United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant,

v.

OSHRC Docket No. **18-0680 (EAJA)**

Henry Marine Service, Inc.,

Respondent.

Attorneys and Law Firms:

Jeremy K. Fisher, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Complainant

William G. Chason, Esq. and Brian P. McCarthy, Esq., McDowell Knight Roedder & Sledge, LLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER DENYING EAJA APPLICATION

On March 12, 2019, I issued a decision and order granting a motion for summary judgment in favor of Henry Marine Service, Inc. (Henry Marine) and vacating the remaining Citation items. It became a final order of the Commission on April 12, 2019. Henry Marine now seeks an award of attorney fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), and the Commission's Rules Implementing EAJA, 29 C.F.R. §§ 2204.101-.311, for costs incurred in litigating the Citation and Notification of Penalty. Henry Marine contends it meets the eligibility requirements (regarding net worth and number of employees) and the legal requirements (establishing it is the prevailing party and the Secretary's failure to establish he was substantially justified in issuing the Citation) set out by EAJA and is entitled to recover an award for fees and expenses incurred litigating the Citation.[1] In his

[1] "Henry Marine seeks $58,775.00 in attorneys' fees, $2,399.93 in litigation expenses, and $28,527.71 in expert fees and costs." (*Application*, p. 1) In addition, Henry Marine contends it incurred another $2,750.00 for legal services when its attorney reviewed and responded to the Secretary's *Opposition* (*Reply to Opposition*, pp. 10-11; Exh. 1). Henry Marine seeks a total of $92,402.64.

Opposition to Respondent's Application, the Secretary contends "he was substantially justified in the prosecution of this matter and an award of EAJA fees should be denied." (*Opposition,* p. 5)

For the reasons that follow, I find the Secretary has established he was substantially justified in bringing the action underlying this case. Accordingly, I **DENY** Henry Marine's Application.

BACKGROUND

I reiterate some of the factual background I set out in the decision and order granting Henry Marine's motion for summary judgment.

> The JAMIE H is a tugboat owned and operated by Henry Marine. On October 7, 2017, an employee of Henry Marine was found dead in the water surrounding the JAMIE H. The decedent had been returning after his normal shift to stay on the vessel during Hurricane Nate which was predicted to make landfall in the area that night. The decedent did not return to the JAMIE H in a timely manner and was found in the water near the vessel by the captain. No one witnessed the decedent fall into the water.
>
> . . .
>
> On October 12, 2017, upon notification of the Secretary of the fatal accident, Compliance Safety and Health Officer (CSHO) Stephen Yeend of the Mobile Area OSHA Office conducted an inspection of the worksite. CSHO Yeend measured the distance from the dock to the fleet deck to be 43 inches; the distance from the ladder to the main deck to be 41 inches; and the distance from the fleet deck to the water below to be 9 feet, 6 inches. CSHO Yeend concluded employees accessing the JAMIE H by either method were exposed to the hazard of hitting objects while falling to the water below. Based on this conclusion, CSHO Yeend recommended citations be issued to Henry Marine for failure to provide a safe means of access to a working surface in violation of § 1910.22(c) and for failure to provide personal protective equipment in the form of a personal flotation device to employees in violation of § 1910.132(a). Respondent timely contested. At the completion of formal discovery, the parties each filed a motion for summary judgment on both citation items.

Henry Marine Serv., Inc., No. 18-0680, 2019 WL 1977302, at *2 (OSHRC April 12, 2019).

On March 27, 2018, the Secretary issued a Citation and Notification of Penalty to Henry Marine alleging ten serious and two other than serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (the Act). Henry Marine timely contested the Citation. The Secretary filed a complaint in which he withdrew all but four of the items. Henry Marine answered the complaint, asserting sixteen affirmative defenses, including preemption of OSHA's jurisdiction under § 4(b)(1) of the Act. The parties subsequently entered into a partial settlement agreement in which the Secretary withdrew two more items. Remaining at issue were

Items 1a and 7a of Citation No. 1 alleging, respectively, serious violations of § 1910.22(c) and § 1910.132(a). Henry Marine agreed to bear its own attorney fees and expenses relating to the defense of the withdrawn items, including fees that might be available under EAJA (*Partial Stipulation and Joint Motion*).

