SSECRETARY OF LABOR, Complainant, v. AGRA ERECTORS, INC., Respondent.	OSHRC Docket No. 98-0866

DECISION

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

BY THE COMMISSION:

Agra Erectors, Inc. ("Agra") is a company based in Greenville, Ohio that erects grain elevators. On October 30, 1997, Agra was erecting an 85-foot grain elevator tower at Webb Super Gro's ("Webb's") facility in Mill Hall, Pennsylvania. Agra employee Donald Johnson, who was working on top of the fully erected tower, died when the tower collapsed. As a result of the fatality, OSHA Compliance Officer ("CO") James Jury inspected the worksite. Based on the inspection, the Secretary of Labor ("Secretary") issued to Agra one serious and one willful citation. We affirm the serious citation but remand the willful citation for further proceedings as discussed below.[1]

Background

Agra's crew at the Mill Hall worksite consisted of foreman William Johnston and employees Alfonso Coria, Donald Johnson, and Richard Kiser. Webb had contracted with Susquehanna Crane Service for a crane for the project. The crane was operated by David Ludwig, an employee of the Lundy Construction Company, the owner of Susquehanna Crane Service. Coria and Johnson worked with Ludwig in erecting the grain elevator tower. The tower was pre-assembled into several sections on the ground. Ludwig lifted each section into place and Coria and Johnson attached them. Once erected, the tower was to be supported by

[1]Respondent made a motion for oral argument; however, upon review of the record, judge's decision, and briefs, we conclude that oral argument is unnecessary in this case.

several guy cables attached to guy posts. Until the guy cables were in place, the top of the tower was to remain connected to the crane.

The last section of the tower that was attached was the "head" or top section. On top of the head section was a platform to which were attached two guy cables and a rope that was to be used to pull up additional cables. After Coria and Johnson attached the head section, foreman Johnston called for one of the two to come down and assist in attaching the two guy cables to the guy posts. Coria came down from the tower and Johnson went from the base of the head section up to the platform. Before descending, Coria gave Johnson the radio with which the two employees were communicating with the crane operator. At some point after Johnson reached the top, he and the crane operator disconnected the crane from the tower so that the crane instead of the rope could be used to bring the other guy cables to the top of the tower. Once the crane was disconnected, the tower was only supported by its weight on the base.

After Coria climbed down from the tower, he took one of the guy cables to attach to a guy post. At the same time, Agra employee Richard Kiser was connecting the other guy cable to another guy post located near railroad tracks. That post was approximately 22 feet high in order to allow the safe passage of trains underneath the guy cable. Kiser reached the attachment point on the post by standing on a wooden pallet that was elevated approximately ten feet off the ground and unsecured to the forks of the forklift on which it rested. After Kiser attached the cable to the guy post, he tightened a turnbuckle on the cable. The tightening of the cable caused the tower to collapse and employee Johnson to fall to his death.

There is a conflict in the record regarding whether foreman Johnston ordered the crane to be disconnected from the tower. Crane operator Ludwig testified that employee Johnson radioed him twice from the top of the tower to release tension on the crane line so that Johnson could disconnect the crane from the tower. Ludwig testified that he ignored both requests because he thought the tower should be secured first. Ludwig stated that he only released tension on the crane line after foreman Johnston directed him to do so. Ludwig

testified that foreman Johnston then directed him to use the crane to lift guy cables up to Johnson at the top of the tower.

Foreman Johnston testified that he did not have any conversation with the crane operator about disconnecting the crane. He claims that he first became aware that the crane was disconnected from the tower when he "almost ran into the ball" at the end of the lowered crane's cable. Realizing that it was dangerous for an employee to be on the head section with the crane disconnected, Johnston claims that he told Coria to get the crane reconnected. He did not communicate directly with Johnson about reconnecting the crane because only Johnson and Ludwig had radios. Johnston testified that after giving this order to Coria, he went behind some storage tanks and did not see whether his order was carried out. Johnston testified that he later asked Coria whether the crane was reconnected. When Coria said that it was not, he told Coria to get the crane reconnected to the tower. By that time, however, the elevator was already collapsing.

