United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

No. 19-60695

ECHO POWERLINE, L.L.C.,

Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; EUGENE SCALIA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondents.

Petition for Review of the Occupational Safety & Health Review Commission
OSHRC Dkt. No. 17-1188

Before DAVIS, GRAVES, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

Rehanging downed powerlines poses obvious risks of electrocution and death. To minimize those dangers, an OSHA regulation requires power companies to use "the tension-stringing method, barriers, or other equivalent measures." 29 C.F.R. § 1926.964(b)(1). The point of these precautions is to keep slack, deenergized lines from whipping up and contacting nearby energized lines.

Tragically, though, that is just what happened here. Two employees of petitioner Echo Powerline, L.L.C. ("Echo"), were electrocuted when a

line they were rehanging whipped up into an energized line carrying deadly amounts of electricity. The crew had been using Echo's standard precautions—which primarily involve extending a bucket truck's arm as a barrier beneath the energized line. The Occupational Safety and Health Administration ("OSHA") found this inadequate and cited Echo for violating the tension-stringing regulation, and an Administrative Law Judge ("ALJ") upheld the citation. Echo now asks us to overturn the citation, arguing the regulation is unconstitutionally vague. Alternatively, Echo argues it satisfied the regulation because its truck-barrier method is industry custom.

We sometimes require OSHA to prove an employer failed to adhere to "the general practice in the industry." *S&H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1285 (5th Cir. 1981). But this treatment is only necessary "to flesh out generally worded [OSHA] regulations in order to avoid notice problems under the due process clause." *Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 511 (5th Cir. 1986). Here, the tension-stringing provision is sufficiently precise to repel Echo's vagueness challenge, and evidence of industry custom was unnecessary to establish Echo's violation.

We deny the petition for review.

I.

In January 2017, Echo was hired to restore powerlines downed by an ice storm in Beaver, Oklahoma. One Echo crew was charged with rehanging three, quarter-mile-long parallel lines. These were "distribution lines," which deliver electricity at a relatively low voltage. The lines were deenergized but crossed beneath energized "transmission lines" carrying nearly ten times the electricity. Once restored, the downed lines would have sat only about four feet below the transmission lines.

The crew rehung each line by anchoring one end to a bucket truck near a pole and then using a non-conductive sling to pass the other end to a worker

in a truck near the next pole. This allowed the line's free end to drag along the ground before being rehung. The crew took three precautions to prevent downed lines from contacting transmission lines. First, to keep a line from catching on the ground and "whipping" into the transmission line, a truck was parked at the pole nearest the transmission line, with its arm and bucket extended over the distribution line. The bucket itself was not situated directly beneath the transmission line because there was a lineman in the bucket and Echo's safety procedures called for a fifteen-foot space between a lineman and an energized transmission line. Second, the crew shortened the pole from which the distribution line hung that was nearest to the transmission line, such that the distribution line, once rehung, would sit a few feet farther from the transmission line. Third, the crew were given personal protective equipment, including gloves rated to withstand the electricity that normally runs through distribution lines.

The crew successfully rehung two of the three distribution lines. The third line, however, caught on an obstacle on the ground—likely a barbed-wire fence—and whipped up, hitting the transmission line. The resulting shock electrocuted two workers who were pulling the line along the ground. One suffered severe burns, and the other died.

Echo immediately reported the incident to OSHA. After an inspection, OSHA cited Echo for violating 29 C.F.R. § 1926.964(b)(1) (the "tension-stringing provision"):

> (1). Tension stringing method. When lines that employees are installing or removing can contact energized parts, the employer shall use the tension-stringing method, barriers, or other equivalent measures to minimize the possibility that conductors and cables the employees are installing or removing will contact energized power lines or equipment.

Echo contested the citation. An ALJ held a hearing in July 2018 and subsequently affirmed the citation.

As relevant here, the ALJ rejected Echo's argument that the method its crew used, sometimes called "hand-lining," constitutes the tension-stringing method. Although hand-lining does involve "the simple application of tension while re-hanging lines," the ALJ reasoned that the "tension-stringing method requires wires to be kept off the ground and clear of energized circuits."[1] According to the ALJ, this accords with industry usage of the term "tension-stringing method," which typically involves a mechanical device called a "tension stringer." A tension stringer releases powerlines from a spool while keeping them under constant tension, in order to keep them above the ground. The ALJ held that to qualify as tension stringing, the method in question must keep the line off the ground and clear of all energized lines. Here, Echo's method involved stringing the lines out on the ground and applying tension only to lift them up to the poles.