The parties then filed cross-motions for summary judgment, followed by responses. In its motion for summary judgment, Henry Marine argued,

> (1) Subchapter M in the Coast Guard's regulations preempted OSHA's authority to issue **any** of the citations; (2) Subchapter C in the Coast Guard's regulations preempted OSHA's authority to issue the citations based on the 1910.132(a) standard; (3) the Secretary did not have substantial evidence to support his argument that Henry Marine violated the 1910.22(c) standard; and (4) the Secretary did not have any expert testimony to support his position that it was feasible for Henry Marine to use a gangway to access the M/V JAMIE H from Alabama Power's dock.

(*Application*, p. 6) (emphasis in original)

In his response in opposition to Henry Marine's motion for summary judgment, the Secretary argued OSHA's jurisdiction over the cited conditions at Henry Marine's worksite was not preempted by any Coast Guard regulation. The Secretary argued Henry Marine's claim was without merit because the new Subchapter M regulations were not in effect at the time of OSHA's inspection.

In my decision and order, I agreed with Henry Marine that the Coast Guard had exercised its authority to regulate the cited working conditions and thus preempted OSHA's jurisdiction under § 4(b)(1) of the Act. I did not address Henry Marine's three alternative arguments. My reasoning for finding the Coast Guard preempted OSHA's jurisdiction was as follows:

> Where the parties differ is whether, at the time of the alleged violations, the Coast Guard had exercised its authority to regulate towing vessels. Henry Marine contends the Coast Guard exercised its authority to regulate the health and safety of seamen working on towing vessels upon promulgation of the Subchapter M regulations, the effective date of which predated the alleged violations. The Secretary points to § 136.172 of the Subchapter M regulations, noting because the JAMIE H did not have a COI [certificate of inspection] prior to the fatal accident, it was not required to comply with those regulations until July 20, 2018, after the fatal accident. *See also* 46 C.F.R. § 140.105(a) (specifically addressing the § 140 regulations referenced herein). The Secretary argues, on the date of the alleged violation, the Coast Guard had not yet exercised its authority to regulate the working conditions of seamen on towing vessels because the Subchapter M regulations did not have the "force and effect of law" until July 20, 2018. There

is no factual dispute the JAMIE H had not received a COI prior to the fatal accident. The issue to be resolved is whether the Coast Guard's promulgation of regulations for which it explicitly delayed implementation constitutes an exercise of its authority as that term is used in § 4(b)(1) of the Act. This is a question of law for which no material facts are in dispute. It is appropriate for resolution on summary judgment.

An agency's promulgation of final regulations under its statutory grant of authority constitutes an exercise of that authority under § 4(b)(1) of the Act. The Commission has held it is no less an exercise of statutory authority to take the formal position that a hazard will not be the subject of regulation. . . The Commission has not directly addressed the issue presented here – whether an agency has exercised its authority upon issuance of a final regulation where that regulation sets out a delayed implementation schedule.

The issue presented here must be considered in light of the well-settled Commission precedent that "any oversight of the adequacy of another agency's enforcement activities is beyond the scope of permissible inquiry under section 4(b)(1)." *Pennsuco Cement and Aggregates, Inc*., 8 BNA OSHC 1378, 1381 (No. 15462, 1980) *citing Mushroom Transportation Co*., 1 BNA OSHC 1390, 1392 (No. 1588, 1974). . . . Here too, the Secretary seeks to have the court inquire into the manner in which the Coast Guard has chosen to enforce its regulations applicable to towing vessels. The undersigned declines to do so. The Commission has recognized the Coast Guard as the agency with "special expertise in maritime hazards." *Dillingham Tug and Barge Corp*., 10 BNA OSHC 1859, 1862 (No. 77-4143, 1982). The MOU [Memorandum of Understanding] between the Secretary and the Coast Guard recognizes that the exercise of the Coast Guard's authority – and hence the displacement of OSHA jurisdiction – extends not only to those working conditions on inspected vessels specifically discussed by Coast Guard regulations, but to all working conditions on inspected vessels, including those "not addressed by specific regulations." [48 Fed. Reg. 11365] Thus, as OSHA recognized in the MOU, another agency may "exercise" its authority within the meaning of § 4(b)(1) of the OSH Act either by promulgating specific regulations or by asserting comprehensive regulatory authority over a certain category of vessels. . . . Since July 20, 2016, the Coast Guard has had in effect comprehensive regulations applicable to towing vessels. By these actions, the Coast Guard has asserted "comprehensive regulatory authority" over towing vessels. Recognizing the history of limited regulation of towing vessels and the difficulty and cost of coming into compliance with new regulations, the Coast Guard chose to delay implementation of some of its Subchapter M regulations. This was formal action of the part of the Coast Guard under its statutory authority to regulate towing vessels. . . . Doing so constituted a decision regarding the manner in which the regulations would be enforced by the dominant agency in the area of maritime safety. As such it is not a proper area of inquiry under § 4(b)(1) of the Act. *Pennsuco Cement*, 8 BNA OSHC at 1381. The Coast Guard's promulgation of its Subchapter M regulations prior to the date of the alleged violations was a sufficient exercise of its statutory authority to regulate the cited working conditions to preempt OSHA jurisdiction

