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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. ANDERSON EXCAVATING AND WRECKING COMPANY, Respondent.	:	OSHRC Docket No. 92-3684

DECISION

Before: WEISBERG, Chairman; MONTOYA, and GUTTMAN, Commissioners.

BY THE COMMISSION:

At issue here is the Secretary's proposed willful classification for a violation of 29 C.F.R. § 1926.105(a).[1] Administrative Law Judge Paul. L. Brady reduced the classification to serious and assessed a $1, 000 penalty. For the following reasons, we find the violation willful and we increase the penalty assessment to $5, 000.

On August 18, 1992, when Anderson Excavating and Wrecking Company was engaged in manually demolishing the lower stories of a bank vault in Galesburg, Illinois, Assistant Area Director Rosemary Cooper conducted an inspection on behalf of the Occupational Safety and Health Administration ("OSHA"). Cooper observed three Anderson

[1]Section 1926.105(a) provides that "Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical."

employees, laborers Todd Ash and Gary MacKey, and a working foreman, Roy Brown, standing upon the second floor of the vault only a few feet from the edge of a substantially demolished wall. The height above the ground was approximately 35 feet.[2] The Anderson employees were not protected against the 35-foot fall by any form of fall protection , such as safety belts or safety nets. In lieu of fall protection, Brown testified at the hearing that he watched Ash and MacKey and warned them to be careful not to fall. According to Cooper, she classified Anderson's violation as willful because Anderson had been notified of OSHA's fall protection requirements by two prior citations to section 1926.105(a) that were issued on May 15 and June 12, 1992 regarding demolition work elsewhere.

Willful violations require a "heightened awareness' of the relevant standard or duty that demonstrates a voluntary or conscious disregard for the Act's requirements *or* a plain indifference to employee safety.[3] *E.g., Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-7, 1986-87 CCH OSHD ¶ 27, 983, p. 36, 589 (No. 85-355, 1987). *Williams* further provides:

> A violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of an employer's good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter or

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[2]Anderson did not petition for review of the judge's finding that the standard had been violated. However, in its review brief, Anderson continues to argue that section 1910.105(a) was inapplicable because the fall distance was less than 25 feet. The judge rejected the testimony of four Anderson employees that the height was no more than 25 feet. He relied instead on OSHA Assistant Area Director Cooper's testimony that the actual measurement of the height with a 25-foot long measuring rod established that the height was approximately 35 feet. Exhibit C-10 is a photograph taken by OSHA which shows the length of the wall above where the rod ended and that the rod falls short of the top of the wall to which it is adjacent. The rod was held during measurement by Anderson Supervisor Baker, who had worked for the company for 30 years. Mr. Baker testified that he did not recall disengaging any latches (which might have shortened the rod) during the measurement process.

[3]To prove willfulness under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651-678("the Act") it is *not* necessary to show "malicious intent" or "venal motive." *See, e.g.,Western Waterproofing* v. *Marshall*, 576 F.2d 139, 142-143 (8th Cir.1978)(emphasis added).

> concerning the interpretation of a standard was reasonable under the circumstances.

13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591. The Commission has further explained that "[a] willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete. " *Valdak Corp.*, 17 BNA OSHC 1135, 1139 1993-95 CCH OSHD ¶ 30,759, 42,743 (No. 93-239, 1995), *aff'd,* 73 F.3d 1455 (8th Cir. 1996).

The violative conduct here involved a working supervisor and two laborers, with a second supervisor within ready observation of the violation. Anderson was well aware of the cited standard, for it is essentially contained in one of the workrules in the company's safety plan. The question here is whether the record shows that, having recognized the rule on paper, Anderson strayed so far from implementing it at this worksite as to be plainly indifferent to the safety of its employees.

We find that Anderson was plainly indifferent to the safety of its employees. The evidence is clear that at this worksite Anderson failed to provide its employees with the fundamental means essential for compliance with the standard -- a safety program, training in the recognition of hazards, and equipment to comply with the standard and protect them against falls. The first two of these three omissions were cited in this proceeding as serious violations of the Act. The judge affirmed these items and Anderson did not petition for review of them.[4] The judge found a violation of 29 C.F.R. § 1926.20(b)(2) the safety program standard because Anderson substituted "vague advice" (such as supervisors Baker and Brown saying "[D]on't fall" or "[S]tay away from the edges") to its workers for

[4]The judge did not take these findings into consideration in determining whether the violation of section 1926.105(a) was willful. Rather, he focused on the height of the workplace and tersely concluded, "[A]lthough a willful violation was alleged, only a serious one was proven."

requisite specifics.[5] The judge also found that Anderson gave "only the most cursory instructions" to employees regarding the recognition and avoidance of unsafe conditions, and it thereby failed to comply with the OSHA training standard at 29 C.F.R. § 1926.21(b)(2).[6] As the judge noted, laborer Todd Ash testified that his supervisors told him, " You know, just stay away from the edge and if you got to where you were getting a little carefree, he would always remind you, "Hey, you could fall. Don't fall." That's about it."

