UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036–3419

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SECRETARY OF LABOR
Complainant,
v.
THOR CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 93-2752

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 February 3, 1995. The decision of the Judge will become a final order of the Commission on March 6, 1995 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 February 23, 1995 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. RHDKA

Date: February 3, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2752

NOTICE IS GIVEN TO THE FOLLOWING:

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

Benjamin T. Chinni
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
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Patrick H. Boggs, Esq.
Lane, Alton & Horst
175 South Third Street
Columbus, OH 43215

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-2752
THOR CONSTRUCTION, INC.,	:	
Respondent.	:	

Appearances:

Elizabeth R. Ashley, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Patrick H. Boggs, Esq.
Lane, Alton & Hoist
Columbus, Ohio
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").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration, Thor Construction, Incorporated, ("Respondent") was issued one citation alleging 9 serious violations of the Act and proposing a total civil penalty of $14,875. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard in Columbus, Ohio. 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 general contracting. 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

Of the originally alleged 9 serious violations only 2 (Items 7 and 8) remained at issue at the hearing.[2]

Item 7 - 29 C.F.R. § 1926.105(a)(1)

Item 7 of the citation, as amended, alleged that Respondent violated the construction safety standard at 29 C.F.R. § 1926.105(a) by failing to provide fall protection to its employees who were working at the perimeter exterior portion of the building at heights exceeding twenty-five feet.[3]

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[1] Title 29 U.S.C. § 652(5).

[2] A partial stipulation and settlement agreement was entered into by the parties prior to the hearing. Only items 7 and 8 were not settled. The fully executed partial settlement is attached and is incorporated in its entirety. It meets all of the requirements of Rule 100 and accordingly, it is approved.

[3] Section 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The inspecting Compliance Officer testified that on several occasions during the course of his two day inspection he observed employees of Respondent, both welders and connectors, working at or very close to the perimeter of the structural steel framework without any operative means of fall protection. (Tr. 17-18, 20-22, 23, 24-25, 26-27, 33-34, 34-35, 36-37). He frequently referred to a videotape he made during his inspection (CX -1). Although welders getting ready to weld or actually welding appeared to the Compliance Officer to be wearing safety belts he testified that the belts were not in use in that they were not tied off (Tr. 18, 21, 24, 26, 28, 29, 31, 32, 34). At times, he said, some welders were tied off while working.

Respondent challenges the Secretary's factual assertions. Respondent does concede that the Compliance Officer's testimony and videotape shows one employee engaged in connecting a beam to a column while not using his safety lanyard. (Resp. brief, p. 3). Respondent maintains that the factual testimony of the Compliance Officer should be disregarded due to lack of credibility. It argues that his failure to take videotape recordings of the employees he claims were unprotected from other, better angles of view renders his testimony infirm. Respondent makes much of the Compliance Officer's somewhat hesitant testimony that in places the videotape is less than clear as to whether a particular individual is or is not tied off. Moreover, Respondent argues that the Secretary can not make a *prima facie* case against Respondent because the Compliance Officer failed to show that the welders were "in fact" working at the outside perimeter of the building. (Resp. brief, p. 12). Finally, Respondent suggests that the Compliance Officer is "overzealous" to a degree warranting discounting his testimony. Respondent's arguments suggest a prejudice or bias to such a degree as to render the testimony of the Compliance testimony inadmissible or, at least, unreliable. I decline to so find and for the reasons which follow, I credit the Compliance Officer's testimony.

First, the failure to document by videotape each and every factual observation made by a compliance officer is to be expected. It is simply impossible to tape every moment of an inspection which could well last several hours over a period of several days. In addition, inexperience in conducting inspections as well as inexperience in operating a video camera could well account for less than clear showing of each and every instance of an alleged

violation. The fact that a particular scene at an event being videotaped does not appear in the tape does not necessarily mean that the condition did not exist. Finally, Respondent has shown nothing indicating a bias, prejudice or inability to observe on the part of the Compliance Officer.