Coria did not recall any discussion with Johnston about the fact that the crane was disconnected after the head section had been put on. Coria was not aware if the crane operator spoke with Johnston. Coria acknowledged that although Johnston had instructed them to use the rope to take the cables up to the head section, Coria sent the cables up to the top of the tower by crane instead of by rope.

Based on the subsequent inspection of the worksite, the Secretary issued to Agra two citations. Serious Citation 1, Item 1 alleges a violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") for the exposure of Agra's employees to serious injuries from falling ten feet from the wooden pallet that was not secured to the forks of a fork lift and which did not have a guardrail system. Willful Citation 2, Item 1 alleges a violation of section 5(a)(1) of the Act or, in the alternative, a violation of 29 U.S.C. § 1926.501(a)(2)[2] for Agra's employees' exposure to serious injuries from the

[2]The cited standard, 29 C.F.R. § 1926.501(a)(2) requires:

> The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support

(continued...)

tower's lack of strength and structural integrity while it was free standing for approximately 30 minutes. The Secretary proposed a penalty of $42,000 for this item. The judge affirmed both citations, finding a willful violation under section 1926.501(a)(2), and assessed the proposed penalties. On review, Agra challenges the judge's assessment of a $3,000 penalty for Serious Citation 1, Item 1 and his affirmance of Willful Citation 2, Item 1.

Serious Citation 1, Item 1

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). Agra is a small employer with 35 employees. It has a history of violations, including two prior violations that involved fatalities. There is no evidence that would warrant crediting Agra with good faith. The gravity of a violation is the most significant consideration in assessing a penalty and "depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Agra argues that the penalty should be reduced because only one Agra employee was exposed. It cites to an early Commission decision, *Ed Miller & Sons*, 2 BNA OSHC 1132, 1134, 1974-75 CCH OSHD ¶ 18,409, p. 22,460 (No. 934, 1974), where the penalty was reduced from $500 to $200 in part because "only two employees . . . were exposed to the hazard." However, an employer will not be credited for the fact that only one employee was exposed to a hazard where only one employee is required to perform the work and the size of the work area itself limits the opportunity for employee exposure. *Andrew Catapano Enterprises, Inc.*, 16 BNA OSHC 1949, 1952, 1993-95 CCH OSHD ¶ 30,531, p. 42,214 (No. 89-1981, 1994). Kiser had been exposed to the hazard for approximately 35 minutes. Although Agra argues that it had taken

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[2](...continued)

employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

precautions against employee injury by providing ladders to access the guy posts, the transcript page it cites to does not state that Agra provided the ladder, it merely states that an exhibit was a photograph of a ladder. There is no evidence that Agra provided a ladder or required its employees to use ladders. Agra does not support its assertion that Webb, the owner of the facility, was involved with the decision to use the forklift and pallet. Nor has Agra rebutted the compliance officer's determination that it was probable that a serious injury would occur. We therefore find that the proposed penalty of $3,000 is appropriate.

Willful Citation 2, Item 1

The judge did not determine whether the Secretary had carried her burden of proving that Agra violated section 1926.501(a)(2) by permitting its employees to work on the top of the grain elevator tower when it lacked the requisite strength and structural integrity. Instead, he reduced the question of whether Agra had violated the standard to an inquiry into whether Agra had established the affirmative defense of unpreventable employee misconduct. He found that the affirmative defense had not been established and that the violation was willful.

We address whether the Secretary carried her burden now. In order to prove a violation, the Secretary must establish that (1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. *E.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991).

We find that the standard does apply.[3] Agra does not dispute that the platform at the top of the tower was a working surface. However, it claims that the standard only requires an assessment of structural integrity at the beginning of the construction process and does not require subsequent assessments unless the job requires the integrity of the work surface

[3]The Secretary argues that if the Commission accepts Agra's reading of the standard does not apply, this case should be remanded to the judge for a finding and a holding based on the Secretary's alternative theory that Agra's elevator tower construction method violated the Act's general duty clause. Because we find that the standard applies, we need not reach the Secretary's alternative theory.

to be altered. This argument is without merit.[4] While the phrase "are to work" in the standard's first sentence requires an employer to determine in advance whether a surface is safe to work on, the employer's duty does not end after the initial inspection. The plain language of the second sentence clearly permits employees "to work on those surfaces only when the surfaces have the requisite strength and structural integrity." *See Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, p. 41,729 (No. 89-1555, 1993)(the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned).

