United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. KYKENKEE, INC., Respondent.	OSHRC Docket No. 11-1886

FINAL ORDER

After the Administrative Law Judge's Decision and Order in this case was docketed with the Commission, the Secretary filed the parties' Settlement Agreement. The Commission directed this case for review and ordered the parties' legal counsel to file with the Commission by facsimile any employee objections to the Agreement no later than December 28, 2012. No objections were received.

Having reviewed the record, the Commission approves the Settlement Agreement. Commission Rule 100, 29 C.F.R. § 2200.100. The Commission accords the judge's Decision and Order the status of an unreviewed judge's decision. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-75 CCH OSHD ¶ 20,387, p.24,322 (No. 4090, 1976) (unreviewed judge's decision does not constitute binding Commission precedent).

SO ORDERED.

BY DIRECTION OF THE COMMISSION

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: December 31, 2012

/s/
John X. Cerveny
Deputy Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. KyKenKee, Inc., Respondent.	OSHRC Docket No. **11-1886**

Appearances:

Jennifer Booth Thomas, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

John J. Coleman, Esquire and Ryan M. Aday, Esquire, Burr & Forman, LLP, Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

KyKenKee, Inc. (KyK) operates a sawmill business in Vance, Alabama. On December 31, 2010, a KyK employee, as he walked through the debarking area, was fatally struck on the head when a log weighing approximately 160 pounds, fell from the out-feed conveyor of the barker machine. The Occupational Safety and Health Administration (OSHA) was notified of the fatality and initiated an inspection.

After a wall-to-wall inspection by an OSHA safety compliance officer, KyK received serious, willful, and other than serious Citations issued on June 27, 2011. As a result of an informal settlement meeting, the parties resolved the serious and other than serious Citation Nos. 1 and 3 and signed a partial settlement agreement on July 19, 2011 (Tr. 4). KyK timely contested the willful Citation No 2.

Citation No. 2 alleges a willful violation of 29 C.F.R. § 1910.265(d)(4)(iii) (item 1) for failing to fence off or post as a prohibited area the ring barker and its conveyors. The willful Citation proposes a penalty of $70,000.00.

The hearing on KyK's contest was held on May 30 - June 1, 2012, in Birmingham, Alabama. The parties stipulated jurisdiction and coverage (Tr. 4-5). Post-hearing briefs were filed on August 20, 2012.

KyK denies the alleged violation and the willful classification. KyK asks the court to follow the Administrative Law Judge's (ALJ) decision in *Moser Lumber Company*, 1 BNA OSHC 3108 (No. 1221, 1973) which found the terms "hazardous area" and "unauthorized persons" in § 1910.265(d)(4)(iii) vague and unenforceable. KyK also asserts the standard does not apply to its barker machine because it is a pneumatic debarker and claims the employee who died was engaged in unpreventable employee misconduct.

For the reasons discussed, KyK's violation of § 1910.265(d)(4)(iii) is affirmed as serious violation and a penalty of $5,000.00 is assessed.

The Inspection

KyK has operated a sawmill business at its two-mill facility in Vance, Alabama since 1964. The facility consists of the old saw mill, new saw mill, old planer mill, and new planer mill. KyK is a family owned business started by the grandfather and is currently operated by three brothers. At the time of the accident, KyK employed approximately 175 employees, many of whom speak only Spanish and a Mayan dialect (Exh. R-1; Tr. 362, 377, 405-407).

In the old saw mill area, where the accident occurred, the logs are cut and, by a conveyor, are fed into a barker machine which removes the bark. After the debarking process, the logs continue on the conveyor to an area where they are cut into board lengths according to customers' specifications. The boards are then taken to the stacker area where the boards remain to dry before further processing or shipped to customers. Essentially, the same barker machine and conveyor system configuration has existed since 1991. The old saw mill supervisor is the nephew of the company president. The

old saw mill produces approximately 600,000 board feet of lumber per week and employs approximately 30 employees (Tr. 341, 403, 408-410, 411).

