SECRETARY OF LABOR,
Complainant,

v.

AMERICAN WRECKING CORPORATION,
and
IDM ENVIRONMENTAL CORPORATION,
Respondents.

OSHRC DOCKET
NOS. 96-1330
and 96-1331
(CONSOLIDATED)

DECISION and REMAND

By decision dated December 20, 2001, the Review Commission, *inter alia*, remanded this matter to the undersigned "to review the record and make credibility findings necessary to resolve the issue of whether the violations found in each employer's Item 2 was willful, as alleged" (decision p.24,25). In addition to credibility findings, the undersigned has been directed to make "appropriate findings of fact" (decision p.22) regarding the aforesaid issue of willfulness. By order dated January 3, 2002, the parties were directed to submit proposed findings of fact and supporting legal memoranda directed specifically to the issue raised by the Commission in its remand order. The parties were also directed to submit their views regarding the following issues:

1. Is the current record sufficient to comply with the remand order?
2. Is an additional evidentiary hearing necessary to complete the record?
3. Do the parties require oral argument?

All parties answered in the affirmative as to the first issue and in the negative as to issues 2 and 3.

By motion dated March 5, 2002, with a supporting affidavit, counsel for Respondent IDM Environmental Corporation (hereinafter IDM), Joseph P. Paranac, Jr., Esq., sought to withdraw as counsel for said corporation for the following reasons:

(a) Respondent IDM filed for Chapter 7 bankruptcy proceedings during 2001

(b) a sale of IDM's assets occurred on November 10, 2001

(c) significant legal fees to counsel remain unpaid

(d) IDM's principal stockholder informed Mr. Paranac that the firm no longer exists and he (Mr. Paranac) is no longer authorized to represent Respondent in this

matter.

By order dated March 27, 2002, Mr. Paranac's motion to withdraw as counsel for Respondent IDM was granted. In addition, Mr. Paranac filed an appearance as counsel for Respondent American Wrecking Corporation (hereinafter AW). Submissions were filed on behalf of Complainant and Respondent AW in compliance with the order dated January 3, 2002. No submission has been filed on behalf of Respondent IDM and that firm has remained unrepresented in this phase of the litigation. In compliance with the directive of the Review Commission, the analysis of the willful issue for item 2 of the citations issued to both Respondents must be based "on the totality of the circumstances or multiple factors, none of which by themselves would warrant a finding for or against willfulness" (decision p.19) citing *Anderson Excavating* 17 BNA OSHC 1890 at 1893; 1995-97 CCH OSHD ¶31,228 at p.43,791, affirmed 131 F.3d 1254 (8th Cir. 1997).

Background

During the early part of 1995, respondent IDM entered into a contract with United Illuminating Company (hereinafter UI) to demolish its Steel Point generating plant. The plant had remained idle for a considerable period of time and UI was anxious to demolish the building quickly. To that end UI entered into a contract with IDM for that firm to act as general contractor for the jobsite and to perform the demolition work. However, unknown to UI, IDM intended at that time to subcontract the demolition to AW (TR 678). Based upon contradictory testimony (TR 490,814-816,533), the weight of the evidence supports the conclusion that UI was not aware that the demolition function had been subcontracted to AW until after February 27, 1996; the date of the fatal accident. UI expressed its displeasure to IDM at that time when it learned that AW was performing the demolition work (TR 802).

Pursuant to the contract, IDM was required to complete the work by March 8, 1996 (TR 798). Substantial penalties in the amount of $10,000 per day for the first 10 days; $15,000 for the next 10 days and $20,000 a day thereafter could be assessed for IDM's failure to meet the contract completion date (TR 539-540). The contract price was in excess of four million dollars (TR 573) which represented a premium rate to complete the job within 10 months rather than 15 months. In addition, a high payment was in the contract because of the presence of asbestos on the worksite (TR 725,7737,827). Thus, there was a substantial financial reward for completing the job on time and severe financial penalties for failing to complete the work within the time limit set forth in the

contract.