Henry Marine Serv., 2019 WL 1977302, at *7-*9.

ANALYSIS

EAJA

Section 2204.101 provides:

> The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards and the procedures and standards that the Commission uses to make awards.[2]

Section 2204.104(a) provides:

> The EAJA applies to adversary adjudications before the Commission. These are adjudications under 5 U.S.C. 554 and 29 U.S.C. 659(c) in which the position of the Secretary is represented by an attorney or other representative. The types of proceedings covered are the following proceedings under section 10(c), 29 U.S.C. 659(c), of the OSH Act:
>
> (a) Contests of citations, notifications, penalties, or abatement periods by an employer [.]

Eligibility

The party seeking an award for fees and expenses must apply "no later than thirty days after the period for seeking appellate review expires." 29 C.F.R § 2204.302(a). The decision and order became a final order of the Commission on April 12, 2019. Henry Marine timely filed its *Application* on April 26, 2019.

The prevailing party must meet the established eligibility requirements before it can be awarded attorney fees and expenses. Section 2204.105(b)(4) requires that an eligible employer be a "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." Section 2204.105(c), provides, "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Section 2204.202(a) requires the applicant to:

[2]The Secretary does not argue special circumstances in this proceeding make an award unjust.

> provide with its application a detailed exhibit showing the net worth of the applicant as of the date [it filed the notice of contest]. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part.

The Secretary does not dispute Henry Marine meets the criteria for eligibility. Henry Marine filed its notice of contest on April 20, 2018. It submitted a copy of its balance sheet showing its net worth "[a]s of March 31, 2018," twenty days before the date it filed the notice of contest (*Application,* Sealed Exh. A).[3] The balance sheet establishes the net worth of Henry Marine on that date was well below $7 million (*Application*, Exh. 1, ¶ 2). I find the balance sheet sufficient to establish Henry Marine's net worth as of the date it filed its notice of contest. It has met the eligibility requirement regarding net worth.

In an affidavit, Henry Marine's attorney states, "Henry Marine had approximately 13 employees in March 2018." (*Application*, Exh. 1, ¶ 3). I find Henry Marine has established it had fewer than 500 employees as of the date it filed its notice of contest.

Henry Marine has met the eligibility requirements of § 2204.105(c).

Prevailing Party

"The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified." 29 C.F.R § 2204.201(a).

> Neither the EAJA nor the Commission's EAJA Rules define the term "prevailing party." However, under Commission EAJA Rule 106(a), 29 C.F.R. § 2204.106(a), "[a] prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings." . . . A party prevails if it succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoted case omitted).

Joseph Watson, No. 00-1726, 2006 WL 2641337, at *2 (OSHRC September 6, 2006).

Here, I granted Henry Marine's motion for summary judgment. Henry Marine succeeded on the significant issue of OSHA's lack of jurisdiction and achieved the benefit of having the Citation items vacated. I find Henry Marine was the prevailing party in the underlying proceeding.[4]

[3] On June 12, 2019, I issued an order granting, in accordance with 29 C.F.R. § 2204.202, Henry Marine's motion to seal the record regarding its balance sheet and redacted legal invoices submitted with its *Application.*

[4] "The Secretary does not dispute that, because the citations in this matter were vacated by the ALJ, Respondent is the 'prevailing party' in this matter." (*Opposition*, p. 3, n. 1)

Substantial Justification

The Secretary bears the burden of proving he was substantially justified in bringing the action.

> A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

Section 2204.106(a).

