UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ADM MILLING COMPANY, Respondent.	DOCKET NO. 10-1362

Appearances:

Aaron J. Rittmaster, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Frederic L. Kenney, Esq., Archer-Daniels-Midland, Decatur, Illinois
For Respondent

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of an ADM Milling Company ("Respondent") facility in Lincoln, Nebraska on March 31, 2010. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one serious violation of the Act with a proposed penalty of $7,000.00. Respondent timely contested the citation and a trial was conducted on January 26, 2011 in Lincoln, Nebraska. Both parties submitted a post-trial brief and the case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times

relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a violation of a specific regulation promulgated under Section 5(a)(2) the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

Stipulations

The parties offered, and the court accepted, the following stipulations:

1. ADM Milling Co. manufactures flour and other milled wheat products at its facility located at 540 South Street, Lincoln, Nebraska ("ADM Facility").

2. Certain of ADM Milling's production workers are represented by Bakery, Confectionary, Tobacco, and Grain Millers Local 31G.

3. ADM Milling is not exempt from coverage of the Occupational Safety and Health Act.

4. At the ADM Facility, there is a manlift elevator D. Photographs which fairly and accurately depict portions of the manlift elevator D are attached hereto as Exhibits 1, 2 and 3.

5. Attached hereto as Exhibit 4 is an illustrative diagram of a continuous belt manlift.

6. The subject manlift elevator D was installed at the ADM Facility and has been in use at the ADM Facility since 1954. The manlift elevator D is Model 54-473 and was

manufactured by J B Ehrsam and Sons Manufacturing Co.

7. The base and lower pulley for manlift elevator D is installed in the basement of the grain elevator at the ADM Facility.

8. ADM employees access the basement of the grain elevator, including the area around manlift elevator D, for purposes of inspection and maintenance.

9. ADM employees who accessed the basement of the grain elevator include Elevator Supervisor, Gene Winkler, and Maintenance Supervisor, Dave Stepanek.

10. At the time of the inspection and at all times prior thereto, the lower boot pulley and moving steps of the manlift elevator D were not protected by a guard to prevent employee contact with the pulley or steps.

11. On June 1, 2010, the US Department of Labor, Occupational Safety and Health Administration, by its Area Director, issued Citation No. 314054453 containing Citation 1 Item 1 to ADM Milling at 540 South Street, Lincoln, Nebraska. The Citation references 29 C.F.R. §1910.68(b)(10)(ii) and alleges as follows:

> The employer is failing to protect employees from caught in or between hazards on the continuous belt manlift. The lower boot pulley was not guarded to prevent employee contact with the pulley or steps.

12. 29 CFR §1910.68(b)(3) provides that all new manlift installations and equipment installed after the effective date of these regulations shall meet the design requirements of the "American National Safety Standard for Manlifts ANSI A90.1-1969."

13. The OSHA Directorate of Compliance Programs has issued a letter of interpretation dated December 5, 1991 which interprets the application of 29 CFR §1910.68 to manlifts installed before August, 1971. A copy of this letter of interpretation is attached hereto

as Exhibit 5.

14. The Area Director (Peoria, Illinois) of Occupational Safety & Health Administration issued a letter dated January 10, 2011 to ADM, a copy of which is attached hereto as Exhibit 6.

Additional Factual Findings

Three witnesses testified at the hearing: (1) Michael Connett, an OSHA Compliance Safety and Health Officer, (2) David Frazelle, Respondent's Divisional Health and Safety Manager, and (3) Bonita Winingham, Area Director for OSHA's Omaha Area Office. Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional factual findings:

On March 31, 2010, CSHO Connett conducted a follow-up OSHA inspection (subsequent to an inspection approximately one year earlier) at Respondent's Lincoln, Nebraska facility. (Tr. 21). During the follow-up inspection, CSHO Connett concluded that the lower boot and pulley area on the bottom of manlift elevator D was insufficiently guarded. (Tr. 22, 25; Ex. 1, 2). He testified that the metal bars in front of the manlift's lower pulley did not protect employees from moving parts because an employee could still contact them. (Tr. 25-26). CSHO Connett concluded that this condition violated the manlift guarding requirements in 29 C.F.R. §1910.68(b)(10)(ii). (Tr. 28). Employee interviews conducted during the inspection revealed that maintenance personnel worked in the immediate area of the lower pulley on manlift elevator D approximately two hours per week. (Tr. 28-29). He characterized the proposed violation as serious because contact with any of the moving parts on the lower pulley could result in significant injuries, such as broken legs, torso injuries, and concussions. (Tr. 29-30). In calculating the proposed penalty for the violation, CSHO Connett provided no reductions for violation history, employer size, or good faith, as Respondent is a large employer who had experienced a fatal accident approximately one year earlier. (Tr. 31-32).

Respondent asserted at trial, and in post-trial argument, that 29 C.F.R. §1910.68 does not apply to manlift elevator D because it was installed in 1954, approximately 17 years before OSHA's manlift standard was promulgated. *36 F.R. 8754-01.* The application subparagraph debated by the parties in this case, §1910.68(b)(3), provides:

> *Design requirements:* ***All new manlift installations and equipment installed after the effective date of these regulations shall meet the design requirements of the "American National Safety Standard for Manlifts*** *ANSI A90.1-1969", which is incorporated by reference as specified in §1910.6,* ***and the requirements of this section*** [emphasis added].

