UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR, Complainant, v. MERCHANT'S MASONRY, INC., Respondent.	OSHRC Docket No. 92-424

DECISION

Before: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

Merchant's Masonry, Inc. ("Merchant's") was performing masonry work at a construction site when the area director of the local Occupational Safety and Health Administration ("OSHA") office in Baton Rouge, Louisiana, drove by the worksite and noticed employees working on the top level of an 18-foot-high scaffold with no guardrails. The area director proceeded to his office, where he mentioned this situation to a supervisor, who dispatched a compliance officer to investigate. As a result of an inspection of the worksite, OSHA issued a citation alleging that Merchant's had violated a number of OSHA safety standards. After a hearing, Administrative Law Judge Stanley M. Schwartz issued a decision finding that Merchant's had violated the standards, assessing a total penalty of $700. The issues directed for review are whether the judge erred in finding that one of the items was not serious and whether the penalties he assessed for four of those violations were appropriate.

I. THE SCAFFOLD CITATION

Because the 18-foot-high scaffold on which four of Merchant's employees were working was unguarded, the Secretary of Labor issued a citation alleging that Merchant's had committed a willful violation of 29 C.F.R. § 1926.451(d)(10).[1] The judge affirmed the violation as willful and assessed a penalty of $500.[2]

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). These factors are not accorded equal weight; normally, the most significant consideration in assessing a penalty is the gravity of the violation. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, p. 20,968 (No. 401, 1973). Gravity includes a number of factors, including the number of employees exposed to the hazard, the duration of their exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶ 25,738, p. 32,107 (No. 76-2644, 1981); *Turner Co.*, 4 BNA OSHC 1554, 1567, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), *rev'd on other grounds*, 561 F.2d 82 (7th Cir. 1977).

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[1]That standard provides:

> **§ 1926.451 Scaffolding.**
>
> . . . .
>
> (d) *Tubular welded frame scaffolds....*
>
> . . . .
>
> (10) Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

[2]The judge's finding that the violation in question was willful is not on review.

Examining those factors here, we find that there were four employees exposed for at least the amount of time that it took for the area director to reach his office and set the wheels in motion for the inspection and for the compliance officer to arrive at the site. Merchant's had taken no precautions to prevent its employees from falling. Although the likelihood of a fall may not have been high, there was substantial likelihood that there would be a serious injury in the event of a fall from a height of 18 feet. On balance, then, we consider this violation to be of moderate gravity.

The Secretary did not state the exact number of employees employed by Merchant's. The record indicates that Merchant's had 9 employees at this site, but the company apparently had other jobs going as well. Based on the information before us, we would consider this to be a small company. We find it inappropriate here to allow any credit for good faith or for previous history, because Merchant's had been cited for three prior violations of this same standard, and its superintendent on the site admitted that, although he knew of the standard's requirements, he elected to proceed without guardrails since his normal scaffold supplier did not have any available, rather than to try to obtain railings from another supplier or to build them. Under the circumstances, it appears that a penalty of $7,500 is appropriate for this violation.[3]

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[3]The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990), amended section 17(a) of the Act, 29 U.S.C. § 666(a), to provide that an employer may be assessed a penalty of up to $70,000 for a willful or repeated violation "but not less than $5,000 for each willful violation." Because we find it appropriate to assess a penalty higher than $5,000, we need not reach either the argument made by Merchant's that the amendment did not establish a mandatory minimum for the reason that the Commission has the authority to assess no penalty for a violation that is not serious, so a willful violation that is not serious could carry no penalty, or the Secretary's argument that the Commission has no authority to assess a penalty of less than $5,000 for any willful violation. We therefore express no view on these issues, which were not directed for review. Under Rule 92(a) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.92(a), except in unusual circumstances, the Commission will not decide issues that have not been directed for review. *Northwood Stone & Asphalt, Inc.* 16 BNA OSHC 2097, 2098 n.1, 1994 CCH OSHD ¶ 30,583, p. 42,347 n.1 (No. 91-3409, 1994). Commissioner Foulke notes that our finding that there was a substantial likelihood of serious harm if an employee fell is an implicit finding that this violation was willful-serious and that the amendment to section 17(a) establishing a statutory

(continued...)