Agra did not comply with the terms of the standard because at the time Johnson worked at the top of the tower with the crane disconnected, the tower lacked the requisite strength and structural integrity. The same facts demonstrate employee access to the violative condition. Determining whether Agra had knowledge of the violative condition is not so straightforward. To make that determination, the conflicting testimony regarding whether foreman Johnston participated in the decision to detach the crane from the elevator tower must be resolved. Because the judge who heard the case is best qualified to make specific credibility findings, we remand the case to him to make that finding. *See, e.g., Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1610-11, 1991-3 CCH OSHD ¶ 29,673, p. 40,207 (No. 87-2007, 1992). In determining knowledge, the judge should base his credibility findings on the demeanor of the witnesses on the stand and their manner of responding on cross-examination. *See, e.g., E.L. Jones and Son Inc.*, 14 BNA OSHC 2129, 2132, 1991-93 CCH OSHD ¶ 29,264, pp. 39,231-32 (No. 87-8, 1991). The judge must give reasons for crediting the testimony of one witness over that of another that are "accompanied by summaries of pertinent testimony and reasons for crediting the testimony." *P&Z Co.*, 6 BNA OSHC 1189, 1192, 1977-78 CCH OSHD ¶ 22,413, p. 27,024 (No. 76-431, 1977); *see also Asplundh Tree Expert Co.*, 7 BNA OSHC 2074, 2078-79, 1980 CCH OSHD ¶ 24,147, pp. 29,346-47 (No. 16162, 1979). If the judge determines that Agra violated 29 U.S.C. §

[4]Agra cites to several unreviewed judge's decisions, which lack precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).

1926.501(a)(2),[5] he should then determine whether the Secretary has established a willful violation based on his evaluation of the testimony and other evidence. *See, e.g.*, *Great Lakes Packaging Corp.*, 18 BNA OSHC 2138, 2140-41, 2000 CCH OSHD ¶ 32,094, p. 48,186 (No. 97-2030, 2000).

[5]The judge should take into account that the United States Court of Appeals for the Third Circuit, which has jurisdiction over the site of the alleged violation, has held that a citation for a serious violation cannot stand "on a simple showing that a single employee failed to comply with a regulation" but must instead be based on "conduct that could have been foreseen and prevented by employers with the exercise of reasonable diligence and care." *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 354 (3d Cir., 1984); *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2068, 2000 CCH OSHD ¶ 32,053, p. 48,004 (No. 96-1719, 2000).

Order

We affirm that part of the judge's decision affirming Serious Citation 1, Item 1 and the proposed penalty of $3,000. We remand Willful Citation 2, Item 1 to the judge for further proceedings consistent with this decision.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

/s/
Stuart E. Weisberg
Commissioner

Dated: August 31, 2000

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. AGRA ERECTORS, INC. AND ITS SUCCESSORS, Respondent.	Docket No. 98-0866

Joseph Crawford, Esquire Theresa C. Timlin, Esquire Office of the Solicitor U.S. Department of Labor Philadelphia, Pennsylvania For the Complainant.	Gary W. Auman, Esquire Dunlevy, Mahan & Furry Dayton, Ohio For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

Background and procedural history

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and proposed assessments of penalty issued pursuant to § 10(a) of the Act.

On October 30,1997, Donald Johnson, an employee of Agra Erectors ("Agra") fell from an 85-foot grain elevator while working on top of it. (Tr. 25-26, 193). As a result of the fatality, James Jury, an OSHA compliance officer ("CO"), inspected the work site on

October 31, 1997. (Tr. 175-78, 185-88). On April 29, 1998, Agra was issued one serious and one willful citation proposing total penalties of $45,000.00. Agra timely contested the citations, and an administrative trial was held in Harrisburg, Pennsylvania, on November 2 and 3, 1998. Both parties filed post-trial briefs on February 1, 1999.

Jurisdiction

The parties agree that Agra is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over this case.

