SECRETARY OF LABOR, Complainant, v. MIDWEST MASONRY, INC., Respondent.	OSHRC Docket No. 00-322

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

The issues on review are whether Administrative Law Judge Stanley M. Schwartz erred in: (1) reclassifying a scaffold midrail violation under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, from repeated to serious; and (2) reducing the penalty for that violation from the $5,000 proposed by the Secretary to $100. We hold that the judge erred for the following reasons.

FACTS

Midwest Masonry, Inc., was the bricklaying contractor for a construction project at the University of Nebraska's Kearney West Campus. It erected a scaffold along the length and width of the building it was constructing. The scaffold had two completed work platforms, with a third one underway at the time of the inspection. The first one was about 6 feet 10 inches above the ground, and the second one was about 13 feet 4 inches above the ground. Only the guarding for the second platform is at issue here.

Compliance Officer ("CO") Dean Craig of the Occupational Safety and Health Administration ("OSHA") inspected the site on December 10, 1999. Various materials -- including bundles of bricks, a masonry saw, a "mud" (mortar) board, and a pair of coveralls -- had been placed on the second platform by Midwest employees. Midwest admits that during the stocking operation those employees had worked at the perimeter without midrail protection.[1] OSHA cited Midwest for failure to provide midrails as required by section 1926.451(g)(4)(i).[2] No employees were working on the platform at the time of the inspection. On the one hand, no bricklaying had been done from the second platform; on the other hand, the materials stocked on the second level were not used in the erection of the scaffolding. Midwest's President, Doug Windhorst, was in the process of bringing additional railings to the site.

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[1]The platform was constructed with cross bracing, which was attached to uprights every four feet, and which intersected approximately 42 inches above the platform. That cross bracing could not serve as a midrail under 29 C.F.R. § 1926.451(g)(4)(xv) because the crossing point was not at the requisite height, between 20 inches and 30 inches above the work platform.

[2]That section provides:

> (g) *Fall protection.* (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. . . .
>
> . . . .
>
> (4) . . . (i) Guardrail systems shall be installed along all open sides and ends of platforms. *Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.*

(Emphasis added.) "*Guardrail system* means a vertical barrier, consisting of, but not limited to, toprails, midrails, and posts, erected to prevent employees from falling off a scaffold platform or walkway to lower levels." 29 C.F.R. § 1926.450(b). "When midrails are used, they shall be installed at a height approximately midway between the top edge of the guardrail system and the platform surface." 29 C.F.R. § 1926.451(g)(4)(iv). *See also* 29 C.F.R. § 1926.451(g)(4)(ii) (top edge height of toprails on supported scaffolds placed in service before January 1, 2000 were required to be between 36 inches and 45 inches above platform surface).

The Secretary argues that this violation should be classified as repeated based on a 1997 final order for a prior scaffold guardrail violation by Midwest that was itself a repeated violation. Administrative Law Judge Benjamin Loye had affirmed that violation under the former 29 C.F.R. § 1926.451(d)(10).[3] *Midwest Masonry, Inc.*, 18 BNA OSHC 1431, 1997 CCH OSHD ¶ 31,404 (No. 96-1462, 1997) (ALJ). The repeated violation there occurred at another Midwest masonry construction project in Kearney, Nebraska. Midwest's employees had been working on the upper level of a scaffold, 13 feet 6 inches above ground level, without guardrails. Several of those employees were removing mortar from a tub and placing it on mortar boards. Another employee was using a masonry saw to cut block. Windhorst was present during that inspection.

Judge Loye in his 1997 decision found that violation itself to be repeated, based on a 1994 final order affirming a substantially similar violation by Midwest. He rejected Midwest's claim that the cited standard was not applicable to the scaffold because scaffold assembly had not yet been completed. "In essence, Midwest contends that its scaffold was not complete because no guardrails had been installed." He noted that Midwest's reasoning would lead to the "absurd result" that the guardrail requirement would never apply until the guardrails had been installed.

