *something more* element that highlights the knowing and conscious disregard necessary to establish a willful state of mind occurred in the instant case when Word called down for some tools to be sent up and the employees on the ground, at the direction of the OSHA compliance officer, sent up a safety harness as well. The evidence does not establish that Word knew then that there was an OSHA compliance officer on the site or that it was the compliance officer who had asked the ground crew to send up the safety harness. Nevertheless, even if the employees on the ground (over whom he exercised supervisory authority and some of whom he had instructed to use safety harnesses), had of their own volition sent up the safety harness to him, the incident demonstrates that Word acted willfully by knowledgeably and consciously refusing to use the safety harness and continuing to work without fall protection

Generally, as noted above, a supervisor’s state of mind and conduct can be imputed to the employer for purposes of establishing willfulness. The fact that a supervisor was involved in the cited violation is strong evidence that an employer’s safety program was lax. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982). In the instant case, the evidence amply demonstrates the lack of an

effective safety program or even objectively reasonable good faith efforts by the employer to promote safety on the job. While the company had a general rule informing employees that failure to use required safety equipment could result in OSHA penalties, and also provided safety harnesses at the site for employees to use, the company's safety program did not include any efforts to detect whether supervisors and employees were using safety harnesses. Company owner Thomas Branham, Sr. and his son Thomas Branham, Jr. ( the company manager and only other management official) failed to monitor the worksites or to pay attention to whether employees used the available fall protection equipment. Branham Sr. testified that it was the responsibility of the employees to wear the safety equipment made available by the company. He stated: "It is up to the employees [at the job to] wear [the safety equipment]. It is for their protection and if anyone should be fined it should be the employee because remember one thing I'm only their employer, I'm not their mother and all of our employees know what they're supposed to do."<sup>12</sup> Accordingly, imputing Word's willful conduct to this employer is justified based on the employer's lax enforcement of its safety program.<sup>13</sup>

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<sup>12</sup>In his brief to the Commission, Branham Sr. explained, "[t]here is no possible way that we could check each jobsite to insure that safety equipment is being used. I am an employer not the safety patrol."

<sup>13</sup>Thus, I find it unnecessary to decide whether the company's failure and refusal to monitor the use of safety equipment is sufficient by itself to demonstrate plain indifference to employee safety and establish willfulness, as found by the judge.

\_\_\_\_\_/s/\_\_\_\_

Stuart E. Weisberg  
Commissioner

Dated: May 15, 2000\_\_\_\_\_

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.  
BRANHAM SIGN COMPANY, INC.,  
Respondent.

DOCKET NO. 98-0752

Appearances:

Janice L. Thompson, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Cleveland, Ohio

Thomas E. Branham, Sr.  
Columbus, Ohio  
For the Respondent, *pro se.*

Before: Judge Covette Rooney

***DECISION AND ORDER***

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, *et seq.*) (“the Act”). Respondent, Branham Sign Company, Inc., is engaged in the business of manufacturing, servicing and erecting signs, and, at all times relevant to this action, maintained a work site at the Jeffersonville, Ohio exit on Route 35 and Interstate 71. Respondent has erected signs outside of Ohio, is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act. (Tr. 11-14).<sup>14</sup>

OSHA compliance officer (“CO”) William Wilkerson testified that he was driving home from work on April 2, 1998, when he observed an individual engaged in welding on a horizontal member

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<sup>14</sup>The term “Tr.” refers to the official trial transcript. The term “Ex.” refers to exhibits introduced into evidence at trial.

of the sign at the subject work site. It appeared to him the individual was not tied off, and he decided to commence a fall protection inspection under the local emphasis program.<sup>15</sup> As a result of this inspection, on May 5, 1998, Respondent was issued a serious citation alleging a violation of 29 C.F.R. § 1926.100(a) and a willful citation alleging violations of 29 C.F.R. §§ 1926.453(b)(2)(v) and 1926.501(b)(15), with a total proposed penalty of \$42,750.00. By filing a timely notice of contest, Respondent brought this proceeding before the Commission. The contested violations were the subject of the hearing held before the undersigned on November 2, 1998, in Columbus, Ohio. The parties have submitted post-hearing briefs, and this matter is ready for disposition.

### **Facts**

CO Wilkerson testified that the individual he observed was initially standing on a portion of the sign to work but that by the time he got out his video equipment the individual had stepped into a man basket that was on the end of a crane adjacent to the sign. An employee who was holding a tag line advised the CO that Stephen Word, the person in the basket, was in charge of the site. The CO began videotaping Word and determined that he was not wearing any personal protective equipment, and he also observed that the two employees working on the ground below were not wearing hard hats. As the CO videoed him, Word stepped out of the basket and back onto the sign. Word also called down for some tools to be sent up, and the CO instructed the employees on the ground to send him a safety harness as well. The tools and a harness were hooked onto the crane's load line and sent up to Word; however, CO Wilkerson noted that Word did not put on the harness for about 15 minutes and that even when he did he it was ineffective because he did not fasten the straps. When Word came down, the CO conducted an opening conference with him and then interviewed him. Word informed him that he had been working at a height of 64 feet and that although he required the other employees to wear safety harnesses he himself generally did not wear them because they were uncomfortable and at times presented a tripping hazard; Word also informed him that sometimes there was nowhere to tie off. CO Wilkerson observed that there was an opening

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<sup>15</sup>CO Wilkerson testified that while he specialized in industrial hygiene and had conducted mainly health inspections during his 23-year employment with OSHA, he had performed 100 inspections involving fall protection issues. (Tr. 25).

on one side of the man basket; he measured the opening, and found it to be 22 inches wide and 40 to 45 inches high. (Tr. 29-35, 42-50, 54, 57-59, 63-66, 73-76, 97, Ex. C-1).

Stephen Word testified that he had been employed with Respondent for eight to ten years, that there were no actual foremen or bosses on Respondent's crews, and that in general, the employee on the site with the most experience was the one who ran the job. Word further testified that he was a trusted employee with firing authority, such that Thomas Branham, the owner, rarely visited the sites, and that the only other management person was Branham's son. Word said the company had four employees on the subject site on April 2, 1998, that they were installing a high-rise sign at a truck stop, and that he had been in a man basket 50 to 60 feet above the ground and had been in the process of trying to get the sign down onto its poles when the CO arrived.<sup>16</sup> Word agreed that two employees were on the ground holding onto tag lines at that time and that no one on the crew was wearing a hard hat. He also agreed that he had not worn a body belt or safety harness and lanyard while working either in the basket or on the sign and that he had not put on the safety harness that had been sent up to him. Word noted that he told the CO that he required his men, especially those who feared heights, to wear harnesses; however, he himself considered them uncomfortable and more of a hazard than a help. (Tr. 12-23).

### **Burden of Proof**

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to show a violation of an OSHA standard, the Secretary must prove: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

### **Citation 1, Item 1**

29 C.F.R. § 1926.100(a), the cited standard, states that "[e]mployees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets." The citation alleges that:

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<sup>16</sup>The man basket was connected to an 80-foot Skyhook crane. (Tr. 17).

Employees who were working at ground level at the jobsite at 12403 US Rt. 35 in Jeffersonville, Ohio on April 2, 1998, were not wearing head protection where there was a potential for tools or parts to fall from a manbasket on an aerial lift approximately 64' overhead.

The testimony of CO Wilkerson and Stephen Word shows that two employees were working on the ground in the area below the crane and man basket when the CO arrived and that none of Respondent's crew was wearing a hard hat. (Tr. 17-18, 34-35, 57-59, 97-98). Word testified that the employees were holding onto 100-foot tag lines and that they were not directly below him but 25 to 30 feet away. (Tr. 18). However, CO Wilkerson testified that the employees were underneath Word during the limited periods when they were hooking up materials to the crane's load line. He pointed out that Word was welding and could have accidentally dropped items such as welding rods and tools that could have struck an employee and caused a skull laceration or fracture or even death.<sup>17</sup> (Tr. 28-29, 47-48, 57-59, 87-88, 97-98). By its own terms, the standard requires head protection where there is a "possible danger" from falling objects. The record establishes that the employees were exposed to falling objects from Word's overhead work and that this condition could have resulted in serious injury. The record also establishes Respondent's knowledge of the hard hat requirement and the fact that employees were not wearing them that day. When the CO questioned them about it, the employees retrieved hard hats from trucks on the site and put them on, and Word himself told the CO during his interview that they had hard hats in the trucks and that sometimes employees wore them and sometimes they did not. (Tr. 59). Word's knowledge of the violation, in light of his supervisory authority at the work site, is imputed to Respondent.<sup>18</sup> *Superior Elec. Co.*,<sup>17</sup> BNA OSHA 1636 (No. 91-1597). The Secretary has therefore demonstrated the alleged violation.

