



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.
CATALINA FREIGHT LINES
Respondent.

OSHRC DOCKET
NO. 92-0601

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 25, 1993. The decision of the Judge will become a final order of the Commission on July 26, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 15, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Date: June 25, 1993

DOCKET NO. 92-0601

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

Daniel Teehan, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
71 Stevenson St., 10th Floor
San Francisco, CA 94119

James H. Radcliffe, Esq.
Berth 184
100 West Water Street
Wilmington, CA 90744

James A. Cronin
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

00102289790:09



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.
CATALINA FREIGHT LINE, INC.,

Respondent.

OSHRC Docket No. 92-0601

APPEARANCES:

For the Complainant:
Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor,
San Francisco, California

For the Respondent:
James H. Radcliffe, Esq., Berth 184, 100 West Water Street, Wilmington, California

Before: Administrative Law Judge James A. Cronin, Jr.

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Catalina Freight Line, Inc. (Catalina), at all times relevant to this matter maintained a workplace at Berth 184, 100 Water Street, Wilmington, California, where it was engaged in longshoring activities. Catalina admits it employs approximately 16 workers and is engaged in a business affecting commerce (Answer ¶II). Catalina, therefore, is an employer within the meaning of, and subject to, the Act.

On January 15, 1992, as the result of an Occupational Safety and Health Administration (OSHA) inspection of respondent's Wilmington worksite, Catalina was issued a "serious" citation alleging violation of §1918.73(k) and an "other than serious" citation alleging violations of §§1904.2(a) and 1918.91(c) of the Act.

By filing a timely notice of contest, Catalina brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On February 2, 1993, a hearing was held in Long Beach, California. The parties have submitted briefs on the contested issues and the matter is ready for decision.

Alleged Violation

Serious citation 1 alleges:

1

29 CFR 1918.73(k): Lift trucks or other mechanically powered vehicle(s) were operated on open deck barges, the edges of which were not suitably guarded by railings, sideboards, timbers or other means sufficient to prevent vehicles from rolling overboard:

a) Berth 184, Wilmington: On board the barge "Islander" forklifts, front-end loaders, and semi-tractor trailers were operated on deck without suitable means to prevent rollovers.

The cited standard provides:

When lift trucks or other mechanically powered vehicles are being operated on open deck type barges, the edges of the barges shall be suitably guarded by railings, sideboards, timbers or other means sufficient to prevent vehicles from rolling overboard

Other than serious citation 2, item 1 alleges:

1

29 CFR 1904.2(a): The log of all recordable occupational injuries and illnesses (OSHA Form No. 200 or equivalent), was not maintained at the establishment;

a) Berth 184, Wilmington: The employer did not maintain a log of occupational injuries and illnesses.

The cited standard provides:

Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

Other than serious citation 2, item 2 alleges:

2

29 CFR 1918.91(c): Slippery condition(s) were not eliminated as they occurred:

a) Berth 184, Wilmington; The deck of the barge "Islander" was spotted with oil and was not cleaned up or made safe prior to allowing employees on deck to handle cargo.

The cited standard provides:