The ALJ also rejected Echo's argument that its bucket truck served as a "barrier." The ALJ acknowledged Echo's evidence, including expert testimony, that "the industry uses bucket trucks" as barriers, and it found that "under certain circumstances," a bucket truck can serve as a "barrier" under the tension-stringing provision. But the ALJ found that, as situated, Echo's truck failed to "minimize the possibility" of contacting the transmission line because it "was not directly between" the downed line and the transmission line. The truck was positioned fifteen feet from the intersection of the distribution and transmission lines and far closer to one end of the downed line than the other, leaving "ample space for the cable to

[1] Echo develops no argument that the ALJ erred in this conclusion, and we express no view on it.

rebound upwards" as well as "an ample amount of cable capable of rebounding." The ALJ suggested that the crew should have instead had rubber blankets, sometimes called "guts," hung on the transmission lines.[2]

Finally, the ALJ held Echo failed to implement any "equivalent measure" to minimize risk of contact. The only additional measure Echo used—providing groundmen with rubber gloves not rated for transmission-voltage contact—was insufficient.

The Occupational Safety and Health Review Commission ("OSHRC")[3] denied discretionary review of the ALJ's decision. Echo now petitions for our review.

II.

We have jurisdiction over Echo's petition under 29 U.S.C. § 660. "Though the ALJ's order became final only when the Commission declined to conduct discretionary review, we apply the same standard of review to the final decision here as we would if the Commission had directly issued its own decision." *Sanderson Farms, Inc. v. OSHRC*, --- F.3d ---, 2020 WL 3867380, at *2 (5th Cir. July 9, 2020) (quoting *Excel Modular Scaffolding & Leasing Co. v. OSHRC*, 943 F.3d 748, 753 (5th Cir. 2019)). We conclusively accept the ALJ's findings of fact "if they are supported by 'substantial evidence on the record considered as a whole.'" *Southern Hens, Inc. v. OSHRC*, 930 F.3d 667, 674 (5th Cir. 2019) (quoting 29 U.S.C. § 660(a)). We review the ALJ's legal

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[2] The crew used this method on another set of live distribution lines that intersected the downed line at the opposite end of the worksite. But because the crew was not qualified to work on the transmission lines, it could not have applied the same method to them. "Thus," the ALJ found, Echo's method was used "in lieu of hiring someone to barricade the transmission lines."

[3] Where appropriate, the term "OSHA" refers to the OSHRC and the Secretary of Labor, who are the respondents.

conclusions only "to determine whether they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 675 (quoting 5 U.S.C. § 706(2)(A)).

III.

To establish a violation of the Occupational Safety and Health Act ("OSH Act"), OSHA must prove by a preponderance of evidence that (1) the cited standard applies, (2) the employer failed to comply with the standard, (3) the harmed employee had access to the noncompliant conditions, and (4) the employer had actual or constructive knowledge of the violation. *Southern Hens*, 930 F.3d at 735 (quoting *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 734 (5th Cir. 2016)). On appeal, Echo raises two related arguments. First, it argues that, as applied here, the tension-stringing provision is unconstitutionally vague. Second, it argues that the ALJ erred by ignoring evidence that its use of a bucket truck as a precautionary measure adhered to industry custom.[4] These arguments overlap somewhat because, as we explain below, our court looks to evidence of industry practice to avoid vagueness problems with certain generally worded OSHA regulations. *See, e.g.*, *S&H Riggers*, 659 F.2d at 1285; *B&B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1367 (5th Cir. 1978). For clarity's sake, however, we address each argument separately.

A.

We first consider Echo's vagueness challenge and conclude the tension-stringing provision is not unconstitutionally vague.

[4] As the ALJ noted, this evidence is extensive, including testimony from several experienced linemen that they had used the method "multiple times" with Echo and other employers. OSHA offered only the testimony of its own inspector, which the ALJ rejected.

Due process requires OSH Act standards to "carry[] 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *B&B Insulation*, 583 F.2d at 1368 (quoting *United States v. Petrillo*, 332 U.S. 1, 8 (1947)). Because the OSH Act is "remedial civil legislation" and no First Amendment–protected activity is involved, "the vagueness charge must be considered in light of the regulation's application." *Id.* (citing *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 36 (1963); *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974)). "[T]he regulation[] will pass constitutional muster even though [it is] not drafted with the utmost precision; all that due process requires is a fair and reasonable warning." *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982) (citation omitted).