II. THE FORKLIFT CITATIONS

The compliance officer observed three violations of OSHA standards involving a forklift that Merchant's leased for use at this jobsite: the forklift had no seatbelt, its horn did not work, and it was left running with its forks at waist height. The judge found that these conditions violated the standards at 29 C.F.R. §§ 1926.602(a)(2)(i)[4], 1926.602(a)(9)(i)[5], and 1926.602(c)(1)(vi)[6] respectively. The merits of these violations are not on review. The

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[3](...continued)
minimum would apply where the Commission finds a penalty below that amount to be appropriate.

[4]That standard provides:

> **§ 1926.602 Material handling equipment.**
>
> (a) *Earthmoving equipment; General* (1)
> . . . .
> (2) *Seat belts.* (i) Seat belts shall be provided on all equipment covered by this section and shall meet the requirements of the Society of Automotive Engineers. J386-1969, Seat Belts for Construction Equipment. Seat belts for agricultural and light industrial tractors shall meet the seat belt requirements of Society of Automotive Engineers J333a-1970, Operator Protection for Agricultural and Light Industrial Tractors.

[5]That standard provides:

> **§ 1926.602 Material handling equipment.**
>
> (a) *Earthmoving equipment; General* (1)
> . . . .
> (9) *Audible alarms.* (i) All bidirectional machines, such as rollers, compacters [sic], front-end loaders, bulldozers, and similar equipment, shall be equipped with a horn, distinguishable from the surrounding noise level, which shall be operated as needed when the machine is moving in either direction. The horn shall be maintained in an operative condition.

[6]That standard provides:

> **§ 1926.602 Material handling equipment.**
> . . . .

(continued...)

questions before us involve the degree of the violation involving the lack of an operable horn and the appropriateness of the penalties assessed by the judge for all three violations.

A. 29 C.F.R. § 1926.602(a)(9)(i).

The Secretary alleged that the violation of section 1926.602(a)(9)(i) for not having an operable horn on the forklift was serious. The compliance officer testified that, because the horn did not work, the forklift could go around a blind corner and strike an employee who could not be warned by the operator's horn. The judge found that the Secretary had failed to prove that the violation was serious because the worksite was open and was large enough to go wide around the corners, and the forklift moved at no more than 5 miles per hour.

A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), if it creates a substantial probability of death or serious physical harm. It is clear that the failure to use a horn to warn employees of the forklift's approach at 5 miles per hour is not likely to cause

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[6](...continued)

> (c) *Lifting and hauling equipment (other than equipment covered under Subpart N of this part).* (1) Industrial trucks shall meet the requirements of § 1926.600 and the following:
>
> . . . .
>
> (vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, Safety Standards for Powered Industrial Trucks.

The American National Standards Institute standard incorporated by reference provides in pertinent part:

> SECTION 6
>
> OPERATING SAFETY RULES AND PRACTICES
>
> . . . .
>
> 603 GENERAL
>
> . . . .
>
> E. When leaving a powered industrial truck unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shut off, brakes set, key or connector plug removed. Block wheels if truck is parked on an incline.

an accident. However, the question is not whether an accident was a likely result of this violation. The provision in section 17(k) that a violation is serious if there is a substantial probability that death or serious physical harm could result does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur. *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin*, 1 BNA OSHC at 1205, 1971-73 CCH OSHD at pp. 20,967-68. Examining whether, if an accident did occur, the likely result would be a serious injury, we find that an employee who was struck by a pallet of bricks or by the extended forks, even at 5 miles per hour or less, could suffer serious injury. Accordingly, we conclude that the judge erred in classifying this violation as not serious. We find that this was a serious violation.