JUDGE'S DECISION

In the case on review, the judge affirmed the citation item insofar as it alleged a violation of section 1926.451(g)(4)(i), because work other than erection work was done on the second level of the scaffold before midrails were in place. However, he rejected the Secretary's argument that it was a repeated violation, and instead classified it as serious. The judge ruled that the violation was not repeated because "no masonry work was being performed. No brick was being cut or laid; Midwest's employees were exposed only for the brief periods it took them to stock the second level platform, an activity that they believed

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[3]At that time, the provision stated: "Guardrails . . . approximately 42 inches high, with a midrail . . . and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor."

was part of the erection process." He stated that he could not "find that the earlier violation placed Midwest on notice that the Secretary's interpretation of 'erection' would not include stocking and enclosing scaffolding." He further found that "Midwest believed, in good faith, that its practices conformed to the requirements of the cited standard." The judge concluded that the cited violation was not substantially similar to the violation affirmed in 1997 and thus not repeated. He classified it as serious and assessed a reduced penalty of $100.

DISCUSSION

The merits of the violation are not on review. The only issues before us are the classification and penalty.

A. Repeat Classification

"A violation is repeated under section 17(a) of the Act [29 U.S.C. § 666(a)], if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary may establish a prima facie case that a violation is repeated by showing that the two violations were of the same standard, or if they were not, that they otherwise were substantially similar. *Id.* ("substantially similar" test explained, with illustration that permitting use of unguarded scaffold for two different projects -- such as construction work the first time, and replacing light bulbs the second time -- could result in repeated violation under two entirely different standards). *See J. L. Foti Construction v. OSHRC*, 687 F.2d 853, 857 (6th Cir. 1982) (Commission's test in *Potlatch* that repeated violation may be based on "substantially similar" violations of different standards upheld as "reasonable").[4]

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[4]*See also John R. Jurgensen Co.*, 12 BNA OSHC 1889, 1893, 1986-87 CCH OSHD ¶ 27,641, pp. 35,968-69 (No. 83-1224, 1986) (failure to protect employees from cave-in hazards under standard dealing with "unstable or soft" soil was substantially similar to failure to protect employees from same hazards under different standard dealing with "hard or compact" soil); *Farmers Cooperative Grain and Supply Co.*, 10 BNA OSHC 2086, 2089, 1982 CCH OSHD ¶ 26,301, p. 33,263 (No. 79-1177, 1982) (prior and subsequent exposure

(continued...)

The language of the standard cited here is somewhat different from the one Midwest violated in the 1997 case, but it is the successor standard to that one, and both standards require midrails on scaffolds more than ten feet above a lower level. *See Final Rule: Safety Standards for Scaffolds Used in the Construction Industry*, 61 Fed. Reg. 46,026, 46,027 (1996). We need not decide here whether they are different standards. We will treat them as different for purposes of deciding this case.

"[T]he principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards." *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661, 1995-97 CCH OSHD ¶ 31,081, p. 43,364 (No. 93-1429, 1996), *aff'd without published opinion*, 117 F.3d 1433 (11th Cir. 1997). Here, the hazards created by the prior and current violations are the same -- fall hazards from scaffolds due to lack of required safety railings. *See Superior Elec. Co.*, 17 BNA OSHC 1635, 1638, 1995-97 CCH OSHD ¶ 31,060, p. 43,323 (No. 91-1597, 1996) (installing guardrails without midrails on work platform resulted in same hazard as installing no guardrails at all), *rev'd on other grounds without published opinion*, 124 F.3d 199 (6th Cir. 1997); *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1389-90, 1980 CCH OSHD ¶ 24,495, p. 29,928 (No. 76-5089, 1980) (minor factual distinctions do not make scaffold guardrail violations dissimilar -- same hazards exist in all instances). *Compare Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,826 (No. 91-1807, 1994) (hidden hazard of falling into manhole when its cover breaks or shifts not substantially similar to obvious and routine hazard of stumbling into beam trough).