CSHO Connett acknowledged that he has applied the §1910.68(b)(3) "grandfather" exemption to manlifts in other investigations, but was less than clear as to why the exemption language did not apply to the manlift in this case. (Tr. 43). CSHO Connett conceded on cross-examination that another standard, 29 C.F.R. §1910.212, imposes general guarding requirements to protect employees from rotating parts, but Complainant elected to cite Respondent under §1910.68. (Tr. 40-41).

Mr. Frazelle, Respondent's Divisional Health and Safety Manager, has worked for Respondent in various safety-related positions for 31 years. (Tr. 50-51). He is specifically familiar with manlift elevator D at the Lincoln, Nebraska facility. (Tr. 51-52). He is also a current member of the American Society of Mechanical Engineering's Committee A90.1, which focuses on safety standards for belted manlifts. (Tr. 51). He explained that the cited subparagraph, §1910.68(b)(10)(ii), was part of the original standard when §1910.68 was promulgated in 1971. (Tr. 56). In addition to the regulatory language itself, he explained three additional bases for Respondent's belief that manlift elevator D is exempt from OSHA's manlift standard. First, on December 5, 1991, OSHA's Directorate of Compliance Programs in

Washington, D.C. issued an official Letter of Interpretation addressing manlifts and the "grandfather" provisions of §1910.68(b)(3). (Tr. 54; Ex. 5). In responding to an inquiry from a regulated employer, OSHA stated, in pertinent part, that "since the manlifts you ask about were installed in 1956 and 1964 and the effective date of the regulations is August 1971, you are not bound by the requirements of the standard." (Ex. 5). Second, OSHA Team Leader Bernard Hauber, with OSHA's Omaha Area Office, provided a news interview to a local television station after the fatal manlift accident at Respondent's facility a year earlier during which he stated that OSHA's manlift regulation does not apply to manlifts installed prior to 1971. (Tr. 75-77; Ex. R-9). Third, Respondent received a letter in January 2011 from OSHA's Area Office in Peoria, Illinois identifying numerous concerns about a similar manlift in another facility. In that letter, OSHA asked Respondent to "voluntarily" remove the manlift from service, while conceding that the manlift was "not violative of the standards." (Tr. 58-59; Ex. 6).

OSHA Area Director Winingham explained, when questioned about these three evidentiary exhibits, that only OSHA's national office is authorized to issue official interpretations of OSHA regulations. (Tr. 124-125). Therefore, of the three pieces of evidence introduced by Respondent, only the 1991 Letter of Interpretation constituted OSHA's official position on the exemption issue. When asked her opinion about the scope of the 1991 Letter of Interpretation, Area Director Winingham testified that she understood it to mean that the grandfather exception language in §1910.68(b)(3) applies only to itself, not the entire manlift standard. (Tr. 127-128).

Discussion

The Secretary alleged in Citation 1 Item 1 that:

> *Elevator "D" in the facility located at 540 South St., Lincoln, NE - The employer is failing to protect employees from caught in or between hazards on the continuous belt manlift. The lower boot*

pulley was not guarded to prevent employee contact with the pulley or steps.

The cited regulation provides:

29 C.F.R. §1910.68(b)(10)(ii): Location of lower pulley. The lower (boot) pulley shall be installed so that it is supported by the lowest landing served. The sides of the pulley support shall be guarded to prevent contact with the pulley or the steps.

Generally, the first issue addressed in an analysis of a citation item issued to an employer is whether Complainant has established that the cited regulation applied to the cited condition. In this instance, application of the cited standard is the primary issue in dispute. Complainant argues that the court should defer to its interpretation on the scope and application of its own standards. However, when the meaning of a standard is in dispute, the Commission looks first to the text and structure of the standard itself. *General Motors Corp*., 17 BNA OSHC 1217 (Nos. 91-2973, 91-3116, 91-3117, 1995); *Unarco Commercial Products*, 16 BNA OSHC 1499 (No. 89-1555, 1993). If the meaning of the regulatory language is 'sufficiently clear' then the inquiry ends there. *Id*. If the court finds that the meaning of the standard is unclear, but Complainant's interpretation of the standard is unreasonable in light of its plain language, Complainant's interpretation is not entitled to deference. *Dept. of Labor v. Occup. Safety and Health Rev. Comm.*, 938 F.2d 1116 (10th Cir. 1991).

The court finds that the plain language of §1910.68(b)(3), as well as the 1991 Letter of Interpretation issued by OSHA, clearly and unequivocally establish that the requirements of the manlift standard, §1910.68, do not apply to manlifts installed before 1971. Area Director Winingham's interpretation that the language of §1910.68(b)(3) applies only to §1910.68(b)(3) is illogical and unreasonable. Just as the definitions in §1910.68(a) apply to the entire manlift standard, so too does the effective date language in §1910.68(b)(3). Complainant's contrary

interpretation in this proceeding is therefore entitled to no deference and is rejected.[1]

Accordingly, Complainant failed to prove by a preponderance of the evidence that the cited standard applies to the manlift at issue in the citation. Since application of the standard is a required element to prove a *prima facie* violation of the Act, Citation 1 Item 1 will be vacated.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is hereby VACATED.

Date: March 21, 2011
Denver, Colorado

___/s/_____
BENJAMIN R. LOYE
Judge, OSHRC

[1] The court also notes that Complainant's evidence concerning the lack of an electronic hyperlink on www.osha.gov between subparagraph 1910.68(b)(10) and OSHA's Dec. 5, 1991 Letter of Interpretation on manlifts was unpersuasive, and merely reflective of the manner in which OSHA's IT personnel structured its website. (Tr. 89-97).