Stipulations

1. The Review Commission has jurisdiction over these matters;

2. The proper identity of the respondent is Agra Erectors, Inc.;

3. Agra Erectors, Inc., is engaged in erecting grain elevators and machinery for factories, feed stores, and other industries;

4. Respondent Agra Erectors, Inc., is a corporation with its principal office and place of business at 5352 Sebring-Warner Road, P.O. Box 635, Greenville, Ohio, 45331;

5. In October 1997, Agra Erectors, Inc., had a workplace off Dewey Road, Mill Hall, Pennsylvania 17751;

6. Agra Erectors, Inc., employs approximately 35 employees in its business activities, 4 of whom were employed at the subject worksite;

7. Respondent utilizes tools, equipment, machinery, materials, goods and supplies which originated in whole or in part from locations outside the Commonwealth of Pennsylvania;

8. The respondent is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5);

9. The parties stipulate to the authenticity of each other's exhibits, but not necessarily to their relevance or to the matters asserted therein.

Procedural Issue

The Secretary's counsel sought to introduce a photograph identified as GX-101.[6] (Tr. 206). Agra's counsel objected to its admission "until I'm told what [it] depicts." (Tr. 207; 211). James Jury, the OSHA CO, was unclear about what objects the photograph depicted; he was also unclear about whether any of the collapsed elevator legs had been "damaged or altered" and whether "the pipe *** was *** attached to the leg at the time of the accident." (Tr. 211-17). I sustained the objection and excluded GX-101 from the record.

In her post-trial brief, the Secretary moves for reconsideration of my decision to exclude GX-101 from the record. (Sec. Brief, p. 5). After reviewing the transcript pages identified above, the Secretary's motion for reconsideration is denied.

Facts

Gregory Swabb, President of Agra, testified that Agra is basically a labor contractor specializing in millwright work and "anything that has to do with grain elevators [or] machinery installation." He further testified that Agra normally has six or seven jobs underway at any one time, that it usually operates with six or seven crews, each of which is supervised by a foreman, and that he selected the most experienced crew he had at the time

[6]Exhibits are as follows: GX (Government's Exhibit); RX (Respondent's Exhibit).

to erect the subject elevator leg. Mr. Swabb noted that Agra erected the Reilly-manufactured freestanding 85-foot grain elevator leg pursuant to a contract with Webb's Super Gro, Inc. ("Webb"). (Tr. 477-80, 484, 501-02).

Michael Leupold, a Webb maintenance foreman, testified Webb received GX-172, an installation manual, from Reilly Equipment, Inc. ("Reilly"). He also testified that Webb employees "do a lot of the ground work assembling of the elevators and the concrete work," that the concrete work involves the foundation and the support posts that hold the guy wires to the elevator, and that the guy wires "hold the elevator upright." Mr. Leupold said that Agra was hired "to set the elevator upright and do all of the downspout work and the millwright work for [Webb]." (Tr. 35-38, 42).

William Johnston, the crew foreman for Agra, testified that Webb employees had previously assembled part of the elevator, that Agra had to erect a 40-foot and a 30-foot section, and that the 30-foot section contained the head section.[7] After the erection began, Johnston attached two guy cables to the head section and a rope to pull the guy cables up. After one section was installed, it was caulked and sealed, the bolts were tightened, and the section was "let off the crane." Alfonso Coria and Donald Johnson, the two workers assigned the responsibility of erecting the leg, would then "jump up and down on the leg to see if it would sway and stuff before they let go of it." (Tr. 434-41).

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[7]The head is the top-most component in the elevator. It consists of a steel housing which supports the drive pulley, motor and speed reducer. The head platform provides a safe standing area for performing routine inspection and maintenance service on the elevator head, speed reducer and motor. (GX-172, p. 1).

Mr. Johnston further testified that Messrs. Coria and Johnson set the head section by tying their safety lanyards to the rest platform, reaching around and putting the bolts in, and then tightening them. Mr. Johnston said that he then instructed "one of them to go up and pull the last two cables up and one to come down" and that "Al came down, Donny went up." Mr. Johnston also said that if it had been windy he would have had the guy cables connected to that section before they released the crane; despite the fact that the guy cables were not connected, he was not concerned for Mr. Johnson's safety when he went up because he "had a 4-foot platform up all around it, had rails and everything and it was hooked." (Tr. 441).

As to the events leading up to the accident, Mr. Johnston testified that Mr. Johnson disconnected the crane from the head section. Mr. Johnston also testified that when he discovered that they were using the crane to pull the other two guy cables up to the head section, he told Mr. Coria to re-rig the crane.[8] However, Mr. Johnson and Mr. Ludwig had the only two radios, and Mr. Johnston did not "say anything to the two people [Messrs. Johnson and Ludwig] who have the capability of re-rigging the crane." Mr. Johnston said that he never gave any instruction to either Mr. Johnson or Mr. Ludwig regarding disconnecting the crane from the head section; he also said that he felt that he did not need a Reilly manual to erect the elevator. (Tr. 442-475).

David Ludwig, a crane operator with Susquehanna Crane Service, was assigned by his employer to assist Agra in erecting the grain elevator on October 30, 1997. He testified

[8]Mr. Coria, on the other hand, testified that he did not remember any discussion with Mr. Johnston instructing him "to take steps to re-hook the crane to the head section." (Tr. 412-13).

that Agra used the "stacking system," in which the first section goes into the ground and each successive section is then raised by the crane, lowered into place and bolted to the previously-installed section. He further testified that after the head section was bolted down and the crane was hooked onto it, the crane was "holding and stabilizing the complete tower at that time." Mr. Ludwig said that Mr. Johnson "radioed *** me to let off of my line for him to disconnect the cables" and that he ignored the request as he thought "it should be secured first." Mr. Ludwig also ignored Mr. Johnson's second radioed request, and he slackened the line so that the crane could be disconnected from the head section only after Mr. Johnston, Agra's foreman, twice told him to do so. Mr. Ludwig then hoisted four guy cables up to Mr. Johnson, and the collapse occurred when "they were up on a forklift connecting the cable to the beam with a turnbuckle and they started to tighten the turnbuckle." Mr. Johnson fell off the elevator during the collapse and landed on the crane. (Tr. 86-90, 97-111).

Expert Witnesses

Jau Scott Jin, Ph.D.

Dr. Jin, an OSHA employee, was qualified as an expert in civil engineering. He testified that based on his investigation of the accident, he determined the following:

> [T]he grain elevator was erected in four sections and the first section is 14 foot from the boot to the second section, so it's four foot plus 14 foot. That was erected before the crane was on the site. Then with the help of the crane they erected three more sections, 30 foot section of the lower trunking section, another sections [sic] of the upper truck [sic] section and then lastly to erect the last 17 foot of head section, ***.[9] (Tr. 301).

[9]The boot is the bottom component of the elevator leg, while the trunking forms the structure for supporting the head, platforms, distributor, etc. (GX-17, p. 1)

Dr. Jin further testified that during its erection, the elevator was not supported by any wires other than the crane hook, that the accident occurred because the erection contractor did not follow the erection procedure recommended by the manufacturer, and that once the crane was unhooked the entire elevator became a cantilever structure. Dr. Jin concluded that the structure was unstable once the crane hook was removed. (Tr. 296-308; GX-183).

Rodney Nohr

Mr. Nohr testified as the Secretary's expert in the erection of grain elevator legs. He stated that he was very familiar with the type of leg that was being erected by Agra and that the Reilly manual was fairly consistent with what other leg manufacturers recommend for leg erection. Based upon the written materials he reviewed and the court testimony he heard, he concluded that "the erection method was very unsafe, very dangerous." (Tr. 329-40).

Mr. Nohr further explained his conclusion as follows:

> In reading al [sic] the information, all of the statements by the people that were on site, it was very apparent that leg sections 2, 3 and 4 were erected without guy cables being in place and it was an extremely unstable structure. When they sat the second leg trunking section without installing guys, at that point they were already making a large mistake because when they would set the third section on top the second section, there would have to be a man there to be putting bolts in and if the crane operator would happen to jiggle just right or wrong and would happen to bump the leg, it could have went over and injured somebody at that point already then, so it was wrong by the numbers from the very start to the very finish. (Tr. 340-341).