The in-feed conveyor moves the cut logs into the barker machine which is a 40-inch Nicholson pneumatic air seal ring debarker. The in-feed and out-feed conveyors and the barker machine are approximately 13 feet above the ground level and are controlled by an operator who works inside a house (shed) at the machine. The operator is the only employee assigned to the debarker area and he controls the logs throughout the debarking process. The barker machine runs continuously throughout the shift except for the lunch hour. There is a dirt road in front of the debarking area used by forklifts traveling back and forth (Exh. R-3; Tr. 19, 342, 344, 393-394, 412, 419).

It is undisputed that at the time of the accident, there was no fence or posted signs prohibiting employees from walking through the debarking area. Instead, KyK verbally warned "employees from being in the area in, under, or around the debarker and either side of the debarker conveyor while the debarker is operating" (Tr. 65-66, 381-382).

On December 31, 2010, a laborer who worked in the stacker area died while walking pass the out-feed conveyor to the barker machine. The laborer had been hired in the middle of 2009. He spoke a Mayan dialect. The log, approximately 8 inches in diameter and weighing 160 pounds, fell from the conveyor and struck him on the head. At the time, the barker machine was operated by the relief operator during the morning break (Tr. 19, 461, 522-523).

After reporting the fatality, an OSHA safety compliance officer, on December 31, 2010, initiated a wall-to-wall inspection of the KyK sawmill. This was his first sawmill inspection. As part of the inspection, he took photographs of the debarker area and interviewed employees. The day after the accident, KyK installed a fence in front of the out-feed conveyor and a railing along the conveyor trough. Also, warning signs were posted in front of the conveyor (Exhs. C-8B, C-8C, R-4; Tr. 16, 121, 131).

On June 27, 2011, KyK received the willful citation at issue.

Discussion

In order to establish a violation of a safety standard, the Secretary has the burden of proving:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Willful Citation No. 2
Item 1 - Alleged Violation of §1910.265(d)(4)(iii)

The citation's alleged violation description states that "On or about 12/31/2010 – Old Saw Mill department, the ring debarker conveyor area was not fenced off and warning signs were not posted." Section 1910.265(d)(4)(iii) provides:

> *Area around barkers.* The hazardous area around ring barkers and their conveyors shall be fenced off or posted as a prohibited area for unauthorized persons.

Application of the Standard

There is no dispute that OSHA's *Sawmill* standards at § 1910.265 apply to KyK's sawmill in Vance, Alabama.

1. KyK's Vague and Unenforceable Argument

KyK argues the standard, § 1910.265(d)(4)(iii), is unenforceable. KyK relies on an ALJ' decision in *Moser Lumber Company*, 1 BNA OSHC 3108 (No. 1221, 1973) which vacated the alleged violation on the basis that the terms "hazardous area" and "unauthorized persons" as used in the standard are vague and meaningless. The *Sawmill* standards at §1910.265 contain no definitions of "hazardous area" and "unauthorized persons." Since issuance of the *Moser* decision, OSHA has not issued any written interpretations and no other Commission decisions have been located addressing the standard.

The *Moser* decision is not binding on this court. It is an un-reviewed Commission decision and is not considered precedent. *Elliot Construction Corp.*, 2012 WL 3875594 n. 4 (No. 07-1578, August 28, 2012). In reviewing the decision, the ALJ rendered only conclusions and offered no reasoning or evaluation to support his conclusions. Despite numerous revisions to the general industry standards in Part 1910, OSHA has not withdrawn § 1910.265(d)(4)(iii) and it remains in effect.