#### *Penalty*

The Commission is the final arbiter of penalties and makes the ultimate determination of what constitutes an appropriate penalty. In so doing, the Commission must give "due consideration" to the four criteria under section 17(j) of the Act, 29 U.S.C. § 666(j). These penalty factors are the size of

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<sup>17</sup>Word agreed that he was using welding rods, screwdrivers and a hammer. (Tr. 20).

<sup>18</sup>I find that Word knew or should have known of the condition, since it was easily observable. I also find that he had supervisory authority at the site, based on his testimony set out *supra*.

the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The record in this case shows that the gravity of the violation was high because of the serious injuries or death that could have occurred. The record also shows that the probability of an accident was lesser due to the limited time employees spent under the crane and man basket. These elements resulted in a gravity-based penalty of \$2,500.00, to which reductions of 60% and 10% were applied, respectively, due to Respondent's small size (a total of 14 to 15 employees) and its lack of history of prior violations. There was no adjustment for good faith because of the willful citation that was issued, resulting in a proposed penalty of \$750.00. (Tr. 12, 57, 60-63). Based on the record, I conclude that the proposed penalty is appropriate, and it is accordingly assessed.

### **Citation 2, Item 1**

29 C.F.R. § 1926.453(b)(2)(v), the cited standard, states that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." The citation alleges that:

On April 2, 1998, at the Travel Center of America jobsite at 12403 US Rt. 35, Jeffersonville, Ohio, the jobsite foreman was observed working from an aerial lift approximately 64' above the ground without wearing a body belt or safety harness and lanyard.

The record establishes a prima facie violation. The CO observed Word working in the man basket, which, based on what Word told him, was about 64 feet off the ground. Word was not wearing a safety belt or harness, and, although the CO had a safety harness sent up to him, Word did not put it on for about 15 minutes; further, when he did use it he did so incorrectly such that it was ineffective. (Tr. 29-35, 44-49, 63-66; Ex. C-1). It is clear that Word was fully aware of what the standard required, particularly since he directed other employees to use safety harnesses, and that Word did not comply with the standard even after a harness was sent up to him. (Tr. 18-23). It is also clear the violation was appropriately classified as serious. The CO testified that Word could have fallen from the man basket, especially in view of the opening on one side, and that a 64-foot fall could have resulted in broken bones, crushed body parts or death. (Tr. 54-55, 64-65).

### *Willful*

A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Trinity Indus., Inc.*, 15 BNA

OSHA 1597, 1586 (Nos. 88-1545 & 88-1547, 1992), citing *Williams Enter., Inc.*, 13 BNA OSHA 1249, 1256 (No. 85-355, 1987). A willful violation “is differentiated from other types of violations by a heightened awareness - of the illegality of the conduct or conditions - and by a state of mind - conscious disregard or plain indifference.” *Calang Corp.*, 14 BNA OSHA 1789, 1791 (No. 85-319, 1990). There must be evidence that an employer knew of an applicable standard prohibiting the conduct or condition and consciously disregarded the standard. *Trinity* at 1586, citing *Williams* at 1257. An employer who substitutes his own judgement for the requirement of a standard or fails to correct a known hazard commits a willful violation even if the employer does so in good faith. *Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1469 (8th Cir. 1996).

I find that Stephen Word, the individual in charge of the site and responsible for making decisions and maintaining safety, intentionally, knowingly and voluntarily disregarded the standard’s requirements. The record shows that safety harnesses were available on the site and that while the CO had one sent one up to him Word did not put the harness on for 15 minutes and then put it on incorrectly; moreover, Word told the CO, and indicated at the hearing, that he himself generally did not use fall protection even though he required the other employees to do so. I further find that Respondent’s failure to monitor its sites for the use of safety equipment demonstrates indifference towards employee safety. Thomas Branham, the company president, told the CO and testified at the hearing that he supplied safety equipment but did not inspect the work sites and that it was the responsibility of the employees to use the equipment. Branham did state that employees who did not use safety equipment would be warned after the first infraction and terminated for any subsequent infraction. However, he then admitted that Word had never received a warning, that he had never fired anyone for not wearing fall protection, and that this was the first time the issue had come to his attention. (Tr. 67-68, 107-11; Ex. R-2). Based on the record, a willful violation has been established.