Echo contends the tension-stringing provision is unconstitutionally vague because "[i]t is unclear . . . what the regulation requires in the absence of the tension-stringing method." According to Echo, the provision could require: "(1) other measures equivalent to the tension-stringing method; or (2) other measures equivalent to barriers; (3) or a combination of barriers and other measures to produce an equivalent method to the tension-stringing method." We disagree.

Contrary to Echo's strained reading, the provision does not leave an employer guessing at what "equivalent measures" are. The provision specifies that an "equivalent measure" is a precaution—like tension stringing or barriers—that "minimize[s] the possibility that conductors and cables the employees are installing or removing will contact energized power lines or equipment." 29 C.F.R. § 1926.964(b)(1). We are satisfied this express language afforded Echo "sufficiently definite warning" of the conduct required. *B&B Insulation*, 583 F.2d at 1368; *see also, e.g., Ryder Truck Lines*, 497 F.3d at 233 (finding OSHA regulation survives due process

challenge "[s]o long as [it] affords a reasonable warning of the proscribed conduct in light of common understanding and practices").[5] Moreover, the ALJ's findings showed that deploying an "equivalent" precaution in this situation was no mystery. As the ALJ explained, Echo could have hung rubber "guts" on the transmission lines, serving as an equivalent to tension stringing in its ability to minimize the risk of contact with the transmission line. Indeed, Echo used just this kind of precaution in another part of the worksite.

Finally, Echo's arguments ignore that any vagueness problems with the provision would be cured by Echo's actual knowledge of its obligations under the provision. *See Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573, 576 (5th Cir. 1994) (OSHA may avoid proving adherence to industry custom by proving employer had actual knowledge of requirement).[6] As OSHA points out, Echo's own safety rules required its crew to deploy a barrier to prevent contact with the transmission line, in terms quite similar to the OSHA provision. The problem was not that Echo's crew lacked notice of what the provision required; rather, as the ALJ found, the problem was that the precaution the crew used was ineffective at minimizing contact with the transmission line.[7]

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[5] This also disposes of Echo's erroneous argument that, because there is no "equivalent" to the "highly-specific, machine-driven" tension-stringing method, the provision "creates an impossible standard." To the contrary, the provision expressly states the standard against which an "equivalent" method is measured: it must "minimize the possibility that conductors and cables the employees are installing or removing will contact energized power lines or equipment." 29 C.F.R. § 1926.964(b)(1).

[6] *See also, e.g.*, *Corbesco v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991) (same); *Cotter & Co. v. OSHRC*, 598 F.2d 911, 914 (5th Cir. 1979) (same).

[7] Given our resolution of the vagueness issue, we need not reach OSHA's arguments that Echo had constructive notice of the provision's requirements. *See Faultless*, 674 F.2d at 1185 ("The constitution does not demand that the employer be actually aware

In sum, we reject Echo's argument that the tension-stringing provision is unconstitutionally vague.

B.

Echo next argues the ALJ erred by failing to consider evidence that the precautionary measure Echo used adhered to customary practice in the powerline industry. We again disagree.

We sometimes use "industry custom . . . to flesh out generally worded regulations in order to avoid notice problems under the due process clause." *Brock*, 795 F.2d at 511; *see id.* & n.8 (citing *inter alia B&B Insulation*, 583 F.2d 1364; *Cotter & Co. v. OSHRC*, 598 F.2d 911 (5th Cir. 1979); *S&H Riggers*, 659 F.2d 1273). We have read otherwise-vague regulations "to require only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances." *B&B Insulation*, 583 F.2d at 1367; *accord Cotter*, 598 F.2d at 914 (concluding "the Commission's disregard of demonstrated industry custom [was] improper"). This standard corresponds with "the tort law concept of the 'reasonable man.'" *B&B Insulation*, 583 F.2d at 1369. Regulations that require this treatment are sometimes called "performance standards," as opposed to "specification standards," which must be adhered to strictly and without reference to industry custom. *See, e.g.*, *Sanderson Farms*, 2020 WL 3867380, at *6; *see also Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283 (No. 97-1073, 2007), 2007 WL 4138237, at *4 (distinguishing "performance" from "specification" standards); *Lowe Constr. Co.*, 13 BNA OSHC 2181 (No. 85-1388, 1989), 1989 WL 223356, at *3

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that the regulation is applicable to his conduct or that a hazardous condition exists."). Similarly, we need not reach OSHA's argument that Echo waived reliance on the vagueness doctrine by failing to raise it to the OSHRC.