Respondent also challenges the Compliance Officer's description of many of the welders as being seen working at the exterior perimeter of the structural steel framework. (Resp. brief, Pp. 12-13). Respondent points to testimony from two of the employees identified as working at the perimeter. One employee states, on watching the videotape, that he was working from an interior cross beam, not at the exterior perimeter. Another claims that he was "several feet" from the exterior perimeter of the building. Respondent's claim is rejected. Again, there is no challenge to the claim that at least several employees were observed or videotaped, or both, while working near enough to the exterior perimeter so that a fall could have propelled them over that edge. Given the cited standard's applicability and purpose of protecting against just such falls, the Compliance Officer's misjudgment as to precisely how close to the outer edge certain unprotected employees were working is minor in that it has not been shown that they were, in fact, so far away as to preclude their falling off the perimeter should they have slipped and fallen. Respondent cites testimony by its project Superintendent in support of its contention that its employees were, in fact, tied off. (Resp. brief, p. 10). I accord less weight to the Superintendent's testimony than that of the Compliance Officer. The Superintendent, even in the passage cited by Respondent (Tr. 191), conceded that at least some employees were, at times, working without tying off. Accordingly, I find that several of Respondent's employees were working within the zone of danger of falling from the perimeter while unprotected by an operative safety belt/lanyard or other kind of fall protection.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-

2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989). The cited standard has had a long and arduous history of litigation. Numerous administrative law judges, review commission members, district judges and courts of appeals judges have had the opportunity to review, discuss and interpret this standard.

The cases in which the Secretary has demonstrated that employees were subjected to the hazard of falls of twenty-five feet or more and none of the devices listed in the standard were used have long been regarded as establishing a prima facie case of violation. See, *State Sheet Metal Co.*, 16 BNA 1155, 1158 (No. 90-1620, 1993) and cases cited therein. Cases in which fall protection (usually safety belts and lanyards) was used some of the time but not during the entire work day have been more common. In dealing with this situation, the Commission recently held;

> [t]o prove that safety nets are required under section 1926.105(-a), the Secretary must show that employees were subjected to falls of twenty-five feet or more and that none of the other safety devices listed in the standard were practical - meaning that they [were] either not in use or [were] in use but [were] not practical because they [did] not protect against the cited fall hazard for a substantial portion of the workday. (Citation omitted.)

American Bridge/Lashcon, J.V., 16 BNA OSHC 1867, 1868 (No. 91-633, 1994). The Commission went on to state that the cited standard requires fall protection even where the fall hazard exists for a small fraction of the work day. *Id.* Under the facts of this case, several employees were subjected to falls of twenty-five feet or more on several occasions during a two day inspection, because the safety devices provided to them (belts/lanyards) were not used. No other safety devices were in use at all. Accordingly, I conclude that the Secretary has made a prima facie case of a violation of the cited standard. Respondent argues that the use of safety nets or safety belts and lanyards was not feasible on this project. (Resp. brief, p. 15). In regard to safety belts and lanyards, Respondent can only point to other instances where evidence demonstrated that under the circumstances of those cases belts and lanyards could not be used for fractions of the working conditions.

Respondent does not point to any such evidence in this case. I find that there is no convincing evidence that safety belts and lanyards could not have been used under the circumstances of this case. Respondent's defense is rejected.

In regard to safety nets, Respondent takes strong issue with the testimony of Steven Medlock. Called as an expert witness by Complainant, Mr. Medlock is an OSHA compliance officer with nine years of experience. Complainant proffered Mr. Medlock as an expert witness in the area of fall protection. He was so qualified pursuant to Fed. R. Evid. 702. (Tr. 112-119.) I consider Mr. Medlock's testimony to be of little evidentiary value even though he was qualified as an expert.

The testimony of an expert is not necessarily controlling even if it is unrebutted. *United States Steel Corp. v. OSHRC*, 537 F.2d 780 (3d Cir. 1976). In cases before the Commission;

> [g]enerally speaking, where employees testify from their own knowledge and experience on matters that pertain to their specific work activities, their testimony should be given greater weight than that of witnesses who do not have first-hand experience with the operation in question.

Con-Agra Flour Milling Co., 16 BNA OSHC 1137, 1141 (No. 88-1250, 1993)(citations omitted).