The Commission has repeatedly addressed the issue of interpreting a standard and has outlined various principles in evaluating whether a standard is impermissibly vague. A standard, such as § 1910.265(d)(4)(iii), needs to be interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries Inc.*, 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982). Its words are viewed in context and judged in light of their application to the facts of the case. Their meanings are discerned from the purpose of the standard and the physical conditions to which it applies by reference to objective criteria, including the knowledge and perception of a reasonable person. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1140 (No. 88-1250, 1993). The evidence as to current industry practice is relevant but is not dispositive. *Baker Tank Co.*, 17 BNA OSHC 1177, 1179 (No. 90-1786-S, 1995). Also, the Commission does not impose drafting requirements of mathematical precision or impossible specificity as long as a reasonable person, knowledgeable of the circumstances, can discern the standards application. *Ormet Corp.* 14 BNA OSHC 2134, 2135 (No. 85-531, 1991).

In applying these principles, §1910.265(d)(4)(iii) is not impermissibly vague and the terms "hazardous area" and "authorized persons" have common sense meaning applicable to KyK's debarking area. As evident by its verbal warning to employees, KyK was aware of a hazard from falling logs, in the debarking area and attempted to abate it by verbally warning employees to stay away from the area while the barker machine was operating. KyK's president acknowledges the area around the barker machine particularly the conveyors was a dangerous area (Tr. 419-420). He agreed that there was a potential of logs falling in the area where the employee was struck on the head. He described logs "teepeeing up" and could potentially fall out of the conveyor (Tr. 395-

396). The maintenance supervisor and old mill supervisor also admitted to OSHA during their interviews that logs were falling from the conveyors (Exhs. C-2, C-3).[1] The relief operator agreed logs were falling from the conveyors at the debarking area "once and awhile" (Exh. C-6).

The same reasonable person test applies to "unauthorized persons." Although no warning sign was posted at the debarking area, KyK posted a sign at the entry to the sawmill restricting non-employees access to company property (Exh. R-9; Tr. 367). KyK attempted to also restrict employees, other than the operator or his relief, from accessing the area during debarking by verbally warning employees to stay away from the area. KyK understands what "unauthorized persons" means. An unauthorized person clearly encompasses anyone not otherwise required to work in the debarking area. The only KyK employees authorized in the debarking area during normal operation were the barker machine operator, the relief operator, and maintenance employees who perform necessary repairs and maintenance on the equipment.

KyK president was aware of the OSHA's *Sawmill* standards prior to the accident (Tr. 415). He attempted to define the hazardous area by use of a verbal warning to all unauthorized persons to stay away from the area during operation. He agrees that the debarking area was hazardous and no one, not otherwise authorized, should be in the area (Tr. 412-413, 419).

Section 1910.265(d)(4)(iii) is a performance standard which allows an employer, such as KyK, flexibility at its own worksite in complying with its requirements by fencing off or posting signs as a dangerous area around the barker machine and its conveyors. KyK is in the best position to determine the best location to place the fence or post signs identifying the hazardous area and prohibiting employees' access. As described by the Secretary's expert, the standard is:

> written in such a way as allow employers flexibility in complying with the standards so that they can perform in such

[1] As discussed more fully under "KyK's Knowledge," the employees' denial of the accuracy of their statements is rejected.

> a way, because there are varying types of sawmills, varying types of sizes and models and makes of machinery and setups, the performance language of an OSHA standard will allow flexibility to the employer to comply with the standard rather than putting—and that's as opposed to a specification standard that sets out a specific specification, such as the height of a guardrail or the size of a pipe for a guardrail or even a safety distance (Tr. 302).

The parameters of the hazardous area in this case may be determined by evaluating the length and diameter of the logs, the height of the machine and conveyor system above the ground, the frequency which the conveyor is malfunctioning and jamming logs, and communicating with anyone who directly works around the area (Tr. 228).

KyK's argument that a verbal warning is equivalent to "posted" as required by §1910.265(d)(4)(iii), is rejected. "Posted" as contemplated by the standard and its common sense meaning requires a physical sign. A verbal warning "to stay away" is too general and ambiguous as opposed to posted signs or a fence which clearly identifies the area as hazardous and delineates the safe distance to maintain from the barker machine and its conveyors. Unlike a sign or fence, a verbal warning allows each employee to decide for himself the size of the hazardous area to avoid. Because KyK's multi-lingual workforce, posted signs may be written in any language or commonly understood symbols prohibiting access may be used.