(same). To cite an employer for violating a performance standard, OSHA must prove that the employer either failed to adhere to "the general practice in the industry" or "had clear actual knowledge" that the precaution in question "was necessary under the circumstances." *S&H Riggers*, 659 F.2d at 1285; *see also, e.g.*, *Wal-Mart Distrib. Ctr. #6016 v. OSHRC*, 819 F.3d 200, 204 n.3 (5th Cir. 2016) ("Performance-oriented [OSHA] provisions are interpreted in light of a reasonableness standard." (citing *Thomas Indus. Coatings*, 2007 WL 4138237, at *4)).

We recently identified two hallmarks of performance standards. *See Sanderson Farms*, 2020 WL 3867380, at *6. First, a performance standard "establishes an end result that the employer chooses how to work toward." *Id.* By contrast, a specification standard "does not set a goal for an employer to meet with flexible methods." *Id.*; *see also Lowe Constr. Co.*, 1989 WL 223356, at *3 (explaining that "[t]he entire purpose of a performance standard is to allow flexibility not available in specification standards"). Second, a performance standard "is so general as to require definition by reference to industry standards for the regulation to be reasonable." *Sanderson Farms*, 2020 WL 3867380, at *6 (citation omitted). Specification standards, in contrast, are "explicit and unambiguous" and provide "fair notice on [their] own." *Id.* (quoting *Corbesco, Inc. v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991)). "Many[] if not most" OSHA regulations "are sufficiently specific concerning the circumstances in which safety precautions must be taken that adequacy of notice is not a significant problem" and thus are not treated as performance standards. *S&H Riggers*, 659 F.2d at 1280; *accord Faultless*, 674 F.2d at 1186 (industry custom relevant "only when a specific standard of expected employer conduct is proposed to be derived from a *very* general" provision (emphasis added)).

A review of our precedents demonstrates reluctance to treat most OSH Act regulations as performance standards. We first adopted this

practice in 1978, in a case involving 29 C.F.R. § 1926.28(a) (the "PPE provision"), which provides that all employers must require "the wearing of appropriate personal protective equipment ["PPE"] in all operations where there is an exposure to hazardous conditions." *B&B Insulation*, 583 F.2d at 1368–70. Citing a 1975 First Circuit case involving a related provision,[8] we "rescue[d]" the provision "from unconstitutional uncertainty," looking to "the tort law concept of the 'reasonable man.'" *Id.* at 1369; *see id.* at 1369–70 (citing *Cape & Vineyard Div. of New Bedford Gas v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975)). We reasoned that an employer who conforms to industry custom and "whose activity is not yet addressed by a specific regulation . . . should generally not bear an extra burden" to comply with a vague standard. *Id.* at 1371.

In the forty-odd years since *B&B Insulation*, we have never extended this principle beyond the PPE provisions it specifically addressed. *See Owens-Corning Fiberglass, Corp. v. Donovan*, 659 F.2d 1285, 1287–88 (5th Cir. 1981) (applying *B&B Insulation* to § 1910.132(a)); *S&H Riggers*, 659 F.2d at 1282 (same as to § 1926.28(a)); *Cotter*, 598 F.2d at 913 (same as to § 1910.132(a)); *Power Plant Div. v. OSHRC*, 590 F.2d 1363, 1364 (5th Cir. 1979) (same as to § 1926.28(a)). And we have twice refused to expand *B&B Insulation* to other regulations. In *Brock*, we declined to refer to industry custom to construe a regulation requiring that "[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee." *Brock*, 795 F.2d at 511. We found that regulation sufficiently "precise," such that there was no need "to avoid notice problems under the due process

[8] *See* 29 C.F.R. § 1901.132(a) (employers must provide certain kinds of protective equipment "wherever it is necessary" to prevent certain hazards); *see also Cotter & Co. v. OSHRC*, 598 F.2d 911, 913 (5th Cir. 1979) (recognizing § 1901.132(a) and § 1926.28(a) as analogous).