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[4](...continued)
of employees to fire and explosion hazards due to excessive grain dust accumulations in grain elevator were repeated violations, even though first violation was of general duty clause and second violation was of standard). *Cf. GEM Industrial, Inc.* 17 BNA OSHC 1861, 1866, 1995-97 CCH OSHD ¶ 31,197, p. 43,691 (No. 93-1122, 1996) (evidence regarding hazards and means of abating prior General Duty Clause violation too limited to conclude that it was substantially similar to violation of standard requiring ironworkers to use fall arrest system.)

"Under *Potlatch*, circumstances such as the geographical proximity of the violations, the commonality of supervisory control over the violative condition, and the time lapse between the violations bear only on the size of the penalty to be assessed, not on the 'repeated' character of the infractions." *J. L. Foti*, 687 F.2d at 857. "Factors such as the employer's attitude . . . were declared irrelevant, however, to the substantial similarity of the past and present violations." *Bunge v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir. 1981). Further, contrary to Midwest's arguments, the surrounding circumstances here are almost indistinguishable from those at issue in 1997. Both cases involve missing safety railings on brickmasons' scaffolds, at the same approximate height. In both cases the exposure involved laborers ("tenders") who were doing work preparatory to the masons' work. The required abatement in the two cases -- installation of a proper guardrail -- is identical. The only difference is that here the employees were *placing* a masonry saw, mud board, and other materials on a platform, whereas in the prior case they were *using* a masonry saw, mud board, and other materials on a platform. The hazards, however, are the same and we find, based on the foregoing, that the current violation is substantially similar to the repeated violation affirmed in 1997. Thus, we affirm the current violation as repeated.[5]

Midwest argues against the repeated classification on the ground that it lacked notice that the cited conditions violated the standard. Midwest claims its lack of notice is corroborated by the judge's finding that "Midwest believed, in good faith, that its practices conformed to the requirements of the cited standard." To the extent that Midwest contends

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[5]Midwest argued in its cross-petition for review (that was untimely filed, since it was received two days after the period for granting review expired (Rule 91(e) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.91(e))) that the Secretary's three-year rule for citing a violation as repeated is discriminatory, because it measures from the final order date or final abatement date, rather than the citation date. Midwest did not address that argument in its review brief, however, even though the Commission's briefing notice was broadly worded. We therefore deem the argument abandoned by Midwest, and we need not address it. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1938, 1999 CCH OSHD ¶ 31,932, p. 47,371 (No. 97-1676, 1999) ("[t]he Commission need not review an issue abandoned by a party").

it lacked fair notice of the cited requirement, the issue bears on the existence of the underlying violation. *See, e.g., Sec'y of Labor v. OSHRC (CF & I Steel Corp.)*, 941 F.2d 1051, 1058 (10th Cir. 1991) (resolution of whether violation occurred turns on whether employer had fair notice of Secretary's reasonable interpretation of cited standard); *Brock v. L. R. Willson & Sons, Inc.*, 773 F.2d 1377, 1387 (D.C. Cir. 1985) (standard is enforceable where it is sufficient to put employer on notice of proscribed conduct); *National Industrial Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1054 (8th Cir. 1978) (same). However, the underlying violation is not on review here.[6] Once the underlying violation is established, the employer's alleged good faith belief does not negate the classification of a violation as repeated. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168, 1993-95 CCH OSHD ¶ 30,041, p. 41,221 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994) (once existence of violation is established, "an employer's inadequate attempts to comply are not relevant to whether a violation was repeated").[7]

To the extent that Midwest contends that it lacked fair notice of the "substantial similarity" of the hazards, we find that its argument is without merit. Midwest fails to take into account that the 1997 decision expressly adopted the Secretary's position "that assembly is complete, and the standard applicable once employees begin working from the scaffol7-

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[6]In any event, as discussed below, we find that Midwest had fair notice of the cited requirement from several sources -- the standard, its preamble, and the 1997 decision. *Cf., e.g., Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991) ("[w]hether or not employers are in fact aware of each OSHA regulation and fully understand it, they are charged with this knowledge and are responsible for compliance. . . . It is no defense that they did not understand the reasonable interpretation of a regulation.")

