UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-0639
GEM INDUSTRIAL, INC.,	:	
Respondent.	:	

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Velma Montoya on July 15, 1994. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

BY DIRECTION OF THE COMMISSION

Date: 6-7-95

Ray H. Darling, Jr.
Executive Secretary

1995 OSHRC No. 36

Docket No. 93-0639

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on June 7, 1995.

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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200 Constitution Ave., N.W. Room S4004
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Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT REICH, SECRETARY OF LABOR Complainant, v. GEM INDUSTRIAL, INC. Respondent.	:	OSHRC Docket No. 93- 639

STIPULATION AND SETTLEMENT AGREEMENT

I.

The parties have reached agreement on a full and complete settlement and disposition of Serious Citation No. 1 Item 1b (29 C.F.R. § 1926.751(d)); the affirmance of that citation by the Administrative Law Judge is currently pending before the Commission.

II.

It is stipulated and agreed between the Complainant, Secretary of Labor, and the Respondent, GEM Industrial, Inc., that:

1. Complainant withdraws Serious Citation No. 1 Item 1b.

2. There is no authorized employee representative party in this case.

3. No affected employee elected party status in this case.

4. Each party agrees to bear its own fees, costs and expenses incurred by such party in connection with all stages of this proceeding with regard to this Citation item.

III.

Respondent posted this Stipulation and Settlement Agreement in accordance with Commission Rules 2200.7 and 2200.100 on May 30, 1995.

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
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DANIEL J. MICK
Counsel for Regional
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5/22/95

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GEM Industrial, Inc.

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SECRETARY OF LABOR
Complainant,
v.
GEM, INC.
Respondent.

OSHRC DOCKET
NO. 93-0639

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 June 16, 1994. The decision of the Judge will become a final order of the Commission on July 18, 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 July 6, 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: June 16, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0639

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

GEM INDUSTRIAL, INC.,

Respondent.

OSHRC Docket No. 93-639

APPEARANCES:

Janice L. Thompson, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Michael S. Holman, Esquire
Sarah J. DeBruin, Esquire
Bricker & Eckler
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest a citation issued by the Secretary of Labor (Secretary) pursuant to section 9(a) of the Act. The citation was issued as a result of an inspection of a jobsite at 2600 Dorr Street, Toledo, Ohio.

Respondent, Gem Industrial, Inc. (Gem), was working as a subcontractor to erect structural steel for a single-tiered building. There is no dispute that at the time of the inspection, the building was approximately 100 feet by 300 feet with 3½-inch walls of concrete block about 22 feet in height. There was no roof on the structure, and trucks

carrying steel columns were unloaded and being sorted out with the use of a crane on the inside of the building.

Gem is charged with the violation of 29 C.F.R. § 1926.751(d) and, in the alternative, § 1926.550(b)(2).

Section 1926.751(d), which pertains to structural steel assembly, states: "Tag lines shall be used for controlling loads." Section 1926.550(b)(2), which pertains to cranes and derricks, states in pertinent part as follows:

> All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes . . . .

Section 5-3.2.3 p. of ANSI B30.5-1968 provides: "A tag or restraint line shall be used when rotation of the load is hazardous."

The violation of § 1926.751(d) is described in the citation as follows:

> Employees using a crane for shaking out steel were not provided with tag lines to control the load.

The Commission has held that:

> To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence.

Seibel Modern Mfg. & Welding Corp., 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

Gem contends the Secretary has failed to establish that the cited standard applies. This contention is based on the type of work being performed, which is known as "shaking out."

The inspecting officer, Thomas Buchele, testified that he observed Gem's employees "shaking out or sorting out large columns of steel prior to erection." He explained that "shaking out" means "the steel is taken from piles and sorted out in position to facilitate the erection of steel. It has to go together in a certain pattern and pieces have to be available

when they go in place," and that "the erection assembly can't take place without sorting the steel prior to doing that" (Tr. 30-31).

Gem, through several expert witnesses, asserts that the "shakeout" process is not part of the structural steel assembly. The Secretary argues that "the shakeout" or sorting of steel is the first step in structural steel assembly and is integral to the process. It is also pointed out that Mr. Don Leonhardt, one of Gem's experts, testified that unloading steel and "shakeout" is ironworker work that would present a jurisdictional problem if another trade did the work (Tr. 159).

Without discounting the credibility of Gem's experts, their opinions relate to practical experience in the steel construction industry. The issue presented, however, relates solely to the interpretation and application of the standard, as written, and not necessarily within the scope of their particular expertise. In this regard, expert testimony is not conclusive and need not be accepted even if uncontradicted. *See Connecticut Natural Gas Corp.*, 6 BNA OSHC 1796, 1978 CCH OSHD ¶ 22,874 at 27,668 (No. 13694, 1978).

The Secretary noted that:

> Subpart R of 29 CFR 1926 covers "Steel Erection." Within "Subpart R - Steel Erection" are "§ 1926.750 Flooring Requirements," "§ 1926.751 - Structural Steel Assembly," and "§ 1926.752 - Bolting, Riveting, Fitting-up, and Plumbing-up." Nowhere within Subpart R is there an exception to its requirements for the shake out of steel.

For the purpose of determining applicability of the standard, the testimony of Mr. Jerome Laub, one of Gem's experts, is pertinent. When asked on direct examination if structural steel assembly includes the shakeout, he replied, "Yes, but it's a different process. The shake out is done before you set the iron" (Tr. 191-192).

Considering all the testimony, it is clear that "shakeout" is an integral process of structural steel assembly. The standard applies to the facts in this case.

The question which must now be resolved is whether the terms of the standard were met. Mr. Buchele testified that during the shakeout of steel, employees did not use tag lines to control the loads (Tr. 36-37). Gem does not dispute that tag lines were not used during the shakeout. It is contended that, consistent with industry practice, tag lines are not required during the shakeout process. Mr. Leonhardt testified that in his experience of

working for hundreds of steel erection contractors and in performing and observing the shakeout procedure hundreds of times, he has never used or observed the use of tag lines during the shakeout of structural steel (Tr. 132).

Mr. Jerome Laub, who has been a journeyman ironworker for over twenty years and who has spent 2,000 to 4,000 hours shaking out steel, stated that he has never used or observed or heard of the use of tag lines to shake out steel (Tr. 175-176). Mr. John Gurtzweiler concurred in this observation. He has been a journeyman ironworker for over twenty-five years and has observed and performed shakeout hundreds of times (Tr. 204-205). He testified that he has never seen any contractor or contractor's employee use tag lines during the shakeout procedure (Tr. 204-205). Mr. Mark Adams also testified that he has never observed the use of tag lines during shakeout throughout his experiences in the ironworking trade in numerous states including Ohio, Maryland, Virginia, Florida, Wisconsin and Toronto, Canada (Tr. 224).

Mr. Leonhardt believed tag lines should be used during the erection process on windy days when it is difficult to control the steel (Tr. 148). He stated that most of the time during shaking out, loads are hoisted only a few feet for a short distance and can be guided by hand (Tr. 131).

On Gem's behalf, the testimony amply shows that its conduct was consistent with normal industry practice. However, such industry practice is irrelevant when the standard, as in this case, requires a different course of action. *State Sheet Metal Co., Inc.*, 16 BNA OSHC 1155, 1993 CCH OSHD ¶ 30,042, p. 41,225 (Nos. 90-1620 & 90-2894, 1993); *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶ 27,893, p. 36,585 (No. 85-355, 1987). The standard at § 1926.751(d) specifically requires the use of tag lines for controlling loads.

In its answer to the amended complaint filed in this case, Gem alleges that "compliance would result in a greater hazard." Mr. Leonhardt testified tag lines would get in the way of employees and could become entangled in the steel (Tr. 131). Other expert witnesses similarly testified that the dragging tag lines could become entangled and, in some instances, even cause employees to fall. In addition, use of tag lines does not permit an employee to push a load forward (Tr. 176, 208-219, 226-227).

The Secretary points out that in order to prove a greater hazard defense, the employer must show that (1) the hazards of compliance are greater than the hazards of noncompliance, (2) alternative means of protection are unavailable, and (3) a variance was unavailable or inappropriate. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶ 29,313 (No. 86-521, 1991); *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991 CCH OSHD ¶ 29,239 (No. 87-1359, 1991). It is, therefore, argued that Gem failed to show that the hazards of compliance are greater than the hazards of noncompliance. Also, no evidence of alternative means of protection was introduced or evidence that an application for a variance was submitted. The elements necessary to prove the greater hazard defense in this case have not been met.

The evidence offered by Gem in defense of the alleged violation assumes the loads were being lifted a few feet off the ground and moved short distances. But regardless of the stage of the steel construction or procedure being used, there is compelling evidence to the contrary.

Mr. Buchele testified that he observed the lifting and movement of steel columns approximately 30 to 40 feet in length and weighing approximately 700 or 800 pounds. He stated some loads were lifted 8 to 10 feet in the air and moved 15 to 20 yards (Tr. 30-33). The record also discloses that Mr. Tim Clark, a Gem representative, stated:

> The steel being shaken out on January 7, 1993, by Respondent at the worksite in question weighed approximately 500 pounds per steel beam and was approximately 23-24 feet in length. The steel was hoisted approximately 10 feet above the ground in order to clear some bar joists (Tr. 234-235).

Gem argues that its employees were not exposed to a hazard as a result of the alleged violative condition. Mr. Buchele testified, however, that there was the hazard of employees being struck by the steel (Tr. 49). He observed two employees making the necessary attachments to set up the move and two employees guiding the load for placement on the ground. In both instances, employees worked under or near the load. When the loads were close enough to use their hands, there was the hazard of the steel falling on the employees' legs and feet (Tr. 36-37, 241-242).

The standard expressly states that tag lines shall be used to control loads, and they were admittedly not used in this case. The Secretary has proven the necessary elements to establish the violation.

Alleged Violation of 29 C.F.R. § 1926.404(b)(1)(ii)

The standard provides as follows:

> **§ 1926.404(b)** *Branch circuits--(1) Ground-fault protection*
>
> *(ii) Ground-fault circuit interrupters.* All 120-volt single-phase, 15- and 20-ampere receptacle outlets on constructions [*sic*] sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. Receptacles on a two-wire, single-phase portable or vehicle-mounted generator rated not more than 5kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground-fault circuit interrupters.

The alleged violation is described in the citation as follows:

> The Miller 251-D welder/generator being used on the site was not provided with a GFCI nor was an assured grounding conductor program in effect.

Mr. Buchele testified Gem employees were using the portable generator to power an electric impact gun. It did not have a ground-fault circuit interrupter (GFCI) (Tr. 63-66).

Gem admits there was no GFCI present but contends:

> (1) The Secretary did not demonstrate that employees were exposed to any actual electrical hazard; and (2) the Secretary did not establish that GEM had knowledge of the alleged violative condition.

Seibel, supra.

Mr. Buchele testified that the employees stated the electric impact gun had been used by Gem employees to tighten bolts on the columns. The generator was running, and the gun was plugged in at the time of the inspection (Tr. 63-64). Buchele explained that the difference between a circuit breaker and a GFCI was that, while the circuit breaker protects equipment, it does not prevent injury to the operator (Tr. 115-117). He stated there was

a serious hazard to the operator who could provide a path for the electricity if there is a fault in the circuit. The presence of water at the site increased the hazard (Exhs. C-4, C-7; Tr. 68-69).

Buchele stated foreman Laub told him the GFCIs had not arrived on the site, as they had been working for only about five hours. He indicated the GFCIs would have been on the site the next day (Tr. 67, 100). Clearly, Buchele's testimony, which is not refuted, shows knowledge of the need for the GFCIs which are required by the standard. Violation of the standard is established.

Section 17(k) of the Act provides as follows:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The Secretary presented evidence which shows that the violations could result in death or serious physical harm to employees (Tr. 68, 71, 242).

The determination of penalties in contested cases is to be made by the Commission. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The proposed penalties were recommended and calculated by Mr. Buchele based upon good faith, size, history, and the gravity of the violation (Tr. 59-61).

Upon consideration of the relevant factors, it is determined that the following penalties are deemed appropriate:

Serious Violation of § 1926.751(d)	--	$1,300
Serious Violation of § 1926.404(b)(1)(ii)	--	$1,625

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

(1) That the citation alleging violation of 29 C.F.R. § 1926.751(d) is affirmed as serious, and a penalty of $1,300 is hereby assessed.

(2) That the citation alleging violation of 29 C.F.R. § 1926.404(b)(1)(ii) is affirmed as serious, and a penalty of $1,625 is hereby assessed.

Paul L. Brady

PAUL L. BRADY
Judge

Date: June 9, 1994