Anderson's third omission, the lack of fall protection equipment, is established on the record though also not considered by the judge in his analysis of the characterization of the violation. Thus, Anderson's employees testified that they were not provided with fall protection equipment and Anderson admitted that the needed equipment was not on site at the time of the violation. As the judge noted in discussing the violation of section 1926.21(b)(2):

> Todd Ash had worked for Anderson for five years at the time of the hearing Ash had never before performed demolition work. Ash testified that he and his fellow laborers had never been provided with fall protection, and that he had never tied off before the day of the OSHA inspection.
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> Gary Mackey gave a similar account that demonstrated the inadequacy of Anderson's safety instructions. Mackey testified that he was never provided with fall protection and that neither Brown nor Baker ever discussed the use of safety belts and lanyards prior to the OSHA inspection.

(citations omitted). Moreover, Baker testified that he thought that safety belts were available at the site, but when he looked for them during the inspection at the request of OSHA representative Cooper, he could not find them.

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[5]There was evidence that Anderson's written safety plan had been posted on a wall that had since been demolished. Supervisor Baker acknowledged that there was no reason it could not thereafter have been kept on-site, for example, in Anderson's truck.

[6]The Commission has considered other related citation items that were affirmed in the same case to "bolster" its finding of willfulness. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1188, 1993-95 CCH OSHD ¶ 30,059, p. 41,336 (No. 89-2883, 1993) (consolidated).

By substituting weak admonitions for safety training and hazard recognition and not even providing fall protection equipment, Anderson failed to give its employees the opportunity to protect themselves. As the Fifth Circuit stated in *Georgia Electric Co. v. Marshall*, 595 F.2d 309 (5th Cir. 1979):

> This case is unlike those cases in which a willful violation was upheld when supervisory personnel knew of the OSHA regulation in question but felt for some reason that strict compliance was not necessary in the particular case. . . . The instant case is arguably more serious than those. Here, the Company powers-that-be *had not even given their employees a chance to conform* since they had made no effort to acquaint anyone with the OSHA regulations.

595 F.2d at 320 n.27 (emphasis added). This failure coupled with the involvement of supervisory personnel in the violation[7] and Anderson's apparent failure to take remedial steps after its recent receipt of two other OSHA citations for violations of the same standard at other worksites,[8] compel a finding of willfulness in this case.

The dissent takes issue with our holding by asserting that we are considering in our determination of willfulness, multiple factors, none of which by themselves would warrant a finding of willfulness. The dissent is thus recognizing the obvious - - since the Commission

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[7]Most significantly, there is no showing that foreman Brown and on-site supervisor Baker took readily available steps, such as training and equipping the workers, which would have assured compliance when the standard was applicable. Baker had worked for Anderson for "the majority of thirty years" and had been a supervisor for "fifteen or twenty years." Brown had worked for Anderson for five years.

[8]There is no evidence that Anderson responded to these two citations by taking steps to prevent recurrences at its worksites. *See, e.g., S. Zara and Sons Contrac., Inc.*, 10 BNA OSHC 1334, 1339, 1982 CCH OSHD ¶ 25,892, p. 32,399 (No. 78-2125, 1982)(employer's "failure to take positive steps" towards compliance after receiving citations an element of willfulness finding). The Commission has considered the receipt of, and response to, other citations for violations of the same standard in determining the willfulness of a violation. *E.g., Falcon Steel.*, 16 BNA OSHC at 1188, 1993-95 CCH OSHD at p. 41,336; *Atlas Industrial Painters*, 15 BNA OSHC 1215, 1217, 1991-93 CCH OSHD ¶ 29,439, p. 39,672 (No. 87-619, 1991), *aff'd per curiam*, 976 F.2d 743 (11th Cir. 1992); *Williams*, 13 BNA OSHC at 1257 & n.10, 1986-87 CCH OSHD at p. 36,589 & n.10.

must consider all of the relevant circumstances in making a determination such as willfulness, inevitably the sum will be greater than the parts. Moreover, it appears that our quarrel with the dissent is not merely as to whether the sum of the parts in this case is sufficient to reach the threshold for the requisite finding of willfulness. Rather, in our view, the dissent's analysis effectively excises the concept of "plain indifference" from the definition of willfulness altogether, a leap we are unwilling to make.

Our dissenting colleague takes the view that the Secretary has simply not presented facts sufficient to establish an affirmative duty on the part of Anderson to reasonably ascertain the height of this worksite and, absent accurate knowledge of the height on Anderson's part, there can be no prima facie showing of willfulness in this case.[9] Indeed, the dissent suggests, incorrectly, that we are finding today that Anderson's failure to take measurements at the worksite renders this violation willful *per se.* This analysis of our decision misses the point. This is not a case in which the employer made a sufficient good faith effort to comply with the rule so that compliance would have been likely if the triggering height had been properly estimated. Rather, for the reasons set forth above, this case falls into the category of cases in which the employer's indifference to compliance was so great that adherence to the standard would be unlikely whether or not there was a reasonable error about the actual height.

Anderson's failure to measure is relevant to our analysis of willfulness in this limited respect. While the scope and method of such an inquiry may differ depending on the circumstances, clearly an employer must make reasonable efforts to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. *See Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387-88, 1980 CCH OSHD ¶ 24,495, p.29,926 (No.76-5089, 1980) . Anderson had a number of reasons to be mindful of that duty

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[9] Chairman Weisberg notes that the dissent fails to suggest what set of facts would require Anderson to measure the height, leaving both the Secretary and the Commission clueless. For example, would the duty to reasonably ascertain the height be greater or lesser if the actual height were 50 feet; if it were 27 feet?

here. First, the building being demolished was at the beginning more than 70 feet high. Although the record does not establish that employees had been exposed to violative conditions before the day of the inspection, Anderson could easily anticipate that at some point employees working near the edge of such a building as it was being demolished might be exposed to fall hazards that would require compliance with OSHA fall standards. Since Anderson's own rule basically tracks the OSHA standard cited here, Anderson certainly was aware at what point the standard would kick in and when ascertaining the height of the workplace would be required. The standard itself had recently been brought to Anderson's attention by the two other OSHA citations Anderson had recently received for violations of the same standard. Despite these factors, as noted above Brown and Baker failed to take readily available affirmative steps, such as training and equipping the workers, to assure compliance on the possibility that the rule might be triggered. Hence, Anderson's failure to measure is just one indicia which, when combined with the other serious omissions on Anderson's part set forth above, suggests that Anderson gave little serious thought to the fall hazards at this site, much less had a good faith opinion that it was in compliance. *See Calang Corp.*, 14 BNA OSHC 1789, 1792, 1987-1990 ¶ 29, 080, p.32,872-73 (No.85- 319, 1990)

Stated differently, in another case, the failure to take measurements might not be inconsistent with the exercise of good faith that would negate willfulness. In this case, however, paper recognition of the rule was accompanied by a continuing pattern of indifference -- which evidence of measurement might have contradicted. Failure to measure does not establish willfulness *per se*, but, particularly where, as here, a standard's applicability is triggered by a readily measurable height, if the measurement had been made it would have been an indication of objective good faith countering other evidence to the contrary. In contrast, by the dissent's logic, it seems, employers could immunize themselves from a finding of willfulness by uniformly avoiding any measurements--even where measurement was, as here, one obvious means of assuring compliance with the rule.

Accordingly, an employer who did nothing whatsoever to comply with a rule could never be found to have been plainly indifferent to it.

Finally, we find nothing in Anderson's response to the OSHA inspection that provides us with a basis for reducing the willful characterization.[10] We agree with Judge Breyer writing for the First Circuit in *Brock v. Morello Bros. Constr., Inc.*, 809 F.2d 161 (1st Cir. 1987), that although post-violation conduct might not prove much, "it shows at least a little about how people in the firm respond to the receipt of a citation." *Id.* at 166 (emphasis in original). Thus, *Morello* indicates that evidence of post inspection good faith may be relevant, but is not necessarily dispositive. Here, unfortunately, there is substantial evidence of pre-inspection indifference. Accordingly, Anderson's prompt adoption of safety belts after the OSHA inspection while commendable is simply not sufficient to negate willfulness. Such efforts will, however, provide a basis for some credit for Anderson with respect to the amount of the penalty.

In sum, the evidence does not show that Anderson acted with malice or clear intent to violate section 1926.105(a). Nonetheless, the totality of the circumstances, particularly Anderson's failure to provide the training and equipment that are predicates for compliance with the rule, establishes that Anderson was so indifferent to employee safety that it is questionable that it would have complied with the standard even if the triggering height had been correctly perceived. While Anderson's failure to ascertain the correct height does not itself establish willfulness, neither can it immunize Anderson's clear indifference from being so characterized. Therefore, we find Anderson's violation of section 1926.105(a) to be willful.

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[10]Anderson argues, citing testimony by Baker and Brown, that the use of safety belts could increase risks and pose hazards (for example, entanglement) if a fall did take place. This might be read to suggest that Anderson believed that the standard's requirement that safety belts be "practical" was not met. Anderson might have undertaken to raise and prove the affirmative defenses of greater hazard and infeasibility. However, it did not do so, or even go so far as to expressly argue that it would have been preferable to avoid the use of safety belts even where the height trigger in the rule was met.

Under section 17(j) of the Act, 29 U.S.C. § 666(j), we determine an appropriate penalty by considering the size of the employer's business, the gravity of the violation, the good faith of the employer, and the employer's history of violations. According to OSHA, Anderson was a small employer. The gravity of the violation was high because at least three employees were exposed for part of one morning to the possibility of falling more than 25 feet onto rubble and suffering serious physical harm or death. Anderson's history of violations on this record consisted of a 1989 settlement of two citations.[11] It demonstrated good faith at the time of the inspection by quickly obtaining safety belts at OSHA's request and requiring employees to tie off. We therefore assess a penalty of $5,000.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: January 28, 1997

[11]The record does not establish whether the two recent citations referred to above putting Anderson on notice of the standard had become final orders.

MONTOYA, Commissioner, dissenting:

By its decision today, the majority has dramatically expanded the set of violations to which the willful characterization can be applied. As I understand this decision, the failure of a company to take constant height measurements is not simply a fact the Commission might consider in determining employer knowledge of a fall protection violation, but it is now proof that violations of such standards as 29 C.F.R. § 1926.105(a) are willful. Furthermore, it seems that a training violation may now serve as a predicate for a finding of willfulness with regard to all substantive violations that can be related to that training requirement, even though the training violation itself is found *not* to be willful. There is even a suggestion that violations of standards such as section 1926.105(a) are now willful *per se* whenever an employer fails to maintain fall protection devices at a worksite, even though the supervisors at the worksite are not aware that fall protection devices are necessary.

In order to reach these conclusions, the majority has ignored the very real differences between the level of proof necessary to establish an employer's prima facie knowledge of a violative condition and that necessary to establish that an employer's violation of the OSH Act was willful. A review of these most basic principles is therefore in order. Section 17(k) of the OSH Act, 29 U.S.C. § 666(k), provides that:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices . . . in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

From this primary authority, the Commission and the courts have placed the burden on the Secretary to prove, as a part of her prima facie case, that "the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharmaceutical Products., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578,

p. 31,900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).[12] The cases have also made it clear that it is not necessary for the Secretary to show that the employer knew the requirements of the OSH Act, only that the employer had knowledge of the physical conditions alleged in the citation. *See Shaw Construction Co.*, 6 BNA OSHC 1341, 1342-43, 1978 CCH OSHD ¶ 22,524, p. 27,177 (No. 3324, 1978).[13]

"Proof of something more than mere knowledge of the hazard is required to establish a willful violation." *Martin v. General Dynamics Land Systems, Inc.*, 15 BNA OSHC 2118, 2121, 1991-93 CCH OSHD ¶ 29,958, p. 40,980 (6th Cir. 1993) (unpublished). Unlike knowledge, willfulness requires direct evidence of the employer's state of mind, its subjective attitude toward the law, except for "instances in which unsafe conduct is so egregious, so life-threatening" that willfulness can be presumed "from the offender's knowledge of conditions." *Brock v. Morello Bros. Construction*, 809 F.2d 161, 164 (1st Cir. 1987) citing *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419 (D.C. Cir. 1983) (improper handling of highly explosive substances). Indeed, the United States Court of Appeals for the Seventh Circuit, the circuit in which this case arose, requires proof that an employer's behavior was either reckless or grossly negligent, not simply negligent or careless, to support a finding that a violation was willful. *See McLaughlin v. Union Oil of California*, 869 F2d. 1039, 1047 (7th Cir. 1989).

The Commission similarly describes willfulness as the state of mind of an employer who has violated the OSH Act with an "intentional, knowing, or voluntary disregard for the

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[12]*See also New York State Electric & Gas Corporation v. Secretary of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Carlisle Equipment Co.*, 24 F.3d 790, 792-93 (6th Cir. 1994); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 847 (8th Cir. 1981); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 571 (5th Cir. 1976); *Brennan v. OSHRC (Alsea Lumber Co.)*, 511 F.2d 1139, 1145 (9th Cir. 1975).