Section 1910.265(d)(4)(iii) is not vague simply because its application requires the exercise of judgment. *Dravo Corp.*, 7 BNA OSHC 2095, 2098 (No. 16317, 1980). Viewed in context, the terms "hazardous area" and "unauthorized persons" have meaning and are not impermissibly vague.

2. KyK's Pneumatic Barker Is a Mechanical Ring Barker

KyK argues that its pneumatic barker is not a "mechanical barker" as required by §1910.265(d)(4). KyK asserts its barker machine is a pneumatic air seal ring barker and that unlike a mechanical barker, the operator has "total control" of the knife arms because of the pneumatics. According to KyK, on a mechanical barker, once the knife arms are set in a fixed position with pressure, they cannot be released (Tr. 344, 393). KyK's

expert, based on his discussions with KyK, described the barker with "hydraulic hold-downs and pneumatic components" (Tr. 583-584).

The Secretary's expert testified, based on reviewing photographs of the barker machine, that it was a mechanical ring barker with pneumatic cylinders. The barker machine utilizes pneumatic cylinders in the ring to apply pressure to the tool arms and cutting tools which peels the bark from the logs. He opined the barker machine is mechanical because it mechanically peels bark off the log (Exh. C-15; Tr. 596, 601). He explained that it is also possible for a ring barker to utilize hydraulic cylinders to apply pressure to the tool arms (Exh. C-17; Tr. 596). His testimony is given weight based on his extensive knowledge and work in the sawmill industry (Exhs. C-7, C-12).

Although the standard may have been written before pneumatic, "mechanical" as used in §1910.265(d)(4) has a broad meaning to include any ring barker. The parties agree that the barker machine at KyK is a ring barker. The pneumatics which does not change the mechanical nature of the barker machine allows the operator to control the pressure on the cutting blades as the log goes through the machine. The system powering the blades whether air pressure, hydraulic pressure, or electric does not mean the barker machine is not mechanical. Mechanical applies broadly to the machine and not restricted to the power sources of the blades. KyK's pneumatic barker is a ring barker and § 1910.265(d)(4)(iii) applies.

Compliance with §1910.265(d)(4)

KyK agrees that at the time of the accident, there was no fence or posted signs prohibiting employees' access to the area near the barker machine and its conveyors, in-feed and out-feed conveyors (Tr. 492). Although the accident occurred at the out-feed conveyor, the OSHA citation's alleged violation description refers to the "conveyor area" and is not restricted to the out-feed conveyor. Based on the 1991 OSHA inspection and citations, KyK was aware that OSHA had *Sawmill* standards applicable to its facility. KyK agrees that "by definition, sawmill operations can be hazardous" (Resp. Brief, p. 4). Its president agrees that the area around the barker machine, particularly the conveyors, was a dangerous area (Tr. 419-420).

The terms of § 1910.265(d)(4)(iii) were not complied with by KyK.

Employee Exposure

In order to establish employee exposure, the Secretary must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. The inquiry is more than whether exposure is theoretically possible. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Employees must have been, are, or will be in the "zone of danger" either during their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993).

As evident by the accident and KyK's verbal warnings to employees, it was reasonably predictable that employees, through necessity or inadvertence, pass through the debarking area during operation. The debarking area was in an open, outdoor area and located in the approximate middle of the old saw mill. There were no physical barriers that would prohibit employees from entering the area where the laborer was killed. KyK acknowledges an awareness of the danger to employees in the debarking area and that employees may pass through the area. KyK has repeatedly had to warn employees to stay away from the conveyors during debarking operations. The old mill supervisor testified that he has disciplined an employee for violating the verbal work rule (Tr. 473).

It is clear that the standard requires a physical restriction upon the inadvertent or accidental entry into the hazardous area. An employee's knowledge of the hazardous area based on a verbal rule is not an adequate substitute for fencing or posting. *Tobacco River Lumber Company*, 3 BNA OSHC 1059, 1064 (No. 1694, 1975) (The Review Commission found physical fencing required under § 1910.265(e)(5)(iii). "Mental fences might serve to reduce the probability of intentional entry but they do nothing to prevent accidental entry.").

KyK's expert's testimony regarding the lack of exposure is accorded no weight. His opinion was conclusive and presumed that the company's verbal rule was fully complied with (Tr. 575-576). He claimed that KyK's verbal work rule warning employees to stay away from the area was sufficient. His testimony ignores the specific requirements of the standard which provides for fencing off or posting signs as the prohibited area. He has a lack of expertise in the area of sawmills (Tr. 548, 550). His opinions were limited to employee exposure which is a legal conclusion and properly excluded. *Erickson Air-Crane, Inc.*, 2012 CCH OSHD 33,199, p. 55,760 n. 7 (No. 07-0645, 2012).

Either through necessity or inadvertence, employees were exposed to the hazardous area of the barker machine and its conveyors. Employees' exposure to the area was reasonably predictable.

KyK's Knowledge

As the last element of her burden of proof, the Secretary must show KyK knew or should have known, with exercise of reasonable diligence, of the violative condition. The employer's knowledge element is directed to the physical conditions that constitute a violation. It is not necessary to show that KyK understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). When a standard prescribes specific means of enhancing employee safety, such fencing or posted signage as in this case, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son*, Inc. 6 BNA OSHC 1335, 1337 (No. 15983, 1978).

In support of its argument that it lacked knowledge of logs falling off the conveyor at the barker machine, KyK relies on the testimony of the old mill supervisor and the maintenance supervisor. Both employees denied logs were falling off the conveyor system, particularly the out-feed conveyor (Tr. 427, 470).

Both supervisors' denials are specifically contradicted by their written interview statements given to the OSHA compliance officer. Their claims that the statements were

inaccurate or fabricated by the OSHA compliance officer, are rejected (Exhs. C-2, C-3). The employees agree that the statements contain their signatures and on at least one page their initials showing a change (Tr. 437, 440, 510-511). Their claims that the other pages do not reflect what they said, is contrary to common sense and the lack of motivation by the compliance officer.

The court accepts, under Fed. Rules of Evidence 801(d)(2), the statements based on evaluating the demeanor and credibility of the witnesses. The compliance officer specifically denied changing or altering the statements. He exhibited no animus towards KyK or its officers. He had never inspected the company until this inspection. Also, the statements were witnessed by another compliance officer (Tr. 630-631).

On the other hand, both supervisors are still employed by KyK and one supervisor is the nephew of the president. During their testimony, the supervisors appeared nervous, cautious, and rehearsed in avoiding responses particularly when addressing their statements. Although the compliance officer may have failed to obtain the employees' initials on each page, the accuracy of the statements is not affected. The supervisors acknowledge being interviewed, signing the statements, and given an opportunity to read the statements or have them read to them. They could and did make corrections to their statements.

Despite their denials, the maintenance supervisor told OSHA that logs fell in the area where the employee died at "maybe one a month" for "one year or so" (Exh. C-2 p. 4). The old mill supervisor agreed in his statement that logs were falling from the conveyor once a month (Exh. C-3, p. 3). The relief barker operator told OSHA that logs were falling weekly and employees were passing through the area to take shortcuts to the breakroom and restroom (Tr. 51). The operator stated that "it was expected that logs would jam and fall" (Tr. 52). His statement to OSHA is consistent with the statement he gave to the Tuscaloosa County Sheriff investigating the death (Exh. C-6). KyK president testified that he witnessed logs "teepee up" on the conveyor and that the logs could potentially fall (Tr. 396). Even the old mill supervisor conceded that logs can teepee-up and might fall out of the conveyor (Tr. 529).