Mr. Nohn also testified as follows:

> Q: The testimony in this case has been that there may have been two guys attached to the head platform, but there were no intermediate guys, does that present any issues in your mind?
>
> A: As long as the crane is hooked up, no.
>
> Q: What if the crane is not hooked?

A: An already unstable structure is even more dangerous because the likelihood of somebody pulling on one cable with no counteracting force on the other side and down she'll come. (Tr. 347).

Q: Assuming that Agra Erectors arrived on the site, presented with the single crane without the two-cable hookup, no tower, and the trunking sections already with some ladders and cages attached to it, was there a safe method for them to erect that grain elevator?

A: Yes.

Q: And, what would that method have been?

A: Lift a section and guy it, lift another section and guy it, or when they put the head on it, have the guy cables on it, or leave the crane on it until you use a lariat and pull the cables up into place. (Tr. 351).

Serious Citation 1, Item 1 - Proposed Penalty: $3,000.00

This citation item alleges a violation of section 5(a)(1) of the Act as follows:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to multiple injuries from falling hazard when employees are elevated on platforms when used with a powered industrial truck and the platform is not secured to the lifting carriage:

(a) Agra Erectors, Mill Hall, Pa: The wooden pallet used as a platform to hoist an employee to a height of approximately 10 feet was not secured to the forks of the Wrangler fork lift. The platform did not have a guardrail system.

At the hearing, Agra withdrew its notice of contest with respect to the alleged section 5(a)(1) violation. Consequently, the only aspect of this citation that remains unresolved is whether $3,000.00 is an appropriate penalty. (Tr. 11-13, 229).

OSHA CO James Jury testified that Richard Kiser, an Agra employee, was standing on a wooden pallet that was approximately 10 feet off the ground, that the wooden pallet was not designed to be installed on a forklift, and that the pallet was not secured in any fashion. The CO said the pallet "could have jostled off by him moving around on it," that there was

no operator on the forklift to keep hydraulic pressure on the lift, and that "there were no guardrails, nothing to keep him from falling off including no adequate fall arrest system." The CO also said that the employee was "standing there jostling around, doing whatever with the cable, he could have easily stepped off of it," and that the likelihood of an accident and serious injury was great. CO Jury further testified that a gravity-based penalty of $5,000.00 was proposed, which was reduced by 40 percent due to Agra's small size; however, no reduction for history or good faith was given because Agra had had prior OSHA violations and two previous worker fatalities. (Tr. 230-32).

Once a contested case is before the Commission, the amount of the penalty proposed is just that -- a proposal. The Commission, as the final arbiter of penalties, makes the 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 factors are the gravity of the violation and the employer's size, history and good faith;

the gravity of the violation is the most significant factor. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1972); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128 (No. 76-2644, 1981); *Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992).

CO Jury articulated the reasons for the proposed penalty of $3,000.00. Agra argues that the penalty should be reduced based on the duration of employee exposure, the number of employees exposed and the precautions it took to reduce the potential for an accident or

injury. This argument is not persuasive, in light of CO Jury's testimony. This item is affirmed as a serious violation, and the proposed penalty of $3,000.00 is assessed.

Willful Citation 2, Item 1 - Proposed Penalty: $42,000.00

The Secretary's motion to amend her citation and complaint was granted on September 2, 1998. As amended, the complaint states as follows:

> Citation 2, Item 1 alleging a violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the OSH Act") is amended to allege, in the alternative, a violation of:
>
> 29 C.F.R. § 1926.501(a)(2): The employer did not determine if the walking/working surfaces on which its employees were to work had the structural integrity to support employees safely. Employees were allowed to work on those surfaces when the surfaces did not have the requisite strength and structural integrity.
>
> 29 C.F.R. 1926.501(a)(2) provides that:
>
> The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

Agra asserts that the elevator had structural integrity while the crane was attached to it. However, this position is directly contrary to the above-noted testimony of Rodney Nohr, one of the Secretary's expert witnesses. (Tr. 340-41, 347). Mr. Nohr's testimony was credible and convincing, and Agra did not rebut it. Agra's assertion is accordingly rejected.

