UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
L.R. WILSON AND SONS, INC.
Respondent.

OSHRC DOCKET
NO. 93-0785

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 September 1, 1994. The decision of the Judge will become a final order of the Commission on October 3, 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 September 20, 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Room S4004
200 Constitution Avenue, N.W.
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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.
Executive Secretary

Date: September 1, 1994

DOCKET NO. 93-0785

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-0785
L. R. WILLSON AND SONS, INC.,	:	
Respondent.	:	

Appearances:

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

Frank L. Kollman, Esq.
Kollman and Sheehan
Baltimore, MD 21201
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").

In September of 1992, a work site in Ephrata, Pennsylvania where L.R. Willson & Sons, Inc. was engaged in the erection of structural steel was inspected by a compliance officer of the Occupational Safety and Health Administration. As a result of this inspection, L.R. Willson & Sons, Inc. ("Respondent") was issued a Serious Citation consisting of two violations with proposed penalties of $4000.00 each. The Secretary of Labor ("Com-

plainant" or "The Secretary") subsequently withdrew Serious Citation No. 1, Item 1. As a result, the sole item left for consideration is Serious Citation No. 1, Item 2, alleging a violation of 29 CFR § 1926.751(d) for failure to use tag lines for controlling loads during steel erection.

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 on March 16, 1994. 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 at the time of this inspection Respondent was engaged in structural steel erection at the Ephrata job site. Respondent does not deny that it 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

Serious Citation No. 1, Item 1 alleges a violation of the construction safety standard at 29 C.F.R. § 1926.751(d), which states that "[t]ag lines shall be used for controlling loads."

It is undisputed that, prior to the inspection, Respondent had been lifting and placing steel beams by crane without attaching tag lines of any kind to the steel beams. The standard requires the use of tag lines. Respondent contends that the standard is unenforceably vague because neither the cited standard nor any other standard adopted by the Secretary of Labor describes the length, composition or required usage of a tag line. In the alternative, respondent asserts that the use of tag lines at the Ephrata site was infeasible. For the reasons discussed below, the citation alleging a violation of § 1926.751(d) is affirmed.

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[1] Title 29 U.S.C. § 652(5).

Respondent argues that because "tag lines are no where defined, ... explained, [or] described in sufficient detail to show the Respondent when they are required, what they are to be made of, how long they are to be, or in what circumstances their use may be hazardous," the standard is unenforceably vague. The § 1926.751(d) standard states, in its entirety, that "[t]ag lines shall be used to control lines." This standard is admittedly broad, but the commission has held that "a standard is not impermissibly vague simply because it is broad in nature." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205 (No. 87-2059, 1993). An employer must have either actual or constructive notice of the conduct required by a standard, or must be able to derive notice from the language of the standard. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2205. The issue to be resolved here is whether the requirement that tag lines be used to control loads provided sufficient notice to Respondent as to the conduct required for compliance. *See Knoff Forge Co. v. Secretary of Labor*, 657 F.2d 119, 9 BNA OSHC 2133, 2136 (7th Cir. 1981) (holding that regulations must provide fair warning to the employer as to what is required or prohibited).

The commission has previously upheld standards that do not provide exact specifications for the required conduct. The terms of compliance with a standard may "vary depending on numerous factors" involved with "the circumstances existing in each case" and may require an individual at the job site, such as the crane operator, to "exercise judgment". *Ormet Corp.*, 14 BNA OSHC 2134, 2136 (No. 85-531, 1991). The use of the word "shall" in § 1926.751(d) indicates that the use of tag lines is mandatory. This language put Respondent on notice that some action was required. Prior to the inspection by Compliance Officer ("CO") Womer, however, Respondent did not attach ropes of any kind to the steel beams for use in guiding them into place.

This is not a case where Respondent attempted to comply with the standard and Respondent's actions where later deemed insufficient. As stated in *L.E. Myers Co.*, 16 BNA OSHC 1037, 1044 (No. 90-945, 1993), "[v]agueness challenges are not measured against the facial text of the standard, but are rather considered in light of the conduct to which they are applied." Given the fact that Respondent took no action; failure to comply with the mandatory standard was not shown to be the result of unenforceably vague language.

"A regulation should be construed to give effect to the natural and plain meaning of it's words." *Diamond Roofing Co. Inc. v. OSAHRC*, 528 F.2d 645, 4 BNA OSHC 1001, 1004 (5th Cir. 1976). The language of § 1926.751(d) unequivocally states that the use of tag lines is mandatory in steel erection. CO Womer testified that steel erectors should use common sense in determining the exact specifications for the length and composition of tag lines to be used on a particular job. (Tr. 70). The broad language of § 1926.751(d) is necessary to provide flexibility to employers in determining the best type of tag line to be used. The lack of an explicit definition of a tag line does not, in itself, make the standard unenforceably vague.

In general, to establish 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). Respondent is charged with the failure to use tag lines, a violation of § 1926.751(d). Based upon Respondent's failure to use any type of guiding rope in compliance with this mandatory standard, plus the undisputed fact that employees were close enough to the beams being lifted into place so that they could have been bumped or hit by them were there uncontrolled movement of the steel, the *prima facie* elements of a violation have been shown.

Respondent asserts that it was infeasible to use tag lines at the Ephrata site due to space constraints which limited the mobility of the crane. In order to prevail on the affirmative defense of infeasibility, the employer must show that compliance with the standard would "not be practical or reasonable in the circumstances." *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1966 (No. 82-0928, 1986). Respondent asserts here that the use of tag lines was either not possible at the Ephrata job site, or would have created additional dangers, or both. In this case, the defense of infeasibility depends upon acceptance of

Respondent's narrow definition of a tag line as the sole acceptable definition. Inasmuch as Respondent's limited interpretation of the standard has been rejected, the defense of infeasibility fails. Considerable disagreement exists between the parties as to the definition of a tag line. Complainants witness, CO Womer defines a tag line as "a rope, strong enough to control--it's tied fast to the steel beam or column and it's used to control the movement of that beam." (Tr. 37). Womer further testified that a tag line must "be long enough so that the person that's trying to control it can do so, from a safe distance." (Tr. 38). He did not believe that a tag line must be controlled by a person on the ground from the commencement of the lift until the beam is in place. (Tr. 53). It should be noted that CO Womer did not say that tag lines cannot be used throughout the lift, just that this is not a mandatory requirement.

Respondent's expert witness, Mr. Larson, testified to a much narrower definition of a tag line. He identified a tag line as "a device used to control a load from inception of lift to completion of lift." (Tr. 85). Larson stated that tag lines should be manned at all times by a stationary ground person, who should not even be walking with the movement of the steel. (Tr. 98). Under this limited definition, Larson testified that tag lines could not be used at the Ephrata site because the tag line would potentially be dragged across existing pieces of construction that might snag or interfere with the line. (Tr. 85-86).

In instances such as this one, where the exact meaning of language in the standard is open to different interpretations, "the reviewing court should give effect to the agency's interpretation so long as it is reasonable." *Secretary of Labor v. OSHRC*, 499 U.S. 144, 151, 14 BNA OSHC 2097, 2099 (No. 89-1541, 1991). The two definitions of a tag line set forth by the parties are not necessarily mutually exclusive. Respondent's definition may be considered a subset of the Secretary's definition. CO Womer testified that the exact composition, length and use of a tag line for a specific job site depend on the steel erector's

judgment about what is appropriate at that time[2]. There may be instances when the use of a tag line with the characteristics described by Respondent's expert will be appropriate.

The witnesses for both parties were found to be credible. Respondent's expert, Mr. Larson, was very knowledgeable and has extensive experience in the steel industry. CO Womer was not testifying as an expert in the case, but his work history entailed some prior experience with tag lines and he was able to give lay opinion testimony under Federal Rule of Evidence 701. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1190 (No. 89-2883, 1993) (crediting opinion testimony by experienced compliance officer not proffered as an expert). I am persuaded that the broad wording of the standard warrants the broad definition of "tag line," as given by CO Womer. Respondent pointed out that none of the safety standards adopted by the Secretary contain a more explicit definition of a tag line. Given this lack of specificity, Respondent failed to prove that *only* tag lines with the limited characteristics described by Mr. Larson would be acceptable under § 1926.751(d).

The commission has held that employers who cannot fully comply with a standard, must nevertheless comply to the extent possible. *Bratton Furniture Manufacturing Co.*, 11 BNA OSHC 1433, 1434 (No. 81-799-S, 1983). Lengths of rope labelled "rope grabs" by Respondent's expert, but which fit the definition of tag lines set forth by Complainant's witness, were used at the Ephrata site after CO Womer had begun his inspection. The use of these ropes demonstrates the feasibility of compliance with the standard by the use of shorter ropes which are less likely to become entangled on existing construction. *See Pitt-Des Moines Inc.*, 16 BNA OSHC 1429, 1434 (No. 90-1349, 1993) (holding that the feasibility of compliance with a standard was proven by the employer's post-citation conduct).

For the reasons stated above, I conclude that the standard § 1926.751(d) is not so vague as to fail to provide notice to employers that the use of some type of guiding rope is

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[2] Circumstances may exist at a particular worksite, such as a clear day with a light load in full view of the crane operator to be placed into position for connectors who are on a stable and secure position, under which the failure to use a tag line might not represent any danger to employees handling the steel. Under such circumstances, the failure to comply with the standard could well be *de minimis* within the meaning of §9(a) of the Act inasmuch as such failure would have been shown to "have no direct or immediate relationship with safety or health." 29 U.S.C. §658(a).

required. That Respondent failed to use any kind of tag line to comply with the standard, and that Respondent has failed to show, by a preponderance of the evidence that use of any type of tag line was infeasible at the Ephrata site. Respondent does not argue, nor did it seek to present any evidence that the alleged violation was not serious within the meaning of § 17(k) of the Act as alleged, or that the penalty of $4,000 proposed by the Secretary for the violation is not appropriate under the factors set forth at § 17(j) of the Act. Accordingly, the violation is found to be serious and a civil penalty of $4,000 is assessed therefor.

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

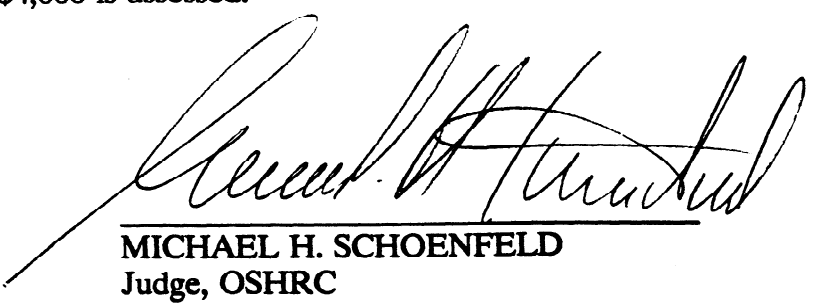
1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

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

3. Respondent failed to comply with the standard at 29 C.F.R. § 1926.751(d), as alleged. A civil penalty of $4,000 is appropriate therefor.

ORDER

1. Item 2 of Citation 1 issued to Respondent on or about February 25, 1993, is AFFIRMED. A civil penalty of $4,000 is assessed.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: AUG 22 1994
Washington, D.C.