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SECRETARY OF LABOR, :  
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 Complainant, :  
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 v. :  
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 C.W. SPRENGER, :  
 :  
 Respondent. :

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OSHRC DOCKET NO. 97-0622

APPEARANCES:

Susan B. Jacobs, Esquire  
New York, New York  
For the Complainant.

James F. Sassaman  
Philadelphia, Pennsylvania  
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 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”) inspected a construction site in Maplewood, New Jersey, on March 13, 1997, where Respondent was engaged in the erection of a multi-story building. As a result of the inspection, Respondent was issued a serious citation with two items. Respondent contested the citation, the case was designated an E-Z Trial case pursuant to Commission Rule 203(a), and a hearing was held on November 20, 1997. At the hearing, the parties advised that they had settled item 1 of the citation.<sup>1</sup> Item 2, the remaining item, alleges a violation of 29 C.F.R. 1926.751(d), one of the provisions of the steel erection standard, which requires tag lines to be used for controlling loads in structural steel assembly.

The Evidence

The record establishes that at the time of the inspection, two connectors of Respondent were working on the third tier of the building under erection; one was sitting on a ladder as a beam was lifted alongside and then over him, as shown on the right side of C-3 and C-4, while the other was

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<sup>1</sup>The settlement agreement is hereby approved and is incorporated herein by reference.

sitting on the steel waiting to receive the beam to connect it to the structure, as shown on the left side of C-4.<sup>2</sup> The record also establishes that the beam was lifted 15 to 20 feet from the connector on the ladder, that the employees were working at a height of about 30 feet, and that no tag line was being used to hoist the beam. CO Torre testified that there are no exceptions to the standard and that the purpose of using a tag line is to guide a load into place and to keep it from swinging or rotating out of control; he further testified that the beam could have swung into one of the connectors, causing a fall, and that the connector waiting to receive the beam could also have fallen in trying to reach out and grab it without a tag line. Torre said that an employee on the ground should have guided the load as it was lifted to keep it from swinging toward the connector on the ladder and that the employee on the slab, shown between the two connectors in C-4, should have guided the load to the connector waiting to receive it. (Tr. 20-24). Louis Ricca, the assistant area director for safety compliance in OSHA's Parsippany, New Jersey, office, reviewed the file and the video and discussed the case with CO Torre; Ricca's testimony about how tag lines should have been used at the site was essentially the same as that of Torre, and he agreed that there are no exceptions to the standard. (Tr. 31-34).

Thomas Jankiewicz, the outside superintendent and safety director for C&C Erectors, testified that he had surveyed the site and determined the logistics of the job before it began and that he had been to the site two to three more times before the OSHA inspection; due to the lay of the land and another building on the left side, the only area where the crane could be put and the steel hoisted was on the right side of the structure under erection, as shown in C-2.<sup>3</sup> Jankiewicz further testified that because of the location of the crane and the steel, tag lines could not be used to hoist the beams up to the structure, explaining that the steel had to be picked up and then taken around the back of the building and that the ground man would have had to use a tag line 200 feet long to guide a load this distance; he also explained that the ground man would have had to run to keep up with the crane's swing, that he would have had to watch the load and where he was going at the same time, and that the only person who could have seen him in back of the building would have been the connector

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<sup>2</sup>C-3 and C-4 are stills made from C-2, the video of the scene taken by Robert Torre, the OSHA Compliance Officer ("CO") who conducted the inspection.

<sup>3</sup>C&C Erectors and C.W. Sprenger are owned by the same principals. (Tr. 37).

waiting for the beam. Jankiewicz said that a long tag line can get hung up and cause a beam to swing out of control and that this would be more hazardous for the connector, who would have to run over and grab the line to get the beam back under control. He also said that using a shorter line would serve no purpose; the beam would be under the control of the crane as soon as the line was out of reach, a connector trying to grab a short line could cause the beam to strike the structure, and the signalman on the slab could not guide the beam because he had to use both hands to signal. The opinion of Jankiewicz was that there was no other way to do the work that day and that the hoisting was done very safely; as shown in C-2, there was no wind and the beam was calm and under control as it was lifted and moved into place. (Tr. 37-61).