Agra also asserts that the cited standard is prospective in application, that is, that it does not create a continuing obligation on the employer's part as long as the employer makes a determination of structural integrity before it permits an employee to work in a particular

location. According to Agra, the employer must determine a surface has structural integrity before assigning employees to work there and is prohibited from permitting employee access to the surface unless and until it has confirmed the structural integrity of the surface. Agra contends that it made the appropriate determination in this case, that employee Donald Johnson altered the conditions without its knowledge, and that Mr. Johnson's act of unhooking the crane was unpreventable employee misconduct.[10] (Agra's Brief, p. 13).

To meet the affirmative defense of unpreventable employee misconduct, the employer must show that: (1) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were discovered. *Halmar Corp.*, 18 BNA OSHA 1014, 1017 (No. 94-2043, 1997); *Falcon Steel Co.*, 16 BNA OSHA 1179, 1193 (Nos. 89-2883 & 89-3444, 1993).

Agra has failed to meet the first prong of the test and therefore cannot prevail in its asserted defense. According to the testimony of CO Jury, Agra had no safety and health program. Specifically, the CO testified as follows:

> Q: How do you know they had no safety and health program?
>
> A: I asked numerous times. I asked Mr. Bill Johnston on site if he had a company safety and health program and the answer was no.
>
> I asked Mr. Bill Swabb via the phone if he had any kind of safety procedures, his answer was no. I think I also asked Mr. Auman after he started representing the company for any procedures that -- any kind of safety procedures that the company may have had and I think Mr. Auman's response was he would check with his client, if there were some he would send them to me.

[10]Because I am resolving this item on the basis of Agra's asserted unpreventable employee misconduct defense, I need not address the company's interpretation of the cited standard.

> I have, up to this date, never seen any safety and health program of Agra Erectors yet. (Tr. 239).

Based on the foregoing, Agra's contention that Donald Johnson's act of unhooking the crane was unpreventable employee misconduct is rejected, and I find that Agra was in violation of the cited standard. With respect to the willful characterization, the Commission has defined willful violations as those that are commited "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984).

CO Jury testified that he considered the fact that William Johnston, Agra's foreman, was knowledgeable in regard to the manufacturer's recommended procedure for erecting the elevator but chose not to follow those recommendations. The CO also considered the fact that Mr. Johnston had ordered David Ludwig, the crane operator, to let up on his line so that Mr. Johnson could unhook the crane, and the fact that Michael Leupold, Webb's maintenance foreman, had questioned the integrity of the grain elevator at some point before the head section was set on.[11] Finally, the CO considered William Johnston's own statement that he knew that Donald Johnson was on the elevator, that the hook of the crane was on the ground, and that the elevator was therefore unsecured. CO Jury pointed out that notwithstanding Mr. Johnston's responsibility for the health and safety of Agra's employees at the site, he had allowed Donald Johnson to remain on top of the elevator after the crane was unhooked. (Tr. 240-41).

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[11]The testimony of Michael Leupold and David Ludwig was in accord with that of CO Jury. (Tr. 43, 105-06).

In view of the record, I conclude that the violation was committed with intentional, knowing or voluntary disregard of the requirements of the Act or with plain indifference to employee safety. The violation is therefore affirmed as willful.

Turning to the assessment of an appropriate penalty, the Secretary has proposed a penalty of $42,000.00 for this citation item. CO Jury testified that this amount was based on the maximum penalty for a serious violation, $7,000.00, which was multiplied by 10 for a total gravity-based penalty of $70,000.00. The CO further testified that a 40 percent reduction was then applied, due to the small size of Agra's business, which reduced the penalty to $42,000.00. (Tr. 241). In light of this testimony, the penalty as proposed is appropriate, and it is accordingly assessed.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed, is as follows:

Citation 1	**Violation**	**Disposition**	**Classification**	**Penalty**
Item 1	§ 5(a)(1)	Affirmed	Serious	$ 3,000.00
Citation 2	**Violation**	**Disposition**	**Classification**	**Penalty**
Item 1	1926.501(a)(2)	Affirmed	Willful	$42,000.00

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: June 1, 1999
Washington, D.C.