In this case, Mr. Medlock's "expert" opinion that safety nets (as well as numerous other safety devices) could have been used on the building under construction lacks a reasonable rational foundation. It is also contradicted by those with considerable experience in the real world of construction. Mr. Medlock has hardly any experience in construction. (Tr. 139-143). Some of Mr. Medlock's experience and training may be a sufficient basis for him giving opinion testimony about fall protection generally. The record in this case, however, clearly demonstrates that he had little or no basis to testify as to the practicality of nets (and other devices) under the circumstances at this work site. His sources of knowledge as to the specific conditions at the work site at issue is limited to conversations he had with the inspecting compliance officer, reviewing only part of the inspection file for a brief period, reading the citation and viewing the videotape. (Tr. 119-121, 137, 145). This witness never saw the building while under construction. He visited it as a completed

building only one week before the hearing. Mr. Medlock never saw any sketches, plans or blueprints for the building. He nonetheless offered detailed opinions as to how nets and other safety devices could have been installed at the project. If there were significant evidence showing that the building under construction was sufficiently similar to others which Mr. Medlock had studied or had experience with, his opinion testimony might be regarded to have some basis. There is clear, unrebutted evidence, however, that the manner in which this particular building was constructed was atypical in that the configuration of the structural steel was unusual. (Tr. 189-190, 237, 247-248). Even Mr. Medlock agreed that the feasibility of each particular safety device at a specific location is dependent on the particular conditions at that project. (Tr. 144). Under these circumstances, I find that Mr. Medlock's opinion testimony as to the feasibility of using myriad safety devices was so lacking in reasoned, rational foundation as to be unreliable. Mr. Medlock's theoretical testimony regarding the use of nets on this project is also contradicted by several employees who have many years experience in the construction industry. (Tr. 189-190, 216, 224, 237, 247-248, 255-256). I assign more probative weight to the cumulative testimony of these experienced employees. Finally, Mr. Medlock's credibility as a witness is questionable. In is reasonable to anticipate some bias when a full time employee of a party is called as an "expert" by that party, as opposed to the party engaging the services of an independent consultant. Moreover, Mr. Medlock was not called upon to participate in this case in order to prepare for litigation as is the usual expert witness. Mr. Medlock, apparently as the area office fall protection coordinator for the Cincinnati OSHA office (Ex. C-2), took part in the determination to amend this item of the citation in regard to the standard allegedly violated. (Tr. 120-121). Mr. Medlock's earlier participation in this case in the role of an OSHA officer participating in prosecutorial type decision making compromises his status as an "expert" as well as his credibility in general.[4] Considering all of the above factors, I find

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[4] In this regard it is noted that Mr. Medlock's resume identifies three cases in which he testified on fall protection and carry the notation "*Qualified Expert Testimony." Of the three cases one, "Baker Concrete Construction" could not be found. Another, "Mutual Erectors, Inc." is *Mutual Erectors, Inc.*, 16 BNA OSHC 1650 (No. 92-1797), in which Mr. Medlock was the inspecting compliance officer who was designated an "expert" at the

that Mr. Medlock was not a credible witness.

Assigning no weight to Mr. Medlock's testimony does not, however, establish any of Respondent's defenses to the alleged violation. The Secretary has established that employees were subject to falls of twenty-five feet or more which could have been protected against had they used the safety belts and lanyards with which they were provided and which, for the most part, they were wearing. There is no showing that the lanyards could not have been tied off during the operations observed. The lack of reliable evidence as to the practicality of using any other safety devices is thus irrelevant. Item 7 of the citation is affirmed.

The Secretary proposed a penalty of $1750. Respondent contested the proposed penalty assessment and denied in its answer (¶ V) that the proposed penalties were appropriate. The Secretary presented scant evidence as to how the proposed penalty amount was calculated (Tr. 58-60). Respondent did not cross-examine the Compliance Officer as to his penalty proposals. Respondent did not present its own evidence relating to penalty assessment nor did Respondent argue or present reasons in its post-hearing brief that the penalties as proposed were inappropriate. The Commission has held that it is not required "to develop arguments not articulated by the parties whenever exception is taken generally to the size of the penalties assessed by the judge." *Roberts Pipeline Construction, Inc.*, 16 BNA OSHC 2029, 2030 (No. 91-2051, 1994). It follows that the Commission's administrative law judges need not develop those arguments for parties not doing so for themselves. Nonetheless, it is the Commission's responsibility to arrive at an appropriate penalty in light of the statutory factors[5] based upon the record made by the parties, while

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hearing. The third, "Kokosing," is *Kokosing Construction Co., Inc.*, ___ BNA OSHC ____, (No. 92-2596, September 8, 1994) (ALJ) (directed for review by the Commission, October 7, 1994). In that case, the administrative law judge concluded that "Mr. Medlock is not a credible witness." (Slip op. p. 14).