[7]Even if good faith were an appropriate consideration here, the judge did not provide a factual basis for his conclusion with respect to good faith. Furthermore, we note that Midwest's asserted belief that stocking the scaffold "was a prerequisite to enclosing it, and enclosing it was clearly a part of the erection process," is belied by Christensen's affidavit acknowledging that Midwest stocked the platform with mortar *after* enclosing the scaffold with plastic.

ding." Although Midwest takes great pains to distinguish between stocking brick and laying brick, they are both "work," and employees performing either activity on the scaffold platform without midrails would be exposed to a fall hazard of over 13 feet.[8] The 1997 decision thus gave Midwest fair notice that guardrails must be installed before the sort of work involved here begins.

In any event, the language of the cited standard clearly requires guardrails before the "scaffold is released for use by employees other than erection/dismantling crews." That provision puts employers on notice that guardrails are required before *any* work other than erection or dismantling is done. The Preamble to the standard clearly confirms that meaning.

> In the case of supported scaffolds, installation [of the required guardrails] must occur before employees are permitted to *work* from the scaffold. When an employee is on a supported scaffold during the scaffold *erection process*, fall protection is covered by final rule paragraph (g)(2).

Final Rule: Safety Standards for Scaffolds Used in the Construction Industry, 61 Fed. Reg. 46,026 (1996) (emphases added).[9] (The scaffold here was a "supported scaffold." *See* section 1926.450(b).)

For the reasons above, we find the violation repeated.

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[8]The definition of a "scaffold" at 29 C.F.R. § 1926.450(b) does not distinguish between types of work done on it. Rather, the definition provides that a scaffold's use is "for *supporting* employees or materials, or both." (Emphasis added.)

[9]In addition, paragraph (g)(2) provides that, even if an employer were still in the erection process, which Midwest was not here, it would be required "to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard." (The judge found that fall protection was feasible here. Midwest does not question that ruling, and has not suggested that compliance might have created hazards of its own.)

B. Penalty

Under the Act, the Commission must give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). Midwest was a relatively small employer, employing 20 to 30 people in winter and 30 to 50 the rest of the year. It had an aggravated history of scaffold violations, however. The scaffold guardrail violation affirmed in 1997 was itself a repeated violation. Also, another repeated violation was affirmed in that 1997 decision for lack of safe access to a scaffold.

The gravity of the current violation is moderate, because the fall distance here was about 13 feet 4 inches, and only the midrails were missing. There was no testimony as to how long the employees' exposure continued. On the other hand, we agree with the Secretary that no credit for good faith is due.

The Secretary proposed a penalty of $5,000. Given Midwest's aggravated history of scaffold guardrail violations, and the ineffectiveness of the $1,250 penalty it received in 1997 for a substantially similar violation, we find that a penalty of $5,000 is appropriate. *See, e.g., Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130-31, 1993-95 CCH OSHD ¶ 30,621, pp. 42,411-12 (No. 92-851, 1994) (fact that violations were repeated diminishes effect of good safety program and low chance of accident).

