UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
THOMAS LINDSTROM & COMPANY
Respondent.

OSHRC DOCKET
NO. 92-3815

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 15, 1993. The decision of the Judge will become a final order of the Commission on January 14, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 4, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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

Petitioning parties shall also mail a copy to:

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

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 15, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3815

NOTICE IS GIVEN TO THE FOLLOWING:

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Office of the Solicitor, U.S. DOL
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James F. Sassaman, Director of
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Philadelphia, PA 19103

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 92-3815
THOMAS LINDSTROM COMPANY, INC.,	
Respondent.	

Appearances:

Howard K. Agran, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

James F. Sassaman
General Building Contractors
Association
Philadelphia, Pennsylvania
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

On October 7, 1992, an inspection by two Compliance Officers ("CO") of the Occupational Safety and Health Administration ("OSHA") was conducted of the site of the construction of a new building for the City of Philadelphia Medical Examiner where a general contractor had hired Thomas Lindstrom & Company ("Respondent") as the structural steel erection sub-contractor. As a result of that inspection a citation alleging two

serious violations of the Act were issued to Respondent. Civil penalties of $3,000 for each violation were proposed.

Respondent timely contested the citations. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on August 26, 1993. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in structural steel erection. It is undisputed that Respondent uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion[2]

Citation 1, item 1 alleges a violation of the construction safety standard at 29 C.F.R. § 1926.751(d), which provides that "[t]ag lines shall be used for controlling loads."

According to Respondent's post-hearing brief:

> The dispute could not be more clear. Complainant's position is that the wording of the standard amounts to a mandatory requirement that all loads carried to people be used with a tag line (Complainant's opening statement at 6). Respondent, on

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[1] Title 29 U.S.C. § 652(5).

[2] Citation 1, item 1 was settled by the parties at the hearing and thus is not in issue. The agreement reached by the parties as to that item is part of the record in this case (Tr. 5-6).

> the other hand, argues that he standard reads that the use of tag lines is predicated upon a need for controlling loads (Respondent's opening statement at 7).

If this were the sole issue in the case at bar, this decision would begin and end with this Judge's agreement with Judge Schwartz's holding in *Swain & Sons*, 15 BNA OSHC 1062 (No.90-0355-S, 1991) (ALJ) (Digest) and disagreement with that of Judge O'Connell in *East Rutherford Steel Erectors, Inc.*, 9 BNA OSHC 1876 (No. 79-2658, 1981) (ALJ) (Digest). The term "shall" is not advisory or precatory -- it is mandatory. The cited standard requires the use of tag lines. A failure to use tag lines during the final placing of solid web structural steel members is a violation of the requirements of the standard[3]. Unless an affirmative defense is pled and proven as it has in this case.

The Commission, in *Seibel Modern Manufacturing & Welding Corp.,* 15 BNA OSHC 1219 (No 88-821, 1991) ("*Seibel*") reviewed the history of the infeasibility defense including *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd in part, sub nom, Secretary v. Dun-Par Engineered Form Co.*, 843 F.2d 1135 (8th Cir. 1988), ("*Dun-Par I*") and *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-0928, 1986) ("*Dun-Par II*"). In order to prevail on this defense, a Respondent must demonstrate that 1) compliance with the standard's requirements would "not be practical or reasonable in the circumstances." *Dun-Par II, supra, 12 BNA OSHC at p. 1966*, and 2) "that an alternative protective measure was used or that there was no feasible alternative measure." *Seibel*, supra, 15 BNA OSHC at 1228. *See also, Kunz Construction Co.*, 15 BNA OSHC 1331, 1333 (No. 90-2369-S, 1991) (ALJ). Infeasibility, said the Commission, in *Dun-Par II*, 12 BNA OSHC at p. 1996, includes "considerations of reasonableness, common sense, and practicality." *Id.* Moreover, where an employer cannot fully comply with the literal requirements of a standard, it must nevertheless comply to the extent that compliance is feasible. *Bratton Furniture Manufacturing Co.,* 11 BNA OSHC 1433, 1434 (No. 81-799-S, 1983).

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[3] Assuming, of course that the other elements of a violation of § 5(a)(2) of the Act, the applicability of the standard, employee exposure and knowledge by Respondent of the violative condition, are also established.

In *Dun-Par II*, Respondent's impracticality argument (that additional employees and additional time would have been needed to erect guradrails) was considered by the Commission as an argument that the installation of guardrails was not economically feasible. The Commission indicated that such argument was within the framework of the affirmative defense of infeasibility. In *Seibel, supra,* at p. 1227, the Commission interpreted *Dun-Par II* as allowing an employer to demonstrate that "the costs [of compliance] would be 'unreasonable' or that [compliance] would be 'unreasonable or senseless.' " In *Falcon Steel Co.,* 16 BNA OSHC 1179, 1186-87 (Nos. 89-2883 and 89-3444, 1993) the Commission examined a defense of infeasibility in terms of "physical impossibility" and "interference with operations" while mentioning the element of alternative protective measures in a footnote. *Id.,* at 1187, n.10.

In this case, Respondent has shown that the use of tag lines on the steel being placed into position at the cited worksite at the time of the inspection was infeasible in that their use would have created more problems than those solved by the use of the lines. Their interference with the operations as they were being conducted was so great as to warrant their not being used.

First raised in its amended answer, Respondent throughout the course of the hearing and in its post-hearing brief presented argument and evidence to the effect that the use of tag lines was infeasible. A review of the evidence presented by Respondent shows significant problems in the use of tag lines, under the circumstances present at the inspected site. First, "ground men" who control the lines from the ground would have had to cross uneven metal decking consisting of four inch cells divided by three inch gaps while concentrating on what was happening above them thus limiting their ability to watch their footing in this potentially dangerous area (Tr. 103-04, 115). Second, the circumstances at the site would have required that the tag lines taken through a "forest" of upright steel columns (with protruding connection plates attached) which could result in the fouling or snagging of the tag lines. In this event, ironworkers would have to go up the 40' to 50' high vertical columns to free the tag lines and the snagging would result in unwieldy movement of the suspended steel beams (Tr. 102-03, Ex. R-2, R-3).

Respondent presented no specific evidence that there were no feasible alternative measures to afford protection to the ironworker connectors who received the steel. It argues, instead, that the control of the suspended steel by the crane itself, without the use of tag lines, was "an alternative protective measure, a primary measure, really. . ." (Resp. Brief, p. 14). The evidence as a whole, however, establishes that there were no feasible alternatives to the use of tag lines. The Secretary recognizes that "there only three means available for the controlling of loads" (Sec. Brief, p. 6). One, control by the crane. Two, hands on control by the connectors once they have hold of the steel. Three, tag lines. Respondent has established that tag lines are infeasible. The Commission, in numerous cases has held that ironworker connectors cannot be required to use safety belts while moving about (as they must do to receive steel being hoisted to them). Thus, Respondent is correct, the only manner and means of controlling hoisted steel under these circumstances, rests with the crane operator's control of the load.

In reaching the assessment of the infeasibility of the use of tag lines greater weight has been accorded the opinion testimony of Respondent's Safety Officer than that of the Compliance Officer and the OSHA Assistant Area Director. All of these witnesses were honest and forthright. The Safety Director, however, was highly experienced in the field of steel erection. While the OSHA officials could and did testify that tag lines were used during most of their construction site inspections, they did not have a sufficient degree and breadth of personal experience to offer reliable testimony as to the effects on this particular site of using tag lines. See, Fed. Rule Evid. 701. (The opinion testimony of a lay witness may be based on that witness's personal experience.) Thus their opinions, while admissible, are accorded significantly less weight than that of the person with many years of experience in the hoisting of steel and the use of tag lines.

In sum, for the above reasons, I find that Respondent has, by a preponderance of the reliable evidence in this case, established the affirmative defense of infeasibility. Accordingly, the item is VACATED.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of the standard at 29 C.F.R. § 1926.751(d) as alleged in item 2 of the citation.

ORDER

Item 2 of the Citation issued to Respondent on December 1, 1992, is VACATED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: DEC 14 1993
Washington, D.C.

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FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 15, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3815

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Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in structural steel erection. It is undisputed that Respondent uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

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[3] Assuming, of course that the other elements of a violation of § 5(a)(2) of the Act, the applicability of the standard, employee exposure and knowledge by Respondent of the violative condition, are also established.

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In this case, Respondent has shown that the use of tag lines on the steel being placed into position at the cited worksite at the time of the inspection was infeasible in that their use would have created more problems than those solved by the use of the lines. Their interference with the operations as they were being conducted was so great as to warrant their not being used.

First raised in its amended answer, Respondent throughout the course of the hearing and in its post-hearing brief presented argument and evidence to the effect that the use of tag lines was infeasible. A review of the evidence presented by Respondent shows significant problems in the use of tag lines, under the circumstances present at the inspected site. First, "ground men" who control the lines from the ground would have had to cross uneven metal decking consisting of four inch cells divided by three inch gaps while concentrating on what was happening above them thus limiting their ability to watch their footing in this potentially dangerous area (Tr. 103-04, 115). Second, the circumstances at the site would have required that the tag lines taken through a "forest" of upright steel columns (with protruding connection plates attached) which could result in the fouling or snagging of the tag lines. In this event, ironworkers would have to go up the 40' to 50' high vertical columns to free the tag lines and the snagging would result in unwieldy movement of the suspended steel beams (Tr. 102-03, Ex. R-2, R-3).

Respondent presented no specific evidence that there were no feasible alternative measures to afford protection to the ironworker connectors who received the steel. It argues, instead, that the control of the suspended steel by the crane itself, without the use of tag lines, was "an alternative protective measure, a primary measure, really. . ." (Resp. Brief, p. 14). The evidence as a whole, however, establishes that there were no feasible alternatives to the use of tag lines. The Secretary recognizes that "there only three means available for the controlling of loads" (Sec. Brief, p. 6). One, control by the crane. Two, hands on control by the connectors once they have hold of the steel. Three, tag lines. Respondent has established that tag lines are infeasible. The Commission, in numerous cases has held that ironworker connectors cannot be required to use safety belts while moving about (as they must do to receive steel being hoisted to them). Thus, Respondent is correct, the only manner and means of controlling hoisted steel under these circumstances, rests with the crane operator's control of the load.

In reaching the assessment of the infeasibility of the use of tag lines greater weight has been accorded the opinion testimony of Respondent's Safety Officer than that of the Compliance Officer and the OSHA Assistant Area Director. All of these witnesses were honest and forthright. The Safety Director, however, was highly experienced in the field of steel erection. While the OSHA officials could and did testify that tag lines were used during most of their construction site inspections, they did not have a sufficient degree and breadth of personal experience to offer reliable testimony as to the effects on this particular site of using tag lines. See, Fed. Rule Evid. 701. (The opinion testimony of a lay witness may be based on that witness's personal experience.) Thus their opinions, while admissible, are accorded significantly less weight than that of the person with many years of experience in the hoisting of steel and the use of tag lines.

In sum, for the above reasons, I find that Respondent has, by a preponderance of the reliable evidence in this case, established the affirmative defense of infeasibility. Accordingly, the item is VACATED.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of the standard at 29 C.F.R. § 1926.751(d) as alleged in item 2 of the citation.

ORDER

Item 2 of the Citation issued to Respondent on December 1, 1992, is VACATED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: DEC 14 1993
Washington, D.C.