clause." *Id.* Most recently, we refused to extend *B&B Insulation* to 29 C.F.R. § 1910.119(j)(4)(i) (the "inspection provision"), which provides that in order to "prevent[] or minimiz[e] the consequences of toxic, reactive, flammable, or explosive chemicals[,] . . . [i]nspections and tests shall be performed on" certain equipment. *Sanderson Farms*, 2020 WL 3867380, at *6. We acknowledged that another portion of the same regulation—which instructed employers merely to "ensure . . . a safe operating condition" for certain equipment—constituted a performance standard. *Id.* at *6 (quoting 29 C.F.R. § 1910.217(e)(1)(i)) (alteration in original). But because the inspection provision prescribed specific methods and goals and was "explicit and unambiguous," we refused to treat it as a performance standard. *Id.*[9]

Here, ignoring our reluctance to treat regulations as performance standards, Echo argues that the tension-stringing provision is vague enough to require this treatment, at least when tension stringing is unavailable. OSHA disagrees, characterizing the regulation as a specification standard, albeit "with a performance-oriented exception" for barriers and other methods. Accordingly, OSHA argues that Echo's evidence of industry custom is irrelevant to its violation.

We agree with OSHA that industry custom is unnecessary to cabin the tension-stringing provision. At the outset, as discussed above, the tension-stringing provision is not unconstitutionally vague. It follows that evidence of industry custom, which is merely a cure for an otherwise–vague regulation, *see B&B Insulation*, 583 F.2d at 1367, is unnecessary to the provision's construction.

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[9] We have also twice acknowledged that 29 C.F.R. § 1926.105(a), which requires use of safety nets in all workplaces when other safety measures are "impractical," may require industry-custom evidence in the absence of proof of actual or constructive knowledge. *See Peterson Bros.*, 26 F.3d at 576–77; *Corbesco*, 926 F.2d at 426–27.

Moreover, the tension-stringing provision bears neither of the characteristics of performance standards we recently identified in *Sanderson Farms*. Like the inspection provision at issue in that case, the tension-stringing provision identifies a specific goal ("minimiz[ing] the possibility that conductors and cables . . . will contact energized power lines or equipment") and how employers must achieve it (by "us[ing] the tension-stringing method, barriers, or other equivalent measures"). As to the second *Sanderson* factor, we find that like the inspection provision, the tension-stringing provision is adequately "explicit and unambiguous." 2020 WL 3867380, at *6. Indeed, if anything, the tension-stringing provision is less ambiguous: the inspection requirement provides only that "[i]nspections and tests shall be performed on" certain equipment. By contrast, the tension-stringing provision instructs the employer about specific methods to use in order to comply.[10]

Our conclusion is consistent with two Seventh Circuit decisions that denied performance-standard treatment to provisions much vaguer than the tension-stringing provision. In *United States v. Pitt-Des Moines, Inc.*, the Seventh Circuit rejected a vagueness challenge to a regulation requiring certain loads to be secured "with not less than two bolts, or the equivalent at each connection." 168 F.3d 976, 987 (7th Cir. 1999) (quoting 29 C.F.R. § 1926.751(a)). The court thus upheld the district court's rejection of industry custom to determine an employer's compliance with the provision. *Id.* at 991. And in *Faultless*, the same court held industry custom was irrelevant to a provision requiring that "[o]ne or more methods of machine

[10] The same can be said for *Brock*, in which we refused to extend *B&B Insulation* to a regulation requiring that "[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee." 795 F.2d at 511.

guarding shall be provided to protect the operator" and providing three non-exclusive examples of such methods. 674 F.2d at 1181 n.2.

The OSHRC, whose opinions we look to as persuasive authority,[11] has reached similar conclusions. In *H.E. Wiese*, the OSHRC rejected the argument that a regulation mandating use of "[a]n access ladder or equivalent safe access" was a performance standard to which industry custom may be relevant. *H.E. Wiese, Inc., & Indus. Elec. Constr. Co.*, 10 BNA OSHC 1499 (Nos. 78-204 & 78-205, 1982), 1982 WL 22605, at *4. The OSHRC has similarly treated as a "specification standard" a regulation providing that "[a] welder or helper working on platforms, scaffolds, or runways shall be protected against falling" and that "[t]his may be accomplished by the use of railings, safety belts, life lines, or some other equally effective safeguards." *Marion Power Shovel Co., Inc.*, 8 BNA OSHC 2244 (No. 76-4114, 1980), 1980 WL 10690, at *1 n.1. Accordingly, OSHA did not need to meet the heightened burden of proof for "performance standards." *Id.* at *1. Finally, in *Tunnel Electric Construction Co.*, the OSHRC rejected a vagueness challenge to a regulation that required electric cable to be "elevated or covered," without defining or providing examples to give meaning to the term "covered." 8 BNA OSHC 1961 (No. 76-1803, 1980), 1980 WL 10644, at *2. The OSHRC noted that "resort to a 'reasonable person' test to clarify the term 'covered' is unwarranted." *Id.*[12] By comparison to the provisions in those casses, the tension-stringing provision provides more notice and is thus even less in need of "rescue" by evidence of industry custom.