ORDER

Thus, we affirm as repeated Midwest's violation of 29 C.F.R. § 1926.451(g)(4)(i), and we assess a penalty of $5,000 for that violation.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: September 7, 2001

SECRETARY OF LABOR, Complainant, v. MIDWEST MASONRY, and its successors, Respondent.	OSHRC DOCKET NO. 00-0322

APPEARANCES:

For the Complainant:
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For the Respondent:
Dean G. Kratz, Esq., McGrath, North, Mullin and Kratz, PC, Omaha, Nebraska

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Midwest Masonry, and its successors (Midwest), at all times relevant to this action maintained a place of business at the University of Nebraska, Kearney West Campus, Kearney, Nebraska, where it was engaged in bricklaying. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 10-15, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Midwest's Kearney work site. As a result of that inspection, Midwest was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Midwest brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 25, 2000, a hearing was held in Omaha, Nebraska. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Repeat citation 1, item 1 alleges:

29 CFR 1926.451(g)(4)(i): Midwest Masonry - Utilizing a scaffold without the use of a complete guardrail system. The contractor was using cross braces for a top rail but the guarding system lacked a mid rail.

The cited standard provides:

> §1926.451(g) *Fall protection.* (i) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.. . .
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> * * *
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> (i) Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

Facts

OSHA Compliance Officer (CO) Dean Craig testified that he arrived on Midwest's Kearney work site just before 11:30 a.m., December 10, 1999, at which time he observed and videotaped Midwest's scaffolding (Tr. 22, 32-33; Exh. C-1). Craig testified that the first level of the scaffold was 6 feet, 10 inches above the ground (Tr. 42). An outrigger extended between the scaffolding and the building being bricked (Tr. 41-42). The second scaffold level was 6 feet, 6 inches above the first platform, 13 feet, 4 inches above the ground (Tr. 43). CO Craig testified that the second tier of the scaffold was guarded with cross bracing that intersected approximately 42 inches above the platform (Tr. 48). Craig testified that, according to OSHA §1926.451(g)(4)(xv), cross bracing 42 inches high could be substituted for the top rail of a guardrail system (Tr. 47). To comply with subparagraph 451(g)(4), however, a guardrail system must also include a midrail at 22 inches above the scaffold platform (Tr. 48). Craig stated that there were no midrails on any of Midwest's scaffolding (Tr. 49).

Craig admitted that no one was laying brick on the scaffolding at the time of the OSHA inspection; however, he concluded that Midwest employees had been working from the second level of the scaffold. Craig based his conclusion on the presence of bundles of bricks on the second level platform; he noted that the bands around some of the bundles had been broken (Tr. 34, 36). Craig also observed a masonry saw, a mud board and a pair of coveralls on the second level (Tr. 35, 40, 44; Exh. C-1).

CO Craig testified that he interviewed Midwest employees including Martin Christensen, who also provided a written statement (Tr. 26, 61, Exh. C-2). In his written statement, Christensen stated that work on the first level of scaffolding began on the 5th or 6th of December (Exh. C-2, p. 1). Christensen stated that on December 9, brick was laid from the outrigger above the first level (Exh. C-2, p. 2). He indicated that once the brick had been laid up to the outrigger they began erection of the second and third scaffold level(Exh. 2, p. 3). When CO Craig arrived on the job site on December 10, they had finished the second level frames, planked the platform and stocked it, and

were working on the third level planking (Exh. C-2, p. 4). It was Christensen's contention that, in the winter, during the erection process, platforms are stocked with bricks and equipment before work begins, so the scaffolding can be encased in plastic and heated before the masons begin working.[10] (Exh. C-2, p. 3, R-2; *See also,* testimony of Doug Windhorst, Tr. 225-27).

Christensen further maintained that no brick had been placed from the second level (Exh. C-2, p. 4). The brick, mudboard, masonry saw and coveralls had been placed on the second level in anticipation of its enclosure in plastic, which would limit access to the scaffold platform (Exh. C-2, p.3). The plastic bands on the brick had been broken during their placement, by forklift, on the second level platform (Exh. C-2, p. 3). However, Doug Windhorst, Midwest's president, admitted that employees stocking the second level platform worked at the perimeter (Tr. 234, 240). Windhorst knew there were no midrails in place during this process (Tr. 223). According to Windhorst, midrails were installed immediately following the inspection (Tr. 246).