[13]*See also Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, p. 36,429 (No. 84-696, 1987); *Southwestern Acoustics & Speciality Co.*, 5 BNA OSHC 1091, 1902, 1977-78 CCH OSHD ¶ 21,582, p. 25,896 (No. 12174, 1977).

Act's requirements, 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). *Williams* goes on to require a showing that the employer have displayed "a heightened awareness -- of the illegality of the conduct or conditions" as well as a "conscious disregard or plain indifference" to employee safety. *Id*. at 1256-57, 1886-87 CCH OSHD at p. 36,589. In determining whether a violation was willful, the Commission also asks whether an employer's failure to comply was in good faith and objectively reasonable. *See Keco Industries, Inc.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987) ("a good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness"), and *Williams*, 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591 ("the test of an employer's good faith for these purposes is an objective one - whether the employer's belief concerning a factual matter or concerning the interpretation of the standard was reasonable under the circumstances").

Applying these established principles to the present case, the proper willfulness inquiry is really quite simple. The Secretary has not presented facts sufficient to establish an affirmative duty on the part of Anderson to have measured the height of this worksite, without which there can be no prima facie showing of willfulness in this case. The record shows that Anderson's employees were standing on a floor that was nearer to ground level than the top of the 35-foot wall they were demolishing. There was also a debris pile on the ground below the wall. Anderson's on-site supervisors, Melvin Baker and Roy Brown, both testified that they honestly believed the height of the open-sided floor they were working on was less than 25 feet above ground level. While the record demonstrates that they were wrong, *their veracity on this point has not been challenged*, either by the Secretary or by the majority. Since the fall protection requirements of section 1926.105(a) apply only "when workplaces are more than 25 feet above the ground," any serious argument that Anderson's

supervisors displayed the state of mind necessary to meet any recognized test for willfulness must end here.[14]

In order to achieve a different result, the majority has constructed an elaborate artifice under which a number of other factors, none of which individually demonstrates a willful state of mind on Anderson's part, combine through some unexplained synergistic process to generate the state of mind not otherwise established on this record. They insist that Anderson's failure to provide training on this standard, which was essentially included as a work rule in the company's Safety Plan, is significant, though the training violation in question was found to be nonwillful and is not on review before the Commission. The majority insists that the failure of supervisors Brown and Baker to measure the height of the building "to assure compliance, on the possibility that the rule might be triggered," is significant, though they do not provide a basis for Anderson's supposed affirmative duty to have taken such measurements. Nor do they explain how any such failure would be a basis for something more than a finding of knowledge. They insist that Anderson's failure to have the equipment required for compliance with section 1926.105(a) at the site is significant, though they do not challenge the truthfulness of the testimony given by Anderson's supervisors that they believed they were working below the height at which this equipment is needed. Finally, the majority insists that it is significant that Anderson had recently received two other OSHA citations for violations of section 1926.105(a) in another part of the country, even though there is no proof that Anderson's supervisors at this worksite were aware of those citations.

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[14]Baker also testified that the men were unlikely to fall because they were standing on the floor inside the walls of the vault they were demolishing and that they were constantly being watched. It is apparent from his testimony that, for much of the time at least, these employees were protected from the fall hazards that section 1926.105(a) seeks to prevent by the very walls they were demolishing. Brown testified that he discussed the work with the two employees that day to make sure they would not create hazards and that he also personally supervised their work. Brown also believed that neither he nor the employees required safety belts because of the large floor-space on which they were working.

For all of its effort, the majority can point to no evidence sufficient to support a conclusion that Anderson's state of mind was such that this violation of section 1926.105(a) can be classified as willful. Nor can it be said on these facts that the conditions at this worksite were so obviously dangerous that disregard or plain indifference should be presumed without any supporting evidence of the employer's subjective attitude. While willfulness can be based on a combination of prior citations of the standards in question, awareness of the requirements of the standards, and actual notice that violative conditions exist,[15] the evidentiary matters on which the majority relies here are not sufficient to show, either individually or collectively, that this employer's state of mind was of a willful nature.

Since I have concluded that this violation was not willful, it follows that I would assess a more nominal penalty than that assessed by the majority.

/s/
Velma Montoya
Commissioner

Dated: January 28, 1997

[15]*See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993), *decision following remand*, 16 BNA OSHC 1497, 1994 CCH OSHD ¶ 30,301 (1993).