[5] Section 17(j) of the Act, 29 U.S.C. § 666(i), provides;

> (j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of

considering the Secretary's penalty proposal merely that -- a proposal.

It appears from the record that Respondent employs 65 to 75 people and may have as many as 12 projects under way simultaneously. The business as a whole grosses approximately 9 or 10 million dollars per year. In its geographic area, it is regarded as a middle sized construction company. (Tr. 252). The net worth of Respondent is less than 7 million dollars. (Tr. 253). There is no claim or evidence that Respondent has been cited previously or exhibited anything less than good faith in dealing with OSHA. While not precisely clear, it appears that several employees were exposed to the fall hazard at various times and at various locations during the inspection. In light of the all of the above and considering that the finding of a serious violation requires the assessment of some monetary penalty up to a maximum of & 7,000[6], and emphasizing that neither party contends otherwise, I conclude that the proposed civil penalty of $1,750 is appropriate for this item.

Item 8 - 29 C.F.R. § 1926.751(d).

Section 751(d) states that "tag lines shall be used for controlling loads." It is undisputed that the Compliance Officer observed steel beams being moved, both from the ground to higher elevations for connecting and near the ground for sorting ("shake out") purposes. (Tr. 46 - 62, Ex. C-1).

Complainant, in its post-hearing brief, maintains that "the standard presumes the

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> the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

See, also, *Nacirema Operating Company*, 1 BNA OSHC 1001 (No. 4, 1972).

[6] Section 17(b) of the Act, 29 U.S.C. § 666(b), provides;

> (b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to $7,000 for each such violation.

existence of a hazard and mandates the use of tag lines." (Sec. Brief, p. 19). Also, the Secretary points to the Compliance Officer's testimony to the effect that ironworkers who were connecting the steel (at heights of approximately 48' above the ground) had to reach out to control the steel. As to the steel beams in the "shake out," which were being lifted about 8' to 10' above the ground, employees on the ground reached out and touched the steel as it was being lowered into place.

At the outset, the Compliance Officer opined that taglines "should be used whenever steel is being moved." (Tr. 95). After additional questioning he appeared to agree that tag lines are required where the lifting and moving of steel exposes employees to the hazard of being struck by the steel. (Tr. 106). This condition could exist, according to the Compliance Officer, only where "there were no employee[s] in the area." In sum, the Compliance Officer contradicted himself and changed his interpretation of the requirements of the cited standard several times while testifying. Nonetheless, Respondent "concedes that the Secretary can maintain its burden of proof in establishing a prima facie violation of this section." (Resp. brief, p. 22).

Respondent argues, however, that tag lines were used except where infeasible or where their use created a greater hazard. Relying on the administrative law judge's decision in *Thomas Lindstrom Company, Inc.*, ___ BNA OSHC _____ (No. 92-3815, 1993), Respondent points to the testimony of the ironworker crew leader and its crane operator that tag lines were used on some steel while, once several levels of construction were reached, tag lines would have created problems in that ground men would have to take the lines in and around numerous upright steel beams (columns) which could result in snags and tangles. At least one attempt at using a tag line resulted in such a snag. (Tr. 215-16; 232-33). Thor reasons that three methods of controlling steel being raised were available; by hand, by crane and by tag line. It maintains that it used tag lines then feasible, and when tag lines could not be used, it relied on hand and crane control. Respondent's defense sounds plausible but is not supported by a preponderance of the evidence of record.