Discussion

Erection. The central issue raised by Respondent is that the cited standard was not applicable to its operation because the cited scaffold was still being erected and had not been released for use by employees other than the erection crew.

Christensen was the only witness with first hand knowledge of the work being done on the site at the time of the inspection, and this judge credits his statement to the effect that no brick was laid from the second level. It had, nonetheless, been used by employees other than the erection crew, for purposes unnecessary to the erection process. Though Respondent's counsel argues that it was not necessary for employees to access the second level to place the mud board, masonry saw and coverall there, the videotape shows, and Doug Windhorst admitted at the hearing that Midwest's crew worked at the perimeter of the scaffolding stocking brick. Windhorst admits that brick is not used in the erection of scaffolding (Tr. 233-34).

The Secretary takes the position that "erection" includes only those steps necessary to the installation of structural members and guarding required by OSHA. The Complainant maintains that stocking and enclosure of the scaffolding is *not* necessary to, and, therefore, not part of the erection process. The Secretary's interpretation of "erection" is neither clearly erroneous, nor inconsistent with the regulation itself, and so must be accorded deference. *See, Martin v. OSHRC (CF&I Steel Corp.)*,

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[10] Doug Windhorst, Midwest's president, conceded that, in this case, the weather was warm enough that enclosure of the second and third level scaffolds never became necessary (Tr. 212, 242, 245).

111 S.Ct. 1171, 1179 (1991); *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). Under the Secretary's definition of the term, enclosure of the scaffolding *is* an extra step; it is not part of the erection process. Because Midwest allowed employees to use the incompletely guarded scaffolding to perform work other than erection, *i.e.,* stocking brick and tools, the cited standard was correctly applied. The Secretary has established the cited violation.

Infeasibility. Though not specifically pleaded prior to the hearing, it is, in essence, Midwest's argument that it is infeasible to completely erect its scaffolding before the brick is loaded onto the platforms. Windhorst and Christensen's explanation of Midwest's winter scaffold erection procedure is lucid, as well as consistent with the physical evidence observed by CO Craig. It is clear that the brick cannot be stocked after it is enclosed in plastic. This judge appreciates that Midwest anticipated enclosing the second level, and so stocked it, though it later proved unnecessary to enclose that level. What Midwest did not explain, was why *midrails* could not be installed on the otherwise complete scaffolding prior to allowing employees to stock the second level. In its brief, Midwest argues that it would have had to remove the midrails to load brick onto the second level scaffold (Brief of Respondent, p. 30). Midwest did not raise this point either prior or during the hearing, and bases its argument solely on the Complainant's videotape of the scaffold. Midwest maintains that Complainant failed to demonstrate how the bundles of brick could have been loaded onto the second level platform with the midrails in place.

The Commission has held, however, that infeasibility is an affirmative defense. In *Seibel Modern Mfg & Welding Corp.*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991) the Commission found any employer seeking to be excused from implementing a cited standard's abatement measure has the burden of establishing not only that the prescribed measure is infeasible, but that alternative protective measures were used or that there were no feasible alternative measures. After viewing Complainant's videotape, this judge cannot conclude that the installation of midrails would have prevented the stocking of bricks onto Midwest's work platform. Moreover, Midwest failed to introduce any evidence that alternative protective measures were taken to protect employees engaged in unloading brick.

This judge commends Midwest for taking the extra step of enclosing its scaffolding during cold weather. However, on this record I cannot conclude that it is infeasible to complete the guarding of the otherwise completed scaffold prior to either its stocking and enclosure in plastic. Midwest failed to carry its burden establishing the affirmative defense of infeasibility and the cited violation will be affirmed.

Classification & Penalty

Repeat. CO Craig testified that the violation was cited as a "repeat" violation, because Midwest was previously cited for a violation of an equivalent standard. As a result of OSHA inspection number #116003997, Midwest was cited for a violation of 29 CFR 1926.451(d)(10), which requires that "Guardrails. . .approximately 42 inches high, with a midrail . . .and toeboards shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor." That citation was affirmed, and became a final order effective September 10, 1997. *Midwest Masonry, Inc.*, 18 BNA OSHC 1431, 1997 CCH OSHD ¶31,404 (No. 96-1462, 1997).

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16,183, 1979).[11] The Secretary has the burden of establishing that two violations are substantially similar. *See, GEM Industrial Inc.,* 17 BNA OSHC 1861, 1996 CCH OSHD ¶31,196 (No. 93-1122, 1996).

Respondent's previous citation arose out of a September 19, 1996 inspection (Exh. J-1), and involved four masons cutting block and moving mortar from mortar tubs to boards for approximately 30 minutes on an unguarded scaffold. That violation placed Midwest on notice of the need to take steps to avoid similar occurrences. *See, Caterpillar, Inc. v. Herman*, 154 F.3d 400 (7th Cir. 1998). However, in this case, no masonry work was being performed. No brick was being cut or laid; Midwest's employees were exposed only for the brief periods it took them to stock the second level platform, an activity that they believed was part of the erection process. While I am constrained to uphold the Secretary's reasonable interpretation of the term "erection," I cannot find that the earlier violation placed Midwest on notice that the Secretary's interpretation of "erection" would not include stocking and enclosing scaffolding. The record establishes that Midwest believed, in good faith, that its practices conformed to the requirements of the cited standard. The cited violation is *not,* therefore, substantially similar, and not "repeated."

Penalty. In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No.

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[11] In order to ensure uniformity, the Secretary issues a "repeat" citation only if a citation for a substantially similar violation became a final order within the preceding three years (Field Inspection Reference Manual CPL 2.103). At the hearing, a May 19, 1995 final order affirming a violation of §1926.451(a)(4) was found to fall outside the Secretary's internal guidelines (Tr. 77). That violation is not considered here.

4, 1972). Midwest is a small employer. Craig testified that the penalty was adjusted based on the size of the employer (Tr. 76-77). CO Craig gave no credit for history or for good faith because Midwest was cited previously for a violation of a substantially similar violation. As discussed above, the cited violation was not repeated; Midwest acted in good faith. The most recent violation for which Midwest was cited took place more than three years prior to the 1999 inspection.

CO Craig testified that a fall from a height of 13 feet, 4 inches could result in serious injury, ranging from broken bones up to and including death (Tr. 75). The violation is "serious," in that an accident, should it occur, could result in serious injury. However, the Secretary overstates the gravity of the violation.

The gravity of the offense is the principle factor to be considered in determining an appropriate penalty. *Id.* Factors to be considered in determining the gravity of a violation include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981). CO Craig stated that he rated the gravity of the violation as high (Tr. 74). There is, however, no direct evidence of exposure in this case; only three Midwest employees were on the site, one of whom drove the fork lift (Exh. 2, p. 2). There is no evidence establishing the duration of the exposure. Because the employees were mainly engaged in offloading the forklift, they would have been aware of their proximity to the edge of the platform. The scaffold was partially guarded with cross bracing, which would have provided some measure of protection. In *Orion Construction, Inc. (Orion),* 18 BNA OSHC 1867, 1999 CCH OSHD ¶31,896 (No. 98-2014, 1999), the Commission found that the gravity of a violation involves not only the number of employees exposed and the duration of exposure, but the *degree* of probability of an accident. In that case, the Commission found that the extremely low probability of an accident occurring justified a penalty assessment of $100.00 per violation.

Here, as in *Orion,* the extremely low probability of an accident, coupled with the small size of the employer and its good faith attempts to comply with OSHA standards justifies a low penalty; $100.00 will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.451(g)(4)(i) is AFFIRMED as a "serious" violation, and a penalty of $100.00 is ASSESSED.

/s/

Stanley M. Schwartz

Judge, OSHRC

Dated: September 11, 2000