#### Decision

The subject standard states that “[t]ag lines *shall* be used for controlling loads.” (Emphasis added). The language of the standard is mandatory, and, as the Secretary’s witnesses noted, there are no exceptions to the standard. Respondent was therefore in violation of the standard, based on the above evidence, unless it can establish its asserted defense of infeasibility of compliance. (Tr. 63-65). To meet this affirmative defense, an employer must show that compliance with the standard was impractical or unreasonable under the circumstances and either that an alternative protective measure was used or that there was no feasible alternative measure. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225-28 (No. 88-821, 1991). Respondent asserts that the testimony of Thomas Jankiewicz, its safety officer, demonstrates its defense. I disagree, for the following reasons.

First, Jankiewicz indicated that the ground man would have had to guide the load all the way to the connector by means of a 200-foot tag line. (Tr. 47-49). However, it is clear from the testimony of the OSHA officials that a tag line could have been used to steady and control the load while lifting it in the vicinity of the connector on the ladder, after which the line could have been released, and that the tag line could then have been used to lower the load to the connector waiting to receive it. (Tr. 22-24; 34). Torre and Ricca have years of CO experience and have conducted many construction inspections, and based on their testimony and the language of the standard, I find that a tag line shorter than the one indicated by Jankiewicz could have been used to lift the load over the first connector and to lower it down to the second connector. (Tr. 7; 32-33). I also find the opinion of

Jankiewicz that a shorter tag line would have served no purpose and would actually have been more hazardous to be unpersuasive, notwithstanding his many years in steel erection. (Tr. 38; 50-51).

Second, Jankiewicz indicated that the employee on the slab could not have guided the load to the connector because he needed both hands to signal the crane. (Tr. 46; 49-50). Despite the obvious importance of the signalman's duties, I am simply not persuaded that this employee could not have used the tag line to guide the load to the connector. In addition, Ricca indicated that the connector himself could have taken hold of the line and used it to steady the beam until it was in position to be connected. (Tr. 34). Respondent's contentions in this regard are consequently rejected.

Finally, Jankiewicz testified that although the company safety rules followed the OSHA standards, the actual practice with respect to tag lines was to use them to unload the steel from the truck and when hoisting the steel on extremely windy days; he further testified that each foreman decided on a daily basis, depending on the circumstances at the particular site, whether it was safe to use tag lines. (Tr. 40; 57-58). Jankiewicz was not at the site during the inspection but opined, based on C-2, that it was a very calm day with no wind and that the work was done safely without tag lines. (Tr. 44-45; 50-56). However, the relevant portion of C-2 is only about two minutes long. Moreover, judicial notice was taken of C-5, an excerpt from the climatological data for Newark, New Jersey for March of 1997, published by the National Climatic Data Center, which shows that the wind speed between 10 a.m. and 1 p.m. on March 13 was 14 to 16 miles per hour. (Tr. 54-56; 61-62).

It would appear from the foregoing that Respondent was not following its own stated practice on the day of the inspection; the beam was hoisted around 11:30 a.m. on March 13, according to C-2, and while no wind is discernible from the video it seems likely, in view of C-5 and the proximity of Maplewood to Newark, that it was a windy day at the site.<sup>4</sup> Regardless, even if it was not, it is clear that Respondent's practice in regard to tag lines did not meet the OSHA standard. It is also clear, in view of the record as a whole, that Respondent has not met its burden of proof with respect to its asserted defense of infeasibility of compliance. This item is accordingly affirmed as a serious violation, and the proposed penalty of \$750.00, upon consideration of the size, history and good faith of the company, as well as the gravity of the violation, is assessed. (Tr. 25).

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<sup>4</sup>Judicial notice is taken of the fact the site is about 5.7 miles from the Newark Civic Center.

Conclusions of Law

1. Respondent C.W. Sprenger is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. 1926.751(d).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 2 of citation 1 is affirmed as a serious violation, and a penalty of \$750.00 is assessed.

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Irving Sommer  
Chief Judge

Date: