UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR, Complainant, v. KIEWIT WESTERN COMPANY, Respondent.	OSHRC Docket No. 91-2578

DECISION

BEFORE: FOULKE and MONTOYA, Commissioners.*

BY THE COMMISSION:

The questions before the Commission are whether trailers being used to move dirt on a construction site are "motor vehicles," and whether those trailers and the tractors pulling them fall in the category of vehicles excluded from the coverage of the cited standard.

Kiewit Western Company ("Kiewit") was performing construction work at the Denver airport when a compliance officer from the Occupational Safety and Health Administration ("OSHA") inspected the worksite. Kiewit was using large rubber-tired tractors and trailers to move earth. As a result of the inspection, the Secretary of Labor issued a citation alleging that Kiewit was in violation of, among others, the safety and health standards at 29

* This case was voted upon before Chairman Weisberg joined the Commission. Accordingly, Chairman Weisberg did not participate in this case in order not to delay the issuance of this decision.

C.F.R. §§ 1926.601(b)(2)(i) and 1926.601(b)(2)(ii).[1] Kiewit contested the citation and the case was submitted on stipulated facts to an administrative law judge of this Review Commission. In his decision, the judge found that Kiewit was not in violation because the cited standards did not apply to Kiewit's equipment. The Secretary petitioned for the Commission to review the judge's decision, and review was directed pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 661(j). Having reviewed the record and the briefs of the parties, we affirm the judge's disposition, although we reverse one of his findings.

BACKGROUND

The parties stipulated that the construction site where Kiewit was working was closed to public traffic and the cited tractors and trailers were not operated on the public highway. The trailers were not capable of self-propulsion and had to be used in combination with the tractors. One tractor would pull two trailers. The tractor-trailer combinations were used in conditions when visibility was poor. The parties stipulated that the cited tractors are motor vehicles but that the trailers, by themselves, are not motor vehicles. They also stipulated that the cited equipment did not have brake lights and taillights, as the citation alleged.

The administrative law judge vacated both citations. In finding that Kiewit's equipment was not subject to the cited standards, the judge relied on 29 C.F.R. § 1926.601(a), which provides:

> Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic. The requirements of

---

[1] Those two standards provide:

> **§ 1926.601 Motor vehicles.**
>
> . . . .
>
> (b) *General requirements.*
>
> . . . .
>
> (2)(i) Whenever visibility conditions warrant additional light, all vehicles, or combinations of vehicles, in use shall be equipped with at least two headlights and two taillights in operable condition.
>
> (ii) All vehicles, or combination of vehicles, shall have brake lights in operable condition regardless of light conditions.

this section do not apply to equipment for which rules are prescribed in § 1926.602.

Based on the parties' stipulation that the trailers were not, by themselves, motor vehicles, the judge concluded that they were not covered by section 1926.601 because they were not motor vehicles. The judge found that the tractors were earthmoving equipment governed by section 1926.602[2] and that, under its own terms, section 1926.601 did not apply to them, either.

To prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited, (2) the terms of the standard were not met, (3) employees had access to the violative conditions, and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1992 CCH OSHD ¶ 29,829 (No. 88-1167, 1992); *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982). The issues before us involve the first element of a violation: whether the cited standards apply to Kiewit's vehicles. We first consider whether Kiewit's trailers are motor vehicles governed by section 1926.601(b)(2)(i).

ANALYSIS

I. Are Kiewit's trailers "motor vehicles" within the meaning of 29 C.F.R. § 1926.601?

Kiewit asserts that the parties' stipulation that the trailers were not by themselves motor vehicles is dispositive, as the judge found. The Secretary, on the other hand, argues that the stipulation does not address the situation that was the subject of the citation.

---

[2] That standard provides in part:

> **§ 1926.602 Material handling equipment.**
>
> (a) *Earthmoving equipment; General.* (1) These rules apply to the following types of earthmoving equipment: scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks, graders, agricultural and industrial tractors, and similar equipment. The promulgation of specific rules for compactors and rubber-tired "skidsteer" equipment is reserved pending consideration of standards currently being developed.

According to the Secretary, the parties stipulated that the trailers by themselves were not motor vehicles, but the trailers were cited for not having lights when they were being pulled by the tractors. The Secretary asserts that it is when they are being moved around a construction site that the trailers must be illuminated. Therefore, it is the tractor-trailer combinations, not the trailers alone, which were the subject of the citation and which the Secretary alleges constitute "motor vehicles." We agree with the Secretary that the trailers cannot be considered by themselves, and we conclude that when they are used in combination with the tractors the trailers are properly classified as "motor vehicles."

The text of the standard, section 1926.601(a), provides in part: "Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic." That sentence does not illuminate the meaning of the term. The sections under which Kiewit was cited are more helpful. Section 1926.601(a)(2)(i) refers to "vehicles, or combinations of vehicles," while section 1926.601(a)(2)(ii) says "vehicles, or combination of vehicles." Clearly, these standards contemplate situations in which one vehicle will pull another, which is the case here.

We also find support for our conclusion that the tractor-trailer combinations are motor vehicles in definitions of the term "motor vehicle" found at 49 U.S.C. § 10102(17)[3] and in the safety regulation at 49 C.F.R. § 390.5,[4] both of which deal with motor vehicle safety and the regulation of motor vehicle transportation. Although we do not necessarily

---

[3] That statute defines the term "motor vehicle" as follows:

> "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Commission, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.

[4] That standard provides:

> *Motor vehicle* means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Federal Highway Administration, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

read these provisions *in pari materia* (covering the same subject matter) with 29 C.F.R. § 1926.601, as the Secretary suggests, they are useful in helping us determine the common understanding of the term "motor vehicle." In our experience, trailers commonly used on the highways to carry cargo are licensed, taxed, and regulated as "motor vehicles" or as part of a motor vehicle combination, even though they, like Kiewit's trailers, are not capable of propelling themselves. We therefore find that these definitions of the term "motor vehicle" support our conclusion that, when Kiewit's trailers are coupled to the tractors, they fall within the common understanding of the term "motor vehicle."

Kiewit has argued that by treating its trailers as motor vehicles the Secretary is attempting to amend section 1926.601(a). We disagree. The sentence, "[m]otor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic" does not define the term "motor vehicle." It simply limits the coverage of section 1926.601 to motor vehicles that operate on off-highway worksites that are not open to the public.

For the reasons above, we conclude that the judge erred when he found that Kiewit's trailers were not "motor vehicles." We hold that, when the trailers are attached to a tractor capable of moving them about the worksite, the tractor-trailer unit must be considered a motor vehicle. We next determine whether the trailers and the tractors pulling them were subject to the requirements of section 1926.601(b)(2), or whether, in light of section 1926.601(a), Kiewit's equipment was excepted from the provisions of that standard.

II. Are Kiewit's tractors and trailers subject to the requirements of 29 C.F.R. § 1926.601?

A. *Arguments*

The parties dispute the meaning of the second sentence in section 1926.601(a): "The requirements of this section do not apply to equipment for which rules are prescribed in § 1926.602." Kiewit asserts that section 1926.601(a) clearly and unambiguously states that the requirements of section 1926.601 do not apply to earthmoving equipment governed by

section 1926.602, and that the cited machinery is such equipment.[5] The Secretary, however, argues that there is "a certain ambiguity in the wording of the [second] sentence" of section 1926.601(a), and that the word "rules" in that sentence should be read to mean "applicable rules." To resolve this ambiguity, the Secretary argues, we must look at the "context" of the standard and at the purpose of the standard and the Act, citing, *e.g.*, *Deal v. United States*, 113 U.S. 1993 (1993) (although "conviction" has several definitions, meaning can be determined from context because only one fits sentence in which term is used). It is the Secretary's contention that such a reading of section 1926.601(a) in light of these factors shows that the second sentence is a preemption provision specifying that the requirements of section 1926.601 do not apply to equipment if the subject matter is more specifically addressed in section 1926.602. According to this analysis, the cited provisions of 29 C.F.R.§ 1926.601(b) would apply here because there are no requirements in section 1926.602 for brake lights or taillights.

The Secretary contends that the standards in Subpart O are organized like standards in other subparts. The subjects being regulated are set out at the beginning of a subpart followed by numerous requirements governing specific subjects. Here, asserts the Secretary, he has set out general requirements for equipment in section 1926.601 and has added specific requirements in section 1926.602. The Secretary points out that numerous safety devices required by section 1926.601 are not mentioned in 1926.602 and asserts that those requirements would apply to earthmoving equipment. According to the Secretary there are four areas of "overlap" between the two standards: brake systems, backup alarms, seat belts, and fenders. The Secretary suggests that these are the only cases in which the more specific provisions of 1926.602 would preempt the general requirements of section 1926.601. Kiewit, on the other hand, claims that the general requirements applicable to all motor vehicles and mechanized equipment are found in section 1926.600, which is entitled "Equipment," and that sections 1926.601 through 1926.605 each applies to a different activity or kind of

---

[5] The parties stipulated that the tractor-trailer combinations were used to haul earth. On review, the parties agree that these units are "earthmoving" equipment within the coverage of section 1926.602. Because neither party has challenged that characterization, we assume that the equipment cited is governed by section 1926.602.

equipment. According to Kiewit, the nature of the equipment determines which of those sections would apply.

To support his contention that sections 1926.601 and 1926.602 are not mutually exclusive, the Secretary points to provisions in section 1926.601 which apply to "haulage vehicles" and to "trucks with dump bodies."[6] According to the Secretary, such vehicles are "earthmoving equipment," and these provisions would be meaningless if earthmoving equipment is governed exclusively by section 1926.602, as Kiewit claims. Kiewit responds that the vehicles which the Secretary points to are not necessarily earthmoving vehicles because they can be used for transporting other kinds of loads, suggesting that whether one section or the other applied would be determined by the load. The Secretary responds that section 1926.601(b)(6) must refer to earthmoving equipment because the different types of loading equipment mentioned in that section all use a bucket, which indicates that the load must be earth materials.[7]

The Secretary asserts that a reading of 1926.601(a) in context demonstrates that the requirements for brake lights and taillights contained in section 1926.601(b)(2) must apply to Kiewit's equipment because there are no corresponding requirements in section 1926.602, and the remedial purposes of the Act are best served by interpreting the standards in the

---

[6] Sections 1926.601(b)(6) and 1926.601(b)(10), cited by the Secretary, provide:

> **§ 1926.601 Motor vehicles.**
>
> . . . .
>
> (b) *General requirements.*
>
> . . . .
>
> (6) All haulage vehicles, whose pay load is loaded by means of cranes, power shovels, loaders, or similar equipment, shall have a cab shield and/or canopy adequate to protect the operator from shifting or falling materials.
>
> . . . .
>
> (10) Trucks with dump bodies shall be equipped with positive means of support, permanently attached, and capable of being locked in position to prevent accidental lowering of the body while maintenance or inspection work is being done.

[7] We are not convinced by the Secretary's assertion that all the loading devices mentioned use a shovel to lift the load. For example, many cranes lift construction materials on a hook, and OSHA has recently adopted a standard permitting the lifting of personnel by cranes under certain circumstances, 29 C.F.R. § 1926.550(g). The Secretary's argument that, on a construction site, these lifting devices must be loading earth materials is not supported by this record.

way that will afford the greatest safety. Finally, asserts the Secretary, if the meaning of the standards is still unclear after reading them in context, his reasonable interpretation must be given deference.

B. *The language of the standard*

The Commission has recently articulated criteria to be considered in determining whether a standard applies:

> It is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation.

Unarco Commercial Prod., 16 BNA OSHC 1499, 1502-03, 1993 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993).

Accordingly, our starting point must be the language of the standard, and that language will ordinarily be regarded as conclusive. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *see also California Save Our Streams Council v. Yeutter*, 887 F.2d 908, 910 (9th Cir. 1989), citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The language in question is the second sentence in section 1926.601(a), which says, "The requirements of this section do not apply to equipment for which rules are prescribed in § 1926.602." We have considered this sentence in the context of sections 1926.601 and 1926.602 as the Secretary requests. We cannot say, however, that the surrounding text overrides that sentence's clear and unambiguous mandate that section 1926.601 does not apply to equipment covered by section 1926.602. Although we recognize that there are provisions in both sections 1926.601 and 1926.602 that might apply to Kiewit's vehicles,[8] we

---

[8] For example, the Secretary cites eight provisions, four in section 1926.601 and four in section 1926.602, apparently suggesting that those in 1926.602 preempt the ones in 1926.601 because they are more specific. Sections 1926.601(b)(1) and 1926.602(a)(4) both govern brakes. Sections 1926.601(b)(4) and 1926.602(a)(9) require backup alarms. Sections 1926.601(b)(9) and 1926.602(a)(2) require seat belts, and sections 1926.602(b)(13) and 1926.602(a)(5) set out requirements for fenders. Having reviewed those provisions, we cannot say that the Secretary's assertion is supported by the language of the standards themselves; the standards in section 1926.602 do not appear to be more specific than their counterparts in section 1926.601.

(continued...)

find nothing in the language of Subpart O that suggests that an employer is required to ignore the clear statement that a vehicle is not covered by a particular standard in favor of searching for applicable provisions in an apparently inapplicable standard. Section 1926.601(a) does not, as the Secretary claims, create a selective preemption. This sentence explicitly excludes Kiewit's vehicles. As a result, the equipment cited here is simply not covered by the standard the Secretary has cited. In that regard, this case is like *Paschen Contrac., Inc.*, 14 BNA OSHC 1754, 1987-90 CCH OSHD ¶ 29,066 (No. 84-1285, 1990) (overhead hoist not a gantry crane governed by 29 C.F.R. § 1926.550(d)); and *A.H. Beck Found. Co.*, 13 BNA OSHC 1040, 1986-87 CCH OSHD ¶ 27,797 (No. 83-928, 1987) (use of drilling rig for incidental lifting did not make it a crane subject to 29 C.F.R. § 1926.550(a)(9)).

We are also unconvinced by the Secretary's claim that the provisions in 1926.601(b) that mention haulage vehicles and trucks with dump bodies support his assertion that sections 1926.601 and 1926.602 both govern the same equipment. We therefore find nothing in Subpart O that persuades us to give the second sentence in section 1926.601(a) a meaning other than its plain one.

Section 2(b) of the Act, 29 U.S.C. § 651(b), states that it was the purpose of Congress "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." The Secretary argues that this remedial purpose is a basis for adopting the interpretation that provides the highest level of protection, citing, *e.g.*, *Crandon v. United States*, 494 U.S. 152 (1990), and *Kelly v. Robinson*, 479 U.S. 40 (1986). The cases cited by the Secretary do state that a statute must be construed in light of its object and underlying policy, but the facts of those cases are so different from those here that the cases are not controlling. Furthermore, the principle for which they are cited is only one of many rules for statutory construction. It is also a well-established principle that the remedial purpose

---

[8](...continued)
While the provisions in sections 1926.601 and 1926.602 cited by the Secretary might plausibly apply to the same machinery, our reading of Subpart O does not persuade us that the theory of selective preemption put forth here by the Secretary is the interpretation intended by the original drafters of the standard. *Lowe Constr. Co.*, 13 BNA OSHC 2182, 1897-90 CCH OSHD ¶ 28,509 (No. 85-1388, 1989).

of the Act does not give license to disregard the plain meaning of a standard. *See Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981); *Borton, Inc. v. OSHRC*, 734 F.2d 508 (10th Cir. 1984). The Act sets the goal of "safe and healthful working conditions for working men and women," but this goal is best accomplished by telling employers precisely what they are required to do in order to prevent or minimize danger to employees. *General Elec. Co. v. OSHRC*, 583 F.2d 61, 67-68 (2d Cir. 1978), quoting *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3d Cir. 1978) and *Diamond Roofing v. OSHRC*, 528 F.2d 645, 649-50 (5th Cir. 1976). The Secretary should not be permitted to rely on the purpose of the Act to require what may have been intended but was not clearly stated in a standard. *Martin v. OSHRC (CF&I Steel Corp.)*, 941 F.2d 1051, 1058 (10th Cir. 1991); *Kent Nowlin Constr. Co. v. OSHRC*, 593 F.2d 368, 371 (10th Cir. 1979).[9]

C. *Legislative history*

Under the analysis set out in *Unarco*, quoted above, the second step in determining the meaning of an ambiguous standard would be to refer to the legislative history of that standard.[10] Subpart O was originally included in a notice of proposed rulemaking pursuant to the Contract Work Hours and Safety Standards Act ("the Construction Safety Act"), 40 U.S.C. §§ 327-333. 36 Fed. Reg. 1802 (1971). It was adopted by the Department of Labor on April 17, 1971 to go into effect seven and ten days after its publication. 36 Fed. Reg. 7340 (1971). Subpart O was subsequently codified at 29 C.F.R. §§ 1518.600-.606. After the Occupational Safety and Health Act went into effect on April 27, 1971, Subpart O and the

---

[9] The Secretary asks why he would leave the operators of Kiewit's machinery without the protection of proper lights. We cannot know why the Secretary promulgated the standard the way he did. Although requiring brake lights and taillights on earthmoving equipment might increase safety on construction sites to some degree, we cannot pursue that objective by endorsing strained interpretations of the Secretary's standards.

[10] Because we do not believe that section 1926.601 is ambiguous, this step would ordinarily be unnecessary. *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978) (when statute is unambiguous on its face, we do not look to legislative history for its meaning) (citing *Ex parte Collett*, 337 U.S. 55, 61 (1949)); *see also Howe v. Smith*, 452 U.S. 473, 483 (1981) (when the terms of a statute are unambiguous, inquiry goes no further); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (where the language is plain and admits of no more than one meaning, there is no need for interpretation and rules which are to aid doubtful meanings require no discussion); *McCord v. Bailey*, 636 F.2d 606, 614-15 (D.C. Cir. 1980). In view of the Secretary's argument that the standard is ambiguous, however, we will look to this extrinsic source to see if it supports the Secretary's assertion.

other Construction Safety Act standards were adopted as "established Federal standards" under section 6(a) of the Act, 29 U.S.C. § 655(a).

As originally promulgated under the Construction Safety Act and adopted under section 6(a), the sentence in question read: "The requirements of this section do not apply to crawler machines, for which rules are prescribed in § 1518.602." It was subsequently amended by OSHA to substitute the word "equipment" for "crawler machines." 36 Fed. Reg. 15,533 (1971). That amendment clearly enlarged the exemption to include not only the tracked vehicles originally mentioned but also vehicles with rubber tires, such as Kiewit's tractors and trailers. We have no information about the Secretary's intent in making this change, which has brought about the dispute before us here. Because the legislative history of the cited standard sheds no light on the meaning of the standard, it provides no basis for assigning any but the plain facial meaning to the standard and lends no support to the Secretary.

D. *Deference to the Secretary's interpretation*

The approach set out in *Unarco* states that, if the text of the standard and its legislative history do not provide its meaning, the courts will defer to a reasonable interpretation developed by the agency charged with administering the standard. Here, the Secretary argues that, because his standard is ambiguous, we must give deference to his interpretation. Because we find that the terms of section 1926.601 are not ambiguous, however, it is not necessary for us to reach this step. Even if we were to address the question of deference, it would not alter our disposition of this case.

In cases where the meaning of a standard is in question, the adjudicatory body should give effect to the agency's interpretation so long as it is "reasonable," meaning so long as it sensibly conforms to the purpose and wording of the regulation. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-51 (1991). The underlying requirement for deference to an agency's interpretation, therefore, is that the interpretation be reasonable. The Commission is authorized to review the Secretary's interpretations for consistency with the regulatory language and for reasonableness. *Id.* at 154-55. In evaluating whether the Secretary's interpretation is reasonable, we note that requiring the use of brake lights and taillights on

earthmoving equipment would, in all probability, increase construction site safety. That is not the issue, however. We must determine whether the requirement the Secretary seeks to impose can reasonably be inferred from the language of the standard. In our view, the wording of section 1926.601(a) clearly does not indicate that an employer operating earthmoving equipment must read and compare all the provisions in sections 1926.601 and 1926.602 to determine which ones apply to his equipment. We cannot accept the Secretary's argument that would require us to read the word "rules" to mean "applicable rules," thereby inserting a limitation where none exists. We therefore conclude that this is not a reasonable interpretation.

E. *Fair notice*

Kiewit has also argued that, if it was required to have lights on its earthmoving equipment, it was deprived of due process of the law because the language of the standard did not give it fair notice of that requirement. In view of our disposition of the case, we need not reach this question.

CONCLUSION

For the reasons above, we affirm the administrative law judge's disposition of the two items in question. The standards cited by the Secretary do not apply to Kiewit's earthmoving equipment.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: March 31, 1994

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-2578
KIEWIT WESTERN COMPANY,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on March 31, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

March 31, 1994
Date

Docket No. 91-2578

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

Tedrick Housh, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 2106
911 Walnut Street
Kansas City, MO 64106

Rodney Smith, Esquire
Eiberger, Stacy, Smith & Martin
3500 Republic Plaza
370 Seventeenth Street
Denver, CO 80202-5635

Kay-Dawn G. Allen, Esquire
1900 Wazee Street, Suite 210
Denver, CO 80202

Sidney J. Goldstein
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.
KIEWIT WESTERN COMPANY
Respondent.

OSHRC DOCKET
NO. 91-2578

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 16, 1992. The decision of the Judge will become a final order of the Commission on October 16, 1992 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 October 6, 1992 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 16, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2578

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

Tedrick Housh, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Bldg., Room 2106
911 Walnut Street
Kansas City, MO 64106

Kay-Dawn Allen, Esquire
Eiberger, Stacy, Smith & Martin
3500 Repbulic Plaza
370 Seventeenth Street
Denver, CO 80202 5635

Sidney J. Goldstein
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3584

00100763762:08

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. SPEER BOULEVARD
ROOM 250
DENVER, COLORADO 80204-3582

PHONE
COM (303) 844-2281
FTS (303) 844-2281

FAX
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

KIEWIT WESTERN CO.,
Respondent.

OSHRC Docket No. 91-2578

DECISION AND ORDER

This is an action by the Secretary of Labor against Kiewit Western Company to enforce a serious citation for the alleged violation of regulations adopted under the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer for the Occupational Safety and Health Administration inspected a workplace of the Respondent, and the Agency concluded that the company was in violation of regulations relating to motor vehicles. The Respondent disagreed with this determination and filed a notice of contest. After a Complaint and Answer were filed with this Commission, the case was set for hearing. This decision is in response to the parties' request that the hearing be eliminated, and that the case be disposed of upon a stipulation of facts.

Citation 1a alleged that:

> Motor vehicle(s), or combination(s) of vehicles, did not have two tail lights in operable conditions:
>
> (a) There were no tail lights used on trailers 19-824, 4-1645, 4-1694, 4-1560, 4-1685, 4-1513 and 4-1646. The trailers were used to haul earth at night where no trailers were observed to have tail lights.

in violation of the regulation found at 29 C.F.R. §1926.601(b)(2)(i) which provides:

> (2)(i) Whenever visibility conditions warrant additional light, all vehicles, or combinations of vehicles, in use shall be equipped with at least two headlights and two taillights in operable condition.

The other item of the citation charges that:

> Motor vehicle(s), or combination(s) of vehicles, did not have brake light in operable condition.
>
> (a) There were no brake lights on trailers 4-1645, 4-1694, 4-1560, 4-1485, 4-1513, and 4-1646. Brake lights were also not working on Caterpillar 776B vehicle #827 and Caterpillar 777 vehicle #44 (19-744) used to move earth at the job site.

in violation of the regulation found at 29 C.F.R. §1926.601(b)(2)(ii) reading:

> (ii) All vehicles, or combination of vehicles, shall have brake lights in operable condition regardless of light conditions.

Summarized, the Stipulation of Facts recites that the company was engaged in construction at the Denver International Airport and utilized trailers and tractors in its exclusively off-highway operations. Trailers listed in the two items of the citation did not have tail lights or brake lights. The two Caterpillar tractors had no working brake lights. Tractors used to pull trailers fall within the definition of motor vehicles, but trailers by themselves are not motor vehicles. Both types of equipment were utilized at night and have experienced a wide variety of weather and working conditions.

The Respondent asserts that there was no violation of the standards with respect to the trailers and tractors listed in the citation because the Secretary did not demonstrate that the cited standards apply to the conditions prevailing at the off-highway jobsite. In support of this position, it cites Section 601 of the regulations, providing:

> §1926.601 Motor vehicles.
>
> (a) *Coverage.* Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic. The requirements of this section do not apply to equipment for which rules are prescribed in §1926.602.

Section 602 is entitled Material handling equipment and reads:

§1926.602 Material handling equipment.

(a) *Earthmoving equipment; General* (1) These rules apply to the following types of earthmoving equipment: scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks, graders, agricultural and industrial tractors, and similar equipment.

It is the Secretary's position that, because §1926.602 does not prescribe any rules for vehicle lighting, employers must comply with the lighting requirements contained in §1926.601 for all motor vehicles or combinations of vehicles operated within an off-highway jobsite. Further, the Commission's inquiry is limited by the language of the citation to the reasonableness of the Secretary's interpretation.

I believe the Respondent's position is well taken. Paragraph 11 of the Stipulation of Facts states that the trailers listed in Items 1a and 1b of the citation by themselves are not motor vehicles. Since Section 601 involves motor vehicles, and inasmuch as the trailers are not motor vehicles, this section of the regulation has no application to trailers.

The Secretary urges that the requirements of Section 601 should be included in the earthmoving equipment Section 602, but that position would be contrary to the specific wording of 601 which states that the requirements of 601 do not apply to 602. The Complainant also submits that its position is a reasonable interpretation of the regulations. But there is no need to interpret the regulations. On their face it is clear that the requirements of 601 are not to be extended to earth moving equipment described in 602.

The Caterpillar tractors fall within the definition of earth-moving equipment in Section 602, and that regulation applies to this equipment. By its terms, the requirements of this regulation do not apply to equipment for which rules are prescribed in §1926.601.

The citation is VACATED.

Sidney J. Goldstein
Judge, OSHRC

Dated: September 4, 1992

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. SPEER BOULEVARD
ROOM 250
DENVER, COLORADO 80204-3582

PHONE
COM (303) 844-2281
FTS (303) 844-2281

FAX
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

KIEWIT WESTERN CO.,
Respondent.

OSHRC Docket No. 91-2578

DECISION AND ORDER

This is an action by the Secretary of Labor against Kiewit Western Company to enforce a serious citation for the alleged violation of regulations adopted under the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer for the Occupational Safety and Health Administration inspected a workplace of the Respondent, and the Agency concluded that the company was in violation of regulations relating to motor vehicles. The Respondent disagreed with this determination and filed a notice of contest. After a Complaint and Answer were filed with this Commission, the case was set for hearing. This decision is in response to the parties' request that the hearing be eliminated, and that the case be disposed of upon a stipulation of facts.

Citation 1a alleged that:

> Motor vehicle(s), or combination(s) of vehicles, did not have two tail lights in operable conditions:
>
> (a) There were no tail lights used on trailers 19-824, 4-1645, 4-1694, 4-1560, 4-1685, 4-1513 and 4-1646. The trailers were used to haul earth at night where no trailers were observed to have tail lights.

in violation of the regulation found at 29 C.F.R. §1926.601(b)(2)(i) which provides:

> (2)(i) Whenever visibility conditions warrant additional light, all vehicles, or combinations of vehicles, in use shall be equipped with at least two headlights and two taillights in operable condition.

The other item of the citation charges that:

> Motor vehicle(s), or combination(s) of vehicles, did not have brake light in operable condition.
>
> (a) There were no brake lights on trailers 4-1645, 4-1694, 4-1560, 4-1485, 4-1513, and 4-1646. Brake lights were also not working on Caterpillar 776B vehicle #827 and Caterpillar 777 vehicle #44 (19-744) used to move earth at the job site.

in violation of the regulation found at 29 C.F.R. §1926.601(b)(2)(ii) reading:

> (ii) All vehicles, or combination of vehicles, shall have brake lights in operable condition regardless of light conditions.

Summarized, the Stipulation of Facts recites that the company was engaged in construction at the Denver International Airport and utilized trailers and tractors in its exclusively off-highway operations. Trailers listed in the two items of the citation did not have tail lights or brake lights. The two Caterpillar tractors had no working brake lights. Tractors used to pull trailers fall within the definition of motor vehicles, but trailers by themselves are not motor vehicles. Both types of equipment were utilized at night and have experienced a wide variety of weather and working conditions.

The Respondent asserts that there was no violation of the standards with respect to the trailers and tractors listed in the citation because the Secretary did not demonstrate that the cited standards apply to the conditions prevailing at the off-highway jobsite. In support of this position, it cites Section 601 of the regulations, providing:

> §1926.601 Motor vehicles.
>
> (a) *Coverage.* Motor vehicles as covered by this part are those vehicles that operate within an off-highway jobsite, not open to public traffic. The requirements of this section do not apply to equipment for which rules are prescribed in §1926.602.

Section 602 is entitled Material handling equipment and reads:

§1926.602 Material handling equipment.

(a) *Earthmoving equipment; General* (1) These rules apply to the following types of earthmoving equipment: scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks, graders, agricultural and industrial tractors, and similar equipment.

It is the Secretary's position that, because §1926.602 does not prescribe any rules for vehicle lighting, employers must comply with the lighting requirements contained in §1926.601 for all motor vehicles or combinations of vehicles operated within an off-highway jobsite. Further, the Commission's inquiry is limited by the language of the citation to the reasonableness of the Secretary's interpretation.

I believe the Respondent's position is well taken. Paragraph 11 of the Stipulation of Facts states that the trailers listed in Items 1a and 1b of the citation by themselves are not motor vehicles. Since Section 601 involves motor vehicles, and inasmuch as the trailers are not motor vehicles, this section of the regulation has no application to trailers.

The Secretary urges that the requirements of Section 601 should be included in the earthmoving equipment Section 602, but that position would be contrary to the specific wording of 601 which states that the requirements of 601 do not apply to 602. The Complainant also submits that its position is a reasonable interpretation of the regulations. But there is no need to interpret the regulations. On their face it is clear that the requirements of 601 are not to be extended to earth moving equipment described in 602.

The Caterpillar tractors fall within the definition of earth-moving equipment in Section 602, and that regulation applies to this equipment. By its terms, the requirements of this regulation do not apply to equipment for which rules are prescribed in §1926.601.

The citation is VACATED.

Sidney J. Goldstein
Judge, OSHRC

Dated: September 4, 1992