Shortly after the work commenced, IDM experienced problems which delayed the demolition. Undisclosed asbestos was discovered in the distribution area which had to be removed as well as "other difficulties" (TR 484,485,708). The demolition work was interrupted from early June to mid July to remove the asbestos (TR 710). Asbestos was also discovered in the low pressure boiler area and approval had to be obtained from the state for its removal. That approval was not obtained until September 20, 1995 (TR 725).

As early as June 1995, IU became aware that the work was behind schedule and refused to grant IDM additional time to complete the project (TR 822). Moreover, the removal of the undisclosed asbestos became an additional financial burden for IDM and IU declined to pay for the additional cost. As a result, the relationship between IDM and UI became "strained" (TR 776). During September 1995, high ranking members of management for IDM and AW visited the site in an effort to revise the work plan and speed up the work process (TR 884-885). However, the work fell further and further behind schedule and, as of October 5, 1995, the job was four to six weeks behind schedule (TR 825). On October 6, 1995, IDM again asked UI for an extension of time to complete the work. That request was denied (TR 826). During this time, strong pressure was being placed upon IDM by UI representatives to speed up the work process (TR 806,808-810,884-885,484-487,539,541-542,581-582,1187,1136-1137) and requested that crews be required to work weekends. IDM refused that request (TR 584). However, in an attempt to remedy the situation, additional equipment and workers were assigned to the job by IDM (TR 1138). In addition, an IDM official met with AW management officials to discuss ways to speed the work along (TR 811). Thus, the record supports the conclusion that IDM was experiencing extreme pressure from IU to complete the project on time and, given the fact that the work progress was weeks behind schedule, was exposed to severe financial penalties. The record further supports the conclusion that IDM was desperately seeking methods and means to speed the work along to meet their contractual obligations. This concern had been conveyed to AW personnel even though IDM was making every effort to conceal the presence of AW at the worksite as the demolition subcontractor. This set of circumstances was in existence as of the date of the fatal accident and the date that the alleged violations occurred.

<u>Witnesses</u>

The Secretary called Russell Geisser and John Maitz as expert witnesses. Mr. Geisser is a professional engineer and well qualified as a civil engineer to render an opinion regarding the hazards presented by bricks suspended by mortar (TR 227,230). I find this individual to be highly credible and his opinion that mortar has a holding value of zero for suspended bricks to be well founded (TR 254,255). Moreover, his opinion that vibration caused by the cutting of columns 14 and 15 added to the instability of the bricks is also credible (TR 256-257). Mr. Geisser also stated that the columns should have been supported for stability purposes before they were cut. (TR 257). An unknown amount of time would have been required to install the support recommended by Mr. Geisser. The condition of the building after columns 14 and 15 were cut was such that there was a danger of the bricks and the building collapsing (TR 293).

The second expert, Mr. John Maitz, is particularly well qualified to render opinions based upon his hands-on experience in the field of demolition. His background and experience are similar to the qualifications of supervisor Bartolotti (TR 295-298) and I find him to be a highly credible witness. He has continuous experience in the field of demolition since 1963 (TR 295) with approximately 20 years' experience as a supervisor (TR 297). He was emphatic in his opinion that placing workers under the unsupported bricks was dangerous and there is "no way" that he would have allowed employees to cut through columns 14 and 15 with unsupported bricks overhead (TR 320,323). He also stated that it was too dangerous to cut columns 14 and 15 under the conditions present at the worksite because heavy equipment and vibrations could cause the bricks to collapse (TR 316,317,334,338). Moreover, there are no circumstances under which he would allow workers to work in an area where beams, as in this case, had been cut completely through (TR 345). He expressed the opinion that he would not allow any employees to work in the area until all of the bricks had been removed because it "was too dangerous" (TR 366). His attitude and demeanor expressed incredulity that an employee was allowed to work under the unsupported bricks and he

stated that anyone who ordered an employee to work beneath the bricks was "unsafe and not competent" (TR 312,313,320,323,326,334,338,345,366).

Respondent IDM called Mr. Marcus Gales as a witness. Mr. Gales was employed by IDM as a safety and health officer at the jobsite (TR 906). Mr. Gales was generally ill at ease during his testimony as well as nervous and evasive. It was clear, based upon his demeanor, that he was

attempting to respond to questions in a fashion most favorable to his employer. Nevertheless, I find the following testimony to be credible. Mr. Gales made frequent inspections of the worksite on a daily basis and observed the partially demolished south brick wall for two or three days prior to the accident (TR 925). He specifically remembered inspecting the bricks on February 26, 1996 (TR 926) and he spoke to Mr. Bartolotti about the wall. Although not stated directly, it is clear that Mr. Gales was concerned about the hazards posed by the suspended bricks (TR 930). He stated that Bartolotti assured him that the bricks were safe (TR 930-931). It is not clear whether Mr. Gales was satisfied with the explanation he received; however, during a safety meeting he conducted on the morning of February 27, 1996, the date of the accident, he warned the supervisors in attendance, including Bartolotti, to be aware of bricks that might fall in the turbine area (TR 922). Based upon the testimony of Messrs. Geisser and Maitz, it is concluded that a reasonable person familiar with the demolition industry would recognize the unstable condition of the unsupported bricks and would appreciate the hazard to which employees were exposed when working beneath the bricks. Thus, Mr. Gales, as a person familiar with the demolition industry and responsible for safety and health at the worksite, knew of the hazard of falling bricks to which employees were exposed when working in that area. Notwithstanding his appreciation of that hazard, he failed to order the removal of the bricks before allowing employees to work beneath the unsupported bricks (TR 482, 483).

Mr. Paul Reis was called as a witness by Complainant and Respondent IDM. Mr. Reis was employed as field superintendent at the worksite by IDM (TR 480) and was the highest ranking employee of that company on site on a daily basis. Mr. Reis was aware that the job was behind schedule and that UI was pressuring IDM to accelerate the work (TR 487). He conferred with Vice President James Harrigan of IDM about the UI complaints and he was present at a meeting with UI personnel when Mr. Harrigan stated that he (Harrigan) told AW personnel that the work was behind schedule and must go faster (TR 487).

Mr. Reis inspected the worksite on a daily basis (TR 951) and observed the bricks suspended from the south wall the morning of the accident and asked Mr. Bartolotti why the bricks had not been removed (TR 508,509). Reis testified that Bartolotti told him that the bricks were "safe" and he (Bartolotti) was the expert (TR 508). Although Mr. Reis was the field supervisor on site and the individual "in charge" (TR 481) including having responsibility for maintaining a safe worksite (TR

482), he did not issue an order to remove the bricks before proceeding to cut columns 14 and 15 even though he thought the non-removal of the bricks to be peculiar (TR 509). When pressed closely on the point, Mr. Reis acknowledged that employees could not work safely under the bricks because the bricks could fall (TR 512) and there were no circumstances under which an employee could work safely under the bricks in the condition present at the worksite (TR 524-525). As the individual ultimately responsible for safety on the worksite and knowing that the work was behind schedule with the potential for severe financial penalties on the horizon for failing to complete the job on time, it is concluded that Mr. Reis allowed an unsafe condition to exist at the worksite to avoid spending the time necessary to remove the hazardous condition. Moreover, as an individual familiar with the work plan (TR 526,527), Mr. Reis knew that beams 14 and 15 would be cut by an employee. Thus, Mr. Reis appreciated the hazard to which employees cutting beams 14 and 15 were exposed and failed to eliminate that hazard in order to "speed up" the work.[1]

Mr. Frank Bartolotti was employed by AW as a working foreman and was the person responsible for demolishing the south brick wall. Bartolotti was the senior AW employee on site (TR 30,1038) and directed the work activity of the deceased employee. He was the designated competent person and safety officer for Respondent AW (TR 46,155,156). Mr. Bartolotti was a nervous witness who displayed a distinct lapse of memory for matters of importance (TR47,141,147,198,199,203,280,221,223) and provided contradictory testimony (TR 110,180,112,117,118,145,180). Bartolotti was ill at ease and attempted to temper his testimony in a fashion most favorable to his employer.[2]

Notwithstanding the foregoing, I find the following testimony to be credible. Mr. Bartolotti had over twenty years' experience in the demolition business at the time of the inspection (TR 31) and extensive experience as a supervisor for large demolition projects (TR 31-35). His knowledge of demolition techniques was acquired by hands-on work in the field and his experience and background are similar to Complainant's expert, Mr. Maitz. As in the case of Mr. Maitz, it is

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[1] I specifically discredit Mr. Reis' testimony that he believed the bricks were in an arch configuration which created a "safe" condition (TR 516,517,520).

[2] Mr. Bartolotti refused to acknowledge even the possibility that the deceased could accidentally bump the manlift in which he was working against the columns that he was cutting (TR 148).

concluded that the unsafe condition of the unsupported bricks was so obvious to a person of Mr. Bartolotti's experience, that his belief that an employee positioned beneath the bricks was not exposed to any hazard while cutting steel beams is unreasonable. Moreover, there is no evidence to support the conclusion that Mr. Bartolotti made a good faith effort to eliminate the hazardous condition. To the contrary, Mr. Bartolotti testified that he intended to remove all of the bricks (TR 112,117,141) but was prevented from doing so because of the height limitations of the front end loader that he operated to remove the bricks (TR 115-117,126,127). He made the decision to leave the suspended bricks in place even though a crane was on site and available to remove the bricks (TR 127).

As noted by the Commission (decision p.14), Bartolotti was granted discretion by his employer to make decisions regarding the manner in which he would "proceed with the various demolition activities" without any guidance from work rules or policies. Thus, as stated by the Commission, Bartolotti's decision to leave the bricks in place was "foreseeable" (decision pg. 15). The issue remaining, as noted by the Commission, is whether Bartolotti had a heightened awareness of the hazard and "appreciated that the working conditions were hazardous" (decision pg. 20).

Based upon the highly credible testimony of Complainant's expert, Mr. Maitz, it is concluded that a person possessing Mr. Bartolotti's extensive experience in demolition had a heightened awareness of the hazard of falling bricks which he created at the worksite. However, the general knowledge throughout the worksite that the job was significantly behind schedule caused Messrs. Gales, Reis and Bartolotti to disregard a condition which they knew presented a hazard to employees working beneath the unsupported bricks in order to speed up the work process. The pressure of financial loss created by the failure to comply with the contractual work schedule as well as the inability to obtain relief from UI created a tense atmosphere which permeated the worksite and caused supervisors and workers to complete work assignments as quickly as possible. This atmosphere was enhanced by the efforts of Messrs. Harrigan and Reis of IDM to encourage AW personnel to work faster (TR 487). Based upon the totality of the circumstances present at the jobsite, it is concluded that Messrs. Gales, Reis and Bartolotti allowed a hazardous condition, to which employees would be exposed, to exist at the worksite to avoid expending the time necessary to eliminate the hazard. The pressure to complete the job as quickly as possible caused the representatives of both Respondents to place expediency above safe work practices.

For the reasons set forth above, as well as the reasons set forth in the original decision and order, it is concluded that Complainant has established that Respondents IDM and AW, through their representatives, possessed a heightened awareness of a hazardous condition at the worksite and, based upon the totality of circumstances, were plainly indifferent to that hazardous condition. Thus, based upon the principles set forth in *Andersen Excavating and Wrecking Company* 1997 OSHD §31,228, it is concluded that both Respondents willfully violated the cited standard as alleged.

ORDER

I. As to Respondent American Wrecking Company:

(a) Willful Citation No. 1, item 2 is AFFIRMED as a Willful violation.

II. As to Respondent IDM Environmental Corporation:

(a) Willful Citation 1, item 2 is AFFIRMED as a Willful violation.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: September 9, 2002