The Secretary's position is 'substantially justified if it has a reasonable basis in both law and fact.' *Joseph Watson*, 21 BNA OSHC 1649, 1651 (No. 00-1726, 2006). In other words, the Secretary's position must be "justified to a degree that could satisfy a reasonable person." *Am. Wrecking Corp. v. Sec'y of Labor,* 364 F.3d. 321, 325 (D.C. Cir. 2004)." *Salco Constr., Inc.,* No. 05-1145, 2007 WL 2127304, at *2 (OSHRC July 18, 2007) (EAJA).

The Secretary contends he was substantially justified in his position that OSHA, and not the Coast Guard, had jurisdiction over the cited working conditions.

> Subchapter M was issued on June 20, 2016. Inspection of Towing Vessels, 81 Fed. Reg. 40004 (2016) (codified at 46 C.F.R. Part 136). The preamble states that the final rule became "effective" on July 20, 2016. *Ibid*. However, existing "uninspected" towing vessels were not obligated to comply with the new requirements of Subchapter M until July 19, 2018, unless a Certificate of Inspection ("COI") had been obtained for the vessel sooner; until the earlier of those two dates had occurred, the vessel had to comply with the "uninspected" vessel regulations in Subchapter C. See 46 C.F.R. §.136.172 and 136.202. 2 Respondent concedes that JAMIE H did not have a COI at the time of the inspection. Thus, . . . the OSH Act was not pre-empted by Subchapter M because the provisions of Subchapter M did not yet carry the force of law.

(*Opposition*, p. 7)

I ultimately disagreed with the Secretary but noted in my decision and order granting summary judgment that the Commission has not addressed the issue of the effect of delayed implementation of regulations on jurisdiction.

> The issue to be resolved is whether the Coast Guard's promulgation of regulations for which it explicitly delayed implementation constitutes an exercise of its authority as that term is used in § 4(b)(1) of the Act. . . . The Commission has not directly addressed the issue presented here – whether an agency has exercised its

> authority upon issuance of a final regulation where that regulation sets out a delayed implementation schedule.

Henry Marine Serv., Inc., 2019 WL 1977302, at *2.

The issue presented was, therefore, novel to the Commission.

> Where a novel issue presents a "genuine dispute" in which "reasonable people could differ" regarding the appropriateness of the Government's actions, courts tend to find the Government's position to be justified. *See DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1341 (Fed. Cir. 2012) (quoting *Pierce,* 487 U.S. at 565–66, 108 S.Ct. 2541); *Ellis*, 711 F.2d at 1577 (affirming a denial of EAJA fees where the Government made a "facially respectable argument" on a novel issue (internal citation and quotation marks omitted)); *Ulysses Inc. v. United States,* 117 Fed. Cl. 772, 778 (2014).

The Meyer Grp., Ltd. v. United States, 129 Fed. Cl. 579, 585 (2016).

I find the issue of whether the Coast Guard's promulgation of regulations was an exercise of authority when it delayed the implementation of the regulations presents a genuine dispute upon which reasonable people could differ.

The Secretary's case for substantial justification is bolstered by the Coast Guard's *Investigating Officer's Report*, dated October 4, 2018, conducted by a Lieutenant Junior Grade of the Coast Guard. The report states,

> **5. <u>Analysis</u>**
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> . . .
>
> 5.2 Lack of gangway or safe access to the vessel: The facility did not provide gangway access between the dock and the JAMIE H., which showed lack of compliance with federal law. The gap between the JAMIE H and the dock measured about four feet wide, which greatly contributed to the decedent's death as he had to jump or take a wider than normal step and balance his body between the vessel and the dock to successfully board the vessel. *According to 29 C.F.R. 1915.74(c)(2) employers shall ensure that at ramp or a safe walkway be provided for the safe boarding to or between the vessel and the dock, if employees cannot safely step to the dock.*

(*Opposition,* Attachment A, p. 11) (emphasis added)

The *Report* concludes,

> **<u>Recommendations</u>**
>
> 8.1. Safety Recommendations: This investigation did not reveal any safety recommendations that were not *already in place by U.S. law or regulation. The recommendation that a gangway or safe access to vessels has already been passed by congress in 29 CFR 1915.*

(*Opposition,* Attachment A, p. 15) (emphasis added)

The Coast Guard Captain in charge of the investigation signed off on the *Report:*

ENDORSEMENT/ACTTON ON RECOMMENDATIONS

Safety Recommendation l. None, *law or regulation already exist in 29 CFR l9l5.*

Endorsement: Concur.