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[11] *See, e.g.*, *Sanderson Farms*, 2020 WL 3867380, at *6 (citing *Thomas Inds. Coatings, Inc.*, 2007 WL 4138237, at *4).

[12] Even though OSHA relied on all the above-cited cases in its brief, Echo makes no effort to address or distinguish any of them.

These cases also dispel Echo's argument that the provision's allowance for "barriers" and "other equivalent methods" as alternatives to tension stringing transform it into a performance standard. Several of these cases involve exceptions for measures that are "equivalent" to explicitly enumerated precautions. *See Pitt-Des Moines*, 168 F.3d at 987 (exception for "equivalent" of two bolts "at each connection"); *Faultless*, 674 F.2d at 1181 n.2 (providing three non-exhaustive examples of acceptable preventive methods); *H.E. Wiese*, 1982 WL 22605, at *4 (mandating use of "[a]n access ladder or equivalent safe access"); *Marion Power Shovel Co.*, 1980 WL 10690, at *1 n.1 (protection from falling "may be accomplished by the use of railings, safety belts, life lines, or some other equally effective safeguards"). As the Seventh Circuit put it in *Pitt-Des Moines*, "[t]he addition of an alternative, less specific means of compliance does not make [a] regulation unconstitutionally vague." 168 F.3d at 987.

Echo relies on four cases for the proposition that industry custom is relevant to the tension-stringing provision. *See B&B Insulation*, 583 F.2d 1364; *Power Plant Div.*, 590 F.2d 1363; *Cape & Vineyard Div.*, 512 F.2d 1148; *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399 (D.C. Cir. 1989). But three of those cases—including the only two from our court—involved the same two PPE provisions at issue in *B&B Insulation*, which, as discussed above, involve generally worded standards applicable to all workplaces. *See B&B Insulation*, 583 F.2d at 1368; *Power Plant Div.*, 590 F.2d at 1364; *Cape & Vineyard Div.*, 512 F.2d at 1150. The fourth case involved another, similarly

general provision[13] applying to all employers. *See Century Steel Erectors*, 888 F.2d at 1405.[14]

In short, the tension-stringing provision identifies a specific risk to be addressed and instructs employers how to address it. It is therefore not a performance standard, and the ALJ did not err by declining to consider evidence that Echo's method complied with industry custom.[15]

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The petition for review is DENIED.

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[13] *See also* 29 C.F.R. § 1926.105(a) (requiring use of safety nets in all workplaces when other safety measures are "impractical").

[14] Echo argues that the ALJ held § 1926.964(b)(1) "imposed a performance standard under the circumstances." We disagree with this characterization of the ALJ's opinion. In reality, the ALJ described § 1926.964(b)(1) as a "hybrid specification/performance standard[]," which requires tension stringing as a specification standard and "becomes a performance standard" only when tension stringing is unavailable. In support of that proposition, the ALJ cited only a case "describing" the different categories of standards. *See Warnel Corp.*, 4 BNA OSHC 1034 (No. 4537, 1976), 1976 WL 6296. But the ALJ provided no legal authority for the proposition that § 1926.964(b)(1) actually has a performance "component," and, as Echo acknowledges, she did not apply the industry-custom standard to the present case. We need not resolve this confusion, though, because Echo does not argue § 1926.964(b)(1) is a "hybrid" standard. And, in any event, we agree with OSHA that the provision—however characterized by the ALJ—does not require evidence of industry custom.

[15] Because we conclude the tension-stringing provision is not a performance standard, we need not resolve OSHA's contention that Echo waived its argument that the ALJ erred by failing to consider evidence of industry custom.