The Secretary proposed a penalty of $900 for this violation; the judge found that it was not a serious violation and concluded that it was appropriate to assess no penalty. Having found that the violation was serious, we must assess a penalty.

Assessing the gravity of the violation, we find that all employees on the worksite except the forklift operator were exposed. Since Merchant's had nine employees on the site, eight employees were exposed. The duration of the exposure began when the walls of the structure were built high enough that the employees and the forklift operator could not see each other around corners, and it lasted several days. The record does not indicate that Merchant's took other precautions to prevent an accident, although the likelihood of an accident may be considered low because the low speed of the forklift could enable the operator to avoid one. The record shows that Merchant's had a history of violations of other safety standards, but does not indicate that the company had previously been cited for a violation of this standard. In terms of good faith, we note that, while the forklift came from the rental company with a defective horn, Merchant's does not appear to have made any attempts to have the horn repaired or replaced. On balance, we consider a penalty of $250 to be appropriate.

B. 29 C.F.R. § 1926.602(a)(2)(i).

The Secretary proposed a penalty of $1,200 for the violation of 29 C.F.R. § 1926.602(a)(2)(i), involving the lack of a seatbelt on the forklift; the judge assessed a

penalty of $100. We deem $250 to be an appropriate penalty for this violation in light of the statutory penalty factors below.

The potential hazard was that, if the forklift tipped, the operator could be thrown from his seat and injured, perhaps even rolled on by the forklift. The only employee exposed to the violation was the forklift operator, but the violation continued as long as the forklift was being operated. Merchant's took no other precautions to protect the operator because it did not perceive this to be a hazard, and we consider the likelihood that an accident would occur to be low. Again, Merchant's was a small company with a history of safety violations but no prior violations of this standard. Finally, it rented the forklift, which came without a seatbelt.

C. 29 C.F.R. § 1926.602(c)(1)(vi).

The final item on review alleged that the forklift was left running with its forks at waist height, a practice prohibited by the American National Standards Institute standard incorporated by reference into 29 C.F.R. § 1926.602(c)(1)(vi). The compliance officer testified that the danger resulting from this violation was that, if the forklift accidentally was knocked into gear and began moving without a driver, it could impale an employee. The record indicates that the forklift was difficult to start and that it had been left running because the operator feared that, if he turned it off, he might not be able to get it started again. Merchant's had already called the leasing company and was waiting for a mechanic to arrive and repair the machine. The Secretary proposed a penalty of $1,200 for this item, and the judge assessed a penalty of $100.

The evidence as to Merchant's' size and prior history is the same as for the other items. As to good faith, we note that Merchant's had called the leasing company and requested that the defect be corrected, although it continued to operate the machine. We consider the gravity here to be low because the only employee who was seen to be exposed to this situation was the forklift operator himself, and the condition existed only intermittently during that morning. Although Merchant's did not take any alternative precautions to prevent an accident, the likelihood that an accident would occur was low.

Here, we deem it appropriate to assess a penalty larger than that assessed for the other forklift items because Merchant's had more control over this situation. Even if it was

necessary to leave the forklift running, the fork should have been lowered as required by the standard. The combination of these conditions, both of which were within the control of the Merchant's employee operating the forklift, makes a larger penalty appropriate. On balance, we find that a penalty of $400 is appropriate.

III. CONCLUSION

For the reasons above, we find that the judge erred in finding that the violation of 29 C.F.R. § 1926.602(a)(9)(i) was not serious. We find that it was a serious violation and assess a penalty of $250. We assess penalties of $250 for the violation of 29 C.F.R. § 1926.602(a)(2)(i) and $400 for the violation of 29 C.F.R. § 1926.602(c)(1)(vi). For the willful violation of 29 C.F.R. § 1926.451(d)(10), we assess a penalty of $7,500.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya by WAM
Velma Montoya
Commissioner

Dated: December 30, 1994

Weisberg, Chairman, concurring:

I agree with what my colleagues decided in this case, namely that a penalty of $7500 is appropriate for the scaffold violation, that the judge erred in classifying the violation of section 1926.602(a)(9)(1) (not having an operable horn on the forklift) as not serious, and that penalties of $250, $250 and $400 are appropriate for the three forklift violations. However, I take issue with what they failed to decide.