(*Opposition,* Attachment A, p. 1) (emphasis added)

As the italicized language indicates, the Coast Guard conducted an official investigation of the accident and concluded existing OSHA law applied to the working conditions at the time of the fatality. Henry Marine contends that because the Secretary did not cite the company for any alleged violations of the § 1915 standards, they are irrelevant to the jurisdictional issue. I disagree. The Secretary has the burden of establishing it was substantially justified in prosecuting this case, which, as a threshold matter, means proving it was substantially justified in arguing that OSHA, and not the Coast Guard, had jurisdiction over the worksite. The Coast Guard's references in its *Report* to OSHA's § 1915 standards are evidence the Coast Guard agreed with the Secretary that OSHA regulations applied. I conclude the Coast Guard's *Report* supports the Secretary's contention it was substantially justified in its position that OSHA's jurisdiction was not preempted under § 4(b)(1) of the Act.

Section 2204.201(a) requires the applicant to "identify the position of the Secretary that [it] alleges was not substantially justified." In is *Application*, under the last section captioned "CONCLUSION," Henry Marine states,

> The Secretary did not have jurisdiction over the working conditions and should not have issued the citations. This legal roadblock was repeatedly pointed out to the Secretary, beginning at the informal conference, then through the June 6th letter, then in the answer to the complaint, and finally during summary judgment briefing. But the Secretary aggressively pursued the case despite his jurisdictional problems.

(*Application,* p. 9)[5] This conclusion indicates Henry Marine is premising its *Application* solely on the issue of preemption.

In its *Reply* to the Secretary's *Opposition,* Henry Marine seeks to expand the scope of the alleged unjustified positions of the Secretary to include the alternate arguments I did not address in the decision and order. "While the Court vacated the citations based on the preemption effect

[5] Under a section captioned "BACKGROUND" in the *Application,* Henry Marine summarized its arguments regarding Subchapter C, § 1910.132(a), and § 1910.22(c) (*Application*, pp. 7-8, ¶¶ 19-22).

of Subchapter M and never reached the other arguments asserted in Henry Marine's motion for summary judgment, the Court should now consider the case as a whole." (*Reply*, p. 1) Henry Marine did not move to amend its *Application* to identify the other three positions of the Secretary as not substantially justified.

The Secretary established it was substantially justified in his alternative positions raised by Henry Marine in its *Reply*—namely, that Subchapter C in the Coast Guard's regulations did not preempt OSHA's authority to issue the citations based on the 1910.132(a) standard; that the Secretary had substantial evidence to support his argument that Henry Marine violated the 1910.22(c) standard; and that the Secretary was not required to produce expert testimony to support his position that it was feasible for Henry Marine to use a gangway to access the M/V JAMIE H from Alabama Power's dock.

Item 7a alleges Henry Marine committed a serious violation of § 1910.132(a)[6] by failing to require its employees to wear personal flotation devices (PDFs) when accessing vessels from the dock. Subchapter C addresses the use of PDFs. The standard at 46 C.F.R. § 25.25-5(b) provides:

> (1) Each vessel not carrying passengers for hire and less than 40 feet in length must have on board at least one wearable personal flotation device (PFD) approved under subchapter Q of this chapter, and of a suitable size for each person on board.
> (2) Each vessel carrying passengers for hire, and each vessel not carrying passengers for hire and 40 feet in length or longer, must have at least one PFD approved under approval series 160.055, 160.155, or 160.176, and of a suitable size for each person on board.

Henry Marine argues this standard applies to the cited conditions and therefore preempts § 1910.132(a). The Secretary points out, however, that the cited Subchapter C regulations "regulate the use of PFDs when *on* the vessel, and not in the situation here, when going from dock to vessel and vice versa. . . . These regulations do not deal with dock safety issues, such as drowning due to falls from a dock or vessel when getting on and off a vessel." (*Secretary's*

[6] Section 1910.132(a) provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Response in Opposition to Respondent's Motion for Summary Judgment, pp. 9-10) (emphasis in original)

The theory of the Secretary's case has always been that the decedent fell while attempting to make his way between the dock and the vessel. This theory is supported by the Coast Guard's *Report*:

> 6. **Conclusions**:
>
> 6.1. Determination of Cause:
>
> 6.1.1. The initiating event for this casualty occurred when the deckhand fell in the water *while trying to board the JAMIE H*., which caused him to suffer a head laceration and ultimately died from drowning.
>
> . . .
>
> 6.1.2.1 The deckhand had not been wearing a lifejacket, as it was required by the Alabama Power Company, Barry Steam Plant company policy. Had the deckhand been wearing a lifejacket when he became unconscious in the water he may have stayed afloat and his drowning may have been avoided.