#### *Penalty*

Although the Secretary proposed a separate penalty for this item and for item 2, *infra*, it is my conclusion that these two items should be grouped for penalty purposes. My reasoning in this regard, as well as the penalty assessed, is set out in the penalty discussion for item 2.

#### **Citation 2, Item 2**

29 C.F.R. § 1926.501(b)(15), the cited standard, states that “[e]xcept as provided in 1926.500(a)(2) or in 1926.501(b)(1) through (b)(14), each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.” The citation alleges as follows:

On April 2, 1998, at the Travel Center of America jobsite at 12403 US Rt. 35 in Jeffersonville, Ohio, the jobsite foreman for the sign crew erecting a sign on the site was observed kneeling or squatting, standing and climbing on a horizontal member of a sign approximately 64' above the ground and was not wearing a personal fall arrest device nor were there guardrails or a safety net in place to protect against falls to the ground.

The record establishes a prima facie violation of the standard. The CO saw Word outside the man basket, standing and working on a part of the sign being erected, as he approached the site; he also saw Word stepping from the man basket and back onto the sign as he was videoing Word. The width of the surface area of the sign Word was standing on was 2 to 3 feet, Word was not using any personal fall arrest equipment, and no other system was in place. (Tr. 29-35, 44-49, 73-75, 81-82; Ex. C-1). I conclude, as the CO did, that the sign Word was standing on was a walking/working surface as defined in the fall protection standard at 29 C.F.R. § 1926.500(b). (Tr. 70-73). I also conclude, based on the CO’s testimony, that a static line could have been erected between the sign’s two main support posts and that Word could have worn a safety harness and tied off to such a line. (Tr. 50-52, 75). Finally, in view of the evidence set out above in item 1, I conclude that Word was fully aware of the violative condition and what the standard required. The violation was serious, in that Word could have fallen 64 feet and been seriously injured or killed. (Tr. 75-77).

#### *Willful*

On the basis of the “Willful” discussion relating to item 1, *supra*, I find that the Secretary has also demonstrated a willful violation with respect to this item.

#### *Penalty*

The record shows that the gravity of the violations described in items 1 and 2 was high. Word’s work in the man basket and on the sign exposed him to a 64-foot fall which could have caused serious injuries or death, and the probability of an accident was greater due to the opening in the man basket and the 2 to 3-foot width of the working surface of the sign; in addition, the CO said that he knew of an incident in which a crane had failed and dropped, causing the basket’s occupant

to be ejected and killed, and that the sign was unstable while it was being erected. These elements resulted in a gravity-based penalty of \$70,000.00 for each item, to which a reduction of 70% was applied because of the company's small size and lack of history of previous violations. There was no adjustment for good faith in light of the willful characterization of the violations, resulting in a proposed penalty of \$21,000.00 for each item. (Tr. 54-55, 63-70, 73-81).

As noted above, the Commission is the final arbiter of penalties. Further, Commission precedent provides for discretion in the assessing of a combined penalty for related violations. *See E.L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2050 (No. 92-35, 1994); *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981). I find that the violative conditions presented similar hazards that could have been abated by the same act, that is, wearing a safety harness with a lanyard and tying off. Moreover, the record demonstrates that Respondent had safety harnesses on the job site and that Word instructed employees to use them. These factors justify the grouping of items 1 and 2 and the assessment of a single penalty of \$21,000.00, which, in my view, achieves a deterrent effect commensurate with the circumstances of this case. A penalty of \$21,000.00 is accordingly assessed for items 1 and 2 of citation 2.

### **Findings of Fact and Conclusions of Law**

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

### **ORDER**

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation 1, item 1, alleging a serious violation 29 C.F.R. § 1926.100(a), is AFFIRMED, and a penalty of \$750.00 is assessed.
2. Citation 2, items 1 and 2, alleging willful violations of 29 C.F.R. §§ 1926.453(b)(2)(v) and 1926.501(b)(15), respectively, are AFFIRMED, and a grouped penalty of \$21,000.00 is assessed.

/s/

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Covette Rooney  
Judge, OSHRC  
Washington, D.C.

Dated: 1-19-99