I would hold that the judge erred by assessing a penalty lower than $5000 for the scaffold violation because it is a serious willful violation and the Omnibus Budget Reconciliation Act of 1990, Pub L No. 101-508, § 3101 (1990) clearly sets a minimum penalty of $5,000 for such violations. The Budget Reconciliation Act multiplied sevenfold the maximum penalties that could be assessed and amended section 17(a) to provide that an employer may be assessed a penalty of up to $70,000 for a willful or repeated violation, "but not less than $5,000 for each willful violation." 29 USC § 666(a).

In assessing a penalty of $500 for a willful violation, the judge failed to address or even mention the issue of a $5,000 statutory minimum for a willful violation. The fact that the Commission is assessing a penalty in excess of $5,000 does not obviate the need to correct the judge's error and omission. By not correcting the judge's oversight and by choosing to avoid the issue, my colleagues have compounded the judge's error.

I am mindful of the need to exercise some judicial restraint and to not expend resources deciding unnecessary issues. However, the judge's action in assessing a penalty less than the statutory minimum goes to the heart of this case and is of major importance in the enforcement of the Act. This is an issue that was squarely raised by the Secretary and argued by both the Secretary and Merchant's in their briefs to the Commission and is clearly encompassed in the directed issue of what penalty the Commission should assess for willful citation 2, item 1. This is an important issue that the judge totally missed. This is not an issue to save for a rainy day. Nor has the Commission decided so many issues this month that this additional holding could be considered burdensome. In short, there is no good reason for my colleagues choosing to duck this issue. In the 1990 Budget Reconciliation Act, Congress set a minimum penalty of $5,000 for a willful violation. Whether or not my

colleagues agree with Congress' action, Congress has spoken and they have to take cognizance of the fact that there is now a $5,000 minimum penalty for a willful violation.

Stuart E. Weisberg

Stuart E. Weisberg
Chairman

Dated: December 30, 1994

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-0424
MERCHANT'S MASONRY, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 30, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

December 30, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0424

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 501
525 S. Griffin Street
Dallas, TX 75202

Steven E. Sanders, Esquire
Gunn, Smith & Kaster, R.L.L.P.
Building One
5800 One Perkins Place Drive
Baton Rouge. LA 70808

Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242-0791

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
MERCHANT'S MASONRY, INC.
Respondent.

OSHRC DOCKET
NO. 92-0424

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 1, 1993. The decision of the Judge will become a final order of the Commission on July 1, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before June 21, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 1, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0424

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

Keith Merchant
Merchang's Masonry, Inc.
1002 Jason Drive
Denham Springs, LA 70726

Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242 0791

00108765918:06

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242-0791

PHONE:
COM (214) 767-5271
FTS 729-5271

FAX:
COM (214) 767-0350
FTS 729-0350

SECRETARY OF LABOR, Complainant, v. MERCHANT'S MASONRY, INC., Respondent.	:	OSHRC DOCKET NO. 92-0424

APPEARANCES:

Ernest A. Burford, Esquire
Dallas, Texas
For the Complainant.

Keith R. Merchant
Denham Springs, Louisiana
For the Respondent, *pro se.*

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") inspected a construction worksite in Baton Rouge, Louisiana, where Respondent was performing masonry work, on October 16, 1991; as a result, Respondent was issued a serious citation with six items and a willful citation with one item. Respondent contested both citations, and a hearing was held on August 21, 1992.

Willful Citation 2 - 29 C.F.R. § 1926.451(d)(10)

The subject standard provides as follows:

> Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

The inspection in this case came about after the Baton Rouge OSHA area director drove by the site on October 16 and observed employees on an unguarded scaffold; he reported the condition to one of the supervisors in his office, who in turn assigned Greg Honaker, an OSHA compliance officer, to inspect the site. Upon arriving at the site, Honaker saw employees working on top of a scaffold about 18 feet high without any protection, as depicted in G-2 and G-3. He discussed the condition with Scott Merchant, the company's jobsite superintendent, who promptly had the company's scaffold builder put another level of scaffolding on top of that already erected and a midrail across each section on that level, as shown in G-4; in Honaker's opinion, the single midrail across each section's cross bracing abated the hazard.

Honaker testified that when he asked why the scaffolding was unguarded, Merchant told him the employees had only a few rows of bricks to lay and would not be up on the scaffold for long. Honaker also testified that when asked if he ever guarded scaffolds over 10 feet high, Merchant replied "sometimes we do and sometimes we don't." Upon returning to his office and checking its history, Honaker learned the company had been cited pursuant to the same standard three previous times, in 1987, 1988 and 1989. He went back to the site the next day to discuss the prior citations with Merchant, who told him he recalled them.

In addition to the foregoing, the Secretary presented at the hearing G-6, a copy of the settlement agreement pertaining to the 1989 inspection, which, as Respondent itself admits, involved a citation for lack of guardrails. The Secretary also presented G-7, a copy of a default judgment issued in 1990 for the amount of $4,317.98 plus interest, and Respondent does not dispute the Secretary's assertion that G-7 relates to the 1987 and 1988 inspections and that both of those involved citations for lack of guardrails.

In defense of the citation, Respondent contends that OSHA has a "vendetta" against it. Respondent has, in fact, had several OSHA inspections. Besides those noted above, the company was inspected a week before the subject inspection, which resulted in a hearing before the undersigned on April 2, 1992. Moreover, Keith Merchant, Respondent's president, testified that one of his jobsites was inspected just prior to the subject hearing. Nevertheless, as noted at the hearing, there is no evidence of any improprieties on the part of OSHA in regard to its dealings with the company; accordingly, Respondent's contention is rejected.

Respondent next contends that OSHA's enforcement of the guarding requirements has been inconsistent. In support of this contention, Keith Merchant testified that the OSHA representative who conducted the latest inspection advised the company that the method approved by Honaker, which was in use at the site, did not comply with the standard. However, even assuming *arguendo* that there have been some inconsistencies in OSHA's enforcement of the standard, it is undisputed Respondent's employees were working on top of the scaffold at the subject site without *any* protection.[1] Respondent's contention is therefore rejected.

Respondent's final contention is that the violation was not willful. In this regard, Keith Merchant testified he had tried to have guardrails at the site but that the company from which he had rented the scaffolding had none available. He explained that the company had given him the last of its guardrails for the job that was inspected a week before the subject site, and that it was to have notified him when it had more guardrails available.[2] He also explained that his employees had been at the subject site for a week or two at the time of the inspection, that they were protected by the cross bracing on the lower levels, and that the guardrails installed on the top level were probably rebar.

Merchant further testified he has had his own business for ten years, and that his employees always erect the scaffolding; most of them have been with him since the inception

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[1]I note that OSHA has recently reopened its scaffolding rulemaking record, and that one of the areas to be addressed is the use of cross bracing as fall protection. *See* 58 Fed Reg. 16,509, March 29, 1993. Regardless, as noted above, Respondent's employees were working on the scaffold without any fall protection.