In order to prevail on the infeasibility defense an employer must show that 1) compliance with the standard's requirements would "not be practical or reasonable in the circumstances." *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1966 (No. 82-0928,

1986) and 2) "that an alternative protective measure was used or that there was no feasible alternative measure." *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1219, 1228 (No 88-821, 1991). Respondent's defense fails here because the evidence does not show that the use of tag lines was not practical or reasonable under the circumstances which existed in this case.

First, as to steel being raised to the upper levels and roof, the factual testimony on which Respondent relies for its argument that tag lines would get entangled is primarily based on the witnesses assumption that tag lines would have to be long enough to be held by a person on the ground at all times. (Tr. 215-16, 223, 239, 242). This assumption is incorrect. The appropriate length of a tag line depends upon the circumstances under which the steel is being raised and the nature of the hazard the lift presents to employees. *L. R. Willson and Sons, Inc.*, ___ BNA OSHC ____ (No. 93-0785, Oct. 5, 1994). The only testimony that a shorter tag line might present a problem was speculation by the crane operator that a five foot tag line hanging down from a steel beam being lifted over other columns presents "a chance it could get hung up on a flange." (Tr. 239). In fact, Respondent never attempted to use tag lines shorter than 60 feet. (Id.). Respondent presents no evidence that the use of tag lines on the steel being sorted (shake out) was infeasible.

Similarly, to the extent that it raises the argument, Respondent has not shown that the use of tag lines would have created a greater hazard.[7] While it maintains that it would be hazardous for a steel worker acting as a connector to reach and hold a tag line attached to a steel beam in order to guide the beam into place, it concedes that its connectors reached and by hand, held on the beams themselves. It presents no reason which would support the conclusion that a connector would have been at greater risk reaching for and holding on to a tag line than he was reaching for and holding on to the beam itself. Respondent's defenses are rejected. I conclude that Respondent failed to comply with the

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[7] In order to establish the "greater hazard" affirmative defense, an employer must demonstrate by a preponderance of the evidence that (1) the hazards of compliance are greater than the hazards of non compliance, (2) alternative means of protection are unavailable, and (3) a variance was unavailable or inappropriate. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020 (No. 86-521, 1991).

standard at 29 C.F.R. § 1926.751(d), as alleged. Accordingly, Item 8 of the citation is AFFIRMED.

As to penalty, consideration is given to the factors as discussed relating to item 7. In addition, based upon the testimony as a whole, I find that the likelihood of an injury occurring due to the lack of tag lines is small despite the fact that if such an incident occurred a connector could have fallen to his death from a height of about 40 feet. In addition, at most, four of Respondent's employees (2 connectors at heights and 2 employees on the ground) were exposed to any hazard connected with the lack of the use of tag lines. (Tr. 57). Given the lesser employee exposure both in terms of number of employees affected as well as a lower likelihood of injury, I conclude that a penalty of $1,000 is appropriate for item 8.

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.

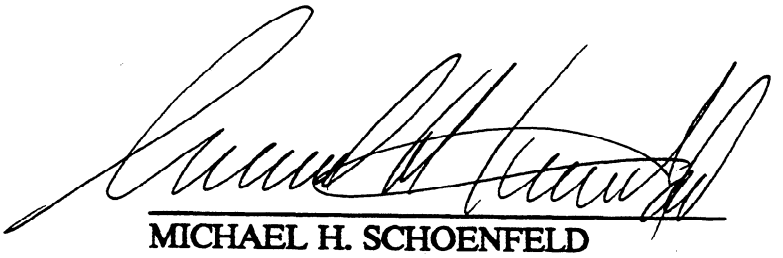
3. Respondent was in violation of the construction safety standard at 29 C.F.R. § 1926.105(a) as alleged in item 7 as amended. A civil penalty of $1,750 is appropriate therefor.

4. Respondent was in violation of the construction safety standard at 29 C.F.R. § 1926.751(d) as alleged in item 8 as amended. A civil penalty of $1,000 is appropriate therefor.

ORDER

1. Item 7 of the citation issued to Respondent on or about September 30, 1993 is AFFIRMED. A civil penalty of $1,750 is assessed therefor.

2. Item 8 of the citation issued to Respondent on or about September 30, 1993 is AFFIRMED. A civil penalty of $1,000 is assessed therefor.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: JAN 31 1995

Washington, D.C.

U.S. Department of Labor

Office of the Solicitor
881 Federal Office Building
1240 East Ninth Street
Cleveland, Ohio 44199
(216) 522-7546

Reply to the Attention of:

August 24, 1994

Hon. Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and
Health Review Commission
One Lafayette Centre
1120 20th Street, N.W.
Room 980
Washington DC 20036-3419

Re: Secretary of Labor v. Thor Construction Inc.,
OSHRC Docket No. 93-2752

Dear Judge Schoenfeld:

Enclosed please find a fully executed partial settlement agreement for filing in the above-referenced matter. Thank you for your cooperation in this matter.

Sincerely,

BENJAMIN T. CHINNI
Associate Regional Solicitor

By Elizabeth R Ashley

ELIZABETH R. ASHLEY
Trial Attorney

cc: Patrick Boggs

SOL:ERA:ba SOL NO. 20403

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. THOR CONSTRUCTION INC., Respondent.	:	OSHRC Docket No. 93-2753 Region V

PARTIAL STIPULATION AND SETTLEMENT AGREEMENT

The parties hereby enter into this partial stipulation and settlement agreement which disposes of specific issues set forth between the Complainant, Secretary of Labor, and the Respondent, Thor Construction Inc., that:

1. The Secretary agrees to vacate and dismiss Item Nos. 1, 2 and 5 of Citation No. 1.

2. Item No. 3 of Citation No. 1 shall be amended to and affirmed as an other than serious violation.

3. Item No. 4 of Citation No. 1 shall be amended to and affirmed as an other than serious violation.

4. Item No. 6 of Citation No. 1 shall be amended to and affirmed as an other than serious violation.

5. Item No. 9 of Citation No. 1 shall be amended to and affirmed as an other than serious violation.

6. The total penalty due for the affirmed items outlined above in paragraphs 2-5 is $3,000.00 which the Respondent agrees to pay to the Complainant when this agreement becomes a final order of the Review Commission.

7. Respondent hereby withdraws its notice of contest with respect to Citation No. 1, Items 1-6 and 9 and the proposed penalties associated with those items as as modified by the terms of this Agreement.

8. Respondent represents that the conditions described in the affirmed items of the citations referred to in this Agreement have been abated.

9. The parties agree to the entry of a final order consistent with the terms of this Agreement.

10. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with the items resolved in this partial settlement agreement.

11. The terms and conditions of this Partial Settlement Agreement are a comprised settlement of disputed claims, the validity, existence and merits of which are expressly denied by the Respondent. It is understood and agreed by the parties hereto that this Partial Settlement Agreement including any and all statements, stipulations and actions taken by Respondent hereunder, does not constitute and shall not be construed as an admission by the Respondent of the allegations contained in the citations at issue in this proceeding. The agreements, statements, stipulations, and actions taken herein by Respondent are made solely for the purpose of settling this matter economically and amicably and they shall not be used for any other purpose except for subsequent proceedings and matters between the parties arising directly under the Occupational Safety and Health Act of 1970.

12. Respondent certifies that a copy of this Agreement will be posted at its Columbus, Ohio facility this 22 day of August, 1994 to afford notice to its affected employees.

DATED: August 24th, 1994.

FOR RESPONDENT:

PATRICK H. BOGGS
Attorney for Respondent

Lane, Alton & Horst
175 South Third Street
Columbus, Ohio 43215-5100

FOR COMPLAINANT:

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OF COUNSEL:

THOMAS S. WILLIAMSON, JR.,
Solicitor of Labor

JOHN H. SECARAS
Regional Solicitor

BENJAMIN T. CHINNI
Associate Regional Solicitor

NOTICE

Any party (including any authorized employee representative of affected employees and any affected employee not represented by an authorized representative) who has any objection to the entry of an order as set should communicate such objections within ten (10) days of the posting of this Agreement to:

Hon. Michael H. Schoenfeld
Occupational Safety and Health
Review Commission
One Lafayette Center
1120 20th Street, N.W.
Room 980
Washington, D.C. 20036-3419

A copy of said objection should also be sent to:

Elizabeth R. Ashley
U.S. Department of Labor
881 Federal Office Building
1240 East Ninth Street
Cleveland, Ohio 44199