As supervisors responsible for the safety of the employees, their knowledge of the violative condition is imputed to KyK. *Dover Elevator Co*. 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Employee Misconduct

KyK asserts that the employee who died was engaged in misconduct by not complying with KyK's verbal warning, given to all employees, to stay away from the debarking area during operations. In order to establish an affirmative defense of unpreventable employee misconduct, an employer must show that (1) it has established a work rule designed to prevent the violation; (2) it has adequately communicated the rule to its employees; (3) it has taken steps to discover violations of the rule; and, (4) it has effectively enforced the rule when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

KyK's employee misconduct defense is rejected. KyK's verbal rule does not replace the fence or posted sign requirement of the standard. The verbal rule merely instructed employees "to stay from the area" which is too general and vague. It inadequately defined the parameters of the hazardous area around the debarking area. The verbal rule is not a substitute for the abatement requirement (fencing or posting) of the standard. Other than verbal warnings to employees who violated the verbal rule, there was no showing of written discipline records or that KyK had a progressive discipline program.

A work rule is defined as an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood. *J.K. Butler Builders, Inc*., 5 BNA OSHC 1075, 1076 (No. 12354, 1977) (employer's warning to employees to avoid unsafe areas was "too general to be an effective work rule"). A work rule must be clear enough to eliminate the employees' exposure to the hazard covered by the standard and must be designed to prevent the cited violation. *Beta Construction Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993). Unlike KyK's verbal rule, the rule must be sufficiently precise to implement the requirements of a standard or be functionally equivalent to it. A

verbal work rule as at KyK, leads to uncertainty of its effectiveness in preventing employee exposure to the hazard.

KyK merely told employees to stay away from an undefined area and gave verbal warnings to employees who violated the unclear and general rule. Such a vague warning is not a work rule and is ineffective because it allows employee discretion in how to comply. Also, it is noted that many employees spoke Spanish or a Mayan dialect that KyK management could not speak. The company had to rely on other bi-lingual employees to translate its verbal instructions (Tr. 398).

An employee misconduct defense is not established.

Willful Classification

OSHA classified KyK's violation of § 1910.265(d)(4)(iii) as willful. "[I]t is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc*., 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). A willful violation is differentiated from other classifications by the heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation. *Hern Iron Works, Inc*., 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

OSHA claims that KyK exhibited "plain indifference" to employee safety (Secretary Brief, p. 7). The record, however, fails to show the requisite heightened awareness. Other than the accident, there is no history in the past 40 years of other injuries to employees in the debarking area from falling logs. KyK believed in good faith that its verbal rule was sufficient. Although not as effective as the requirements of § 1910.265(d)(4)(iii), the company had a well-recognized rule warning employees from walking in the area of the barker machine. KyK provided initial training and regular follow-up training to each of its employees concerning specific safety issues including its verbal rule to stay clear of barker machine and its conveyor during operation. The compliance officer agreed that the employees were warned to avoid the debarking area (Tr. 65-66). Also, KyK provided elevated catwalks and designated walk-areas through

the facility for employees to use (Tr. 361, 471). The Secretary's reliance on the 1991 OSHA citation is misplaced and does not show plain indifference (Exh. C-5). The prior citation did not contain a violation of § 1910.265(d)(4)(iii). Also, 1991 inspection may indicate that OSHA previously did not consider a need for fencing or posting in the debarking area.

A willful classification is not established.

PENALTY CONSIDERATION

Section 17(j) of the Occupational Safety and Health Act requires that when assessing penalties, the Commission must give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992).

KyK , as a large employer with 175 employees, is not given credit for size. KyK is entitled to credit for history and good faith because of its safety program and employee training and its lack of prior OSHA citations since 1991.

A penalty of $5,000.00 is reasonable for KyK's violation of § 1910.265(d)(4)(iii). Although inadequate, the company did have a recognized verbal rule which it trained and enforced to keep employees away from the barker machine. There is no record of any prior employee injuries in the debarking area.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation No. 2, item 1, alleged willful violation of § 1910.265(d)(4)(iii), is affirmed as serious and a penalty of $ 5,000.00, is assessed.

SO ORDERED.

/s/

KEN S. WELSCH
Administrative Law Judge

Date: November 13, 2012