[2]Merchant noted the guardrails were used on the other site, and that no citation was issued in that regard.

of the company, which, in his view, operates safely and tries to meet OSHA requirements. His job superintendents, including his brother, Scott Merchant, are aware of the scaffolding requirements due to meetings he has held with them, and he visits sites to try to improve safety but cannot be there all the time. Merchant said he had told all of his job superintendents to guard scaffolds over 10 feet high, that the employees on top of the scaffold should have had guardrails, and that he was unaware of the situation until after the inspection. He also said the employees had probably been working about a foot from the edge of the scaffold, which he acknowledged was dangerous, and that he would never knowingly expose employees, particularly his own brother, to a hazard.

To establish a willful violation, the Secretary must show it "was committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety." *A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1019, 1986-87 CCH OSHD ¶ 27,786, p. 36,339 (No. 83-1189, 1987). To demonstrate intentional disregard, there must be evidence the employer was aware of the applicable standard and consciously disregarded it. *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1257, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). As *Williams* further explains:

> 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....It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation.

Id. at 1256-57 and p. 36,589.

It is clear that both Keith and Scott Merchant were well aware of the scaffolding guardrail requirements, particularly in light of company meetings in that regard and the previous citations issued by OSHA. Despite this awareness, Scott Merchant allowed the employees at the site to work on top of the scaffolding without any protection. Based on the record, it can only be concluded that Merchant's failure to comply with the standard was a conscious disregard of the Act, and, consequently, a willful violation. This conclusion is supported by a recent Commission decision which found a willful violation on similar facts. *See Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1613-14, 1992 CCH OSHD ¶ 29,673, pp. 40,209-11 (No. 87-2007, 1992). Moreover, as a supervisory employee, Scott Merchant's knowledge of the condition is imputable to Respondent. *See, e.g., Clarence M. Jones*, 11

BNA OSHC 1529, 1531, 1983 CCH OSHD ¶ 26,516 p. 33,749 (No. 77-3676, 1983). This citation is accordingly affirmed as a willful violation.

Turning to the assessment of an appropriate penalty, I note Respondent's small size and financial difficulties, and Keith Merchant's testimony that none of his employees has ever fallen from a scaffold and that the only accident in the last three years resulted from a worker dropping a block on his foot. I note also the violation's apparently short duration, and that the company has exhibited good faith by its prompt abatement of the condition and other efforts to comply with the Act, including consulting with a State OSHA agency. Finally, I note that Respondent is "offering the olive branch" to OSHA. It is hoped that Respondent will contact OSHA, and that the agency will advise the company of what it views as the proper means of complying with the standard. In any case, for the foregoing reasons it is concluded that a penalty of $500.00 is appropriate for this citation.

Serious Citation 1 - Items 1, 2 and 3

These items allege violations of 29 C.F.R. §§ 1926.59(e)(1), (g)(1) and (h) of the Hazard Communication ("HAZCOM") standard, which provide as follows:

> 1926.59(e)(1) - Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces....
>
> 1926.59(g)(1) - Employers shall have a material safety data sheet for each hazardous chemical which they use.
>
> 1926.59(h) - Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

The basis of these citation items, pursuant to the language of the citations themselves and Honaker's testimony, was the company's use of mortar mix and muriatic acid at the site and its failure to comply with the foregoing provisions. It is undisputed the company had not developed a written program or provided HAZCOM training at the time of the inspection, and that it also did not have material safety data sheets ("MSDS's") for mortar mix and muriatic acid.[3] It is also undisputed that mortar mix, which can cause skin irritation

[3]Based on the testimony of Keith Merchant, the company has obtained MSDS's for mortar mix and muriatic acid since the inspection and has also complied with the written program and training aspects of the standard.

and dermatitis, was used at the site. However, the record demonstrates that muriatic acid, which can cause severe eye injuries and burns, was not used at the site, although it is used at some of the company's jobsites. The record further demonstrates the serious characterization of these items was based on Honaker's mistaken belief that muriatic acid was, in fact, used at the site.

Although the foregoing establishes violations of the cited standards, the violations are properly classified as nonserious. The only chemical in use at the site was mortar mix, which, as noted above, can cause skin irritation or dermatitis. In a recent decision, the Commission held a HAZCOM violation to be nonserious because the Secretary failed to show that the skin rash which could have resulted from using the chemicals in that case represented a substantial probability of death or serious harm. *ARA Living Centers of Texas, Inc.*, 15 BNA OSHC 1417, 1418, 1992 CCH OSHD ¶ 29,552, p. 39,957 (No. 89-1894, 1991). These items are therefore affirmed as nonserious violations, and no penalties are assessed.

Serious Citation 1 - Items 4, 5 and 6

These items allege violations of 29 C.F.R. §§ 1926.602(a)(2)(i), (a)(9)(i) and (c)(1)(vi) of the material handling equipment standard, which provide as follows:

> 1926.602(a)(2)(i) - Seat belts shall be provided on all equipment covered by this section....
>
> 1926.602(a)(9)(i) - All bidirectional machines ... shall be equipped with a horn, distinguishable from the surrounding noise level, which shall be operated as needed when the machine is moving in either direction. The horn shall be maintained in an operative condition.
>
> 1926.602(c)(1)(vi) - All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in [ANSI] B56.1-1969, Safety Standards for Powered Industrial Trucks.

The record shows that a bidirectional Koehring forklift which Respondent had rented and was using to move materials at the site had no seat belt and an inoperable horn. The record further shows that the forklift was left running and unattended with its forks elevated about 45 inches during the lunch break. Honaker testified that all three of these conditions were serious violations; the lack of a seat belt could have caused the operator to be thrown

out and crushed by the forklift, its inoperable horn could have resulted in it striking an employee, and its being left running and unattended could have resulted in its moving and hitting an employee or a worker walking into the raised forks.

In regard to items 1 and 2, Respondent contends it was not responsible for the missing seat belt and inoperable horn because it had leased the forklift and did not own it. This contention is rejected; Commission precedent is well settled that an employer is responsible for hazardous conditions to which its employees are exposed, even if it did not create the conditions.

Respondent next contends items 1 and 2 were not serious hazards because, as Keith Merchant testified, the terrain was level, the forklift was only running at about 5 miles per hour, and there would have been no sudden stops. This contention is unpersuasive in regard to item 1, since it is apparent that load-handling equipment is susceptible to becoming unbalanced, which, in this case, could have caused the operator to be thrown from the forklift and seriously injured. However, Respondent's contention is persuasive in regard to item 2, since the lack of a horn on the slow-moving equipment, while violating the standard, did not create a substantial probability of death or serious injury. Item 1 is affirmed as a serious violation with a $100.00 penalty, and item 2 is affirmed as a nonserious violation with no penalty.

In regard to item 3, Keith Merchant testified the forklift had been left idling because it had not been running properly and would not start again if it was turned off; he also testified that his company had already contacted the leasing establishment that day and was waiting for its mechanic to arrive and repair the forklift. While this testimony explains the condition, it does not rebut Honaker's testimony about the serious nature of the violation. Item 3 is affirmed as a serious violation with a $100.00 penalty.

Conclusions of Law

1. Respondent, Merchant's Masonry, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.602(a)(2)(i) and 1926.602(c)(1)(vi).

3. Respondent was in nonserious violation of 29 C.F.R. §§ 1926.59(e)(1), 1926.59(g)(1), 1926.59(h) and 1926.602(a)(9)(i).

4. Respondent was in willful violation of 29 C.F.R. § 1926.451(d)(10).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 4 and 6 of citation number 1 are AFFIRMED as serious violations, and a penalty of $100.00 is assessed for each of these items.

2. Items 1, 2, 3 and 5 of citation number 1 are AFFIRMED as nonserious violations, and no penalties are assessed for these items.

3. Item 1 of citation number 2 is AFFIRMED as a willful violation, and a penalty of $500.00 is assessed.

Stanley M. Schwartz
Administrative Law Judge

Date: MAY 24 1993