(*Opposition,* Attachment A, pp. 13-14) (emphasis added)

I find the Secretary was substantially justified in citing Henry Marine for a violation of § 1910.132(a).

In Item 1a, the Secretary cited Henry Marine for the serious violation of § 1910.22(c), which provides, "The employer must provide, and ensure each employee uses, a safe means of access and egress to and from walking-working surfaces." Henry Marine contends nothing in § 1910.22 makes it clear the standard applies to docks and vessels.

> If OSHA intended to regulate Jones Act seamen accessing towboats from docks when it adopted 29 C.F.R. § 1910.22(c), OSHA would have said so explicitly just like it did in 29 C.F.R. § 1918.26(b). Indeed, OSHA would have explicitly used language found in 29 C.F.R. § 1918.26(B), such as "vessel," "dock," and "gangway". Instead, OSHA used no such language and no reasonable person reading 29 C.F.R. § 1910.22(c) would conclude that it applied to vessels or required use of a gangway to board a vessel.

(*Henry Marine's Motion for Summary Judgment*, p. 16)

The Secretary notes, however, the scope section of § 1910.21(a) provides: "This subpart applies to all general industry workplaces. It covers all walking-working surfaces unless specifically excluded by an individual section of this subpart." No individual section of the subpart excludes docks and vessels. I find the Secretary was substantially justified in citing Henry Marine for a violation of § 1910.22(c).

Finally, Henry Marine argues the Secretary did not have any expert testimony to support his position that it was feasible for Henry Marine to use a gangway to access the M/V JAMIE H from Alabama Power's dock. Henry Marine contends the Secretary has the burden of establishing a feasible means of abatement for Item 1a and cannot do so without expert testimony. In *Envision Waste Servs., LLC*, No. 12-1600, 2018 WL 1735661 (OSHRC, April 4, 2018), the employer argued it was the Secretary's burden to prove the feasibility of requiring employees to wear puncture-resistant gloves. The Commission disagreed.

> [T]he pertinent inquiry is "whether a reasonable person, examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it." *W.G. Fairfield Co. v. OSHRC*, 285 F.3d 499, 505 (6th Cir. 2002) (internal quotation marks omitted; citing *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1387 (No. 88-0282, 1991)); *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005) ("[A] broad, performance-oriented standard ... may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry."); *see, e.g., Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287-88 (No. 97-1073, 2007) (citing to *Siemens* and *W.G. Fairfield*, and holding that "[b]ecause performance standards, such as [[the requirement for adequate hand-washing facilities], do not identify specific obligations, they are interpreted in light of what is reasonable"); *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2151 (No. 08-1656, 2016) (citing to *Siemens* and *Thomas*, and holding that standard regarding safe movement of equipment on access roadways and grades was performance standard and, therefore, must be "interpreted in light of what is reasonable").

Id. at *2.

Here, a reasonable person reading the requirements of § 1910.22(c) ("The employer must provide, and ensure each employee uses, a safe means of access and egress to and from walking-working surfaces."), in light of the approximate 4 foot gap between the dock and the vessel, could determine what was required. This conclusion is borne out by the Coast Guard's conclusions as to the cause of the accident. "Lack of gangway or safe access to the vessel: . . . The gap between the JAMIE H and the dock measured about four feet wide, which greatly contributed to the decedent's death as he had to jump or take a wider than normal step and balance his body between the vessel and the dock to successfully board the vessel." (*Report*, p. 11)

I find the Secretary was substantially justified in citing Henry Marine for committing a serious violation of § 1910.22(c).

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 hereby **ORDERED** that:

Henry Marine's application for attorney fees and expenses is **DENIED.**

/s/

Dated: July 19, 2019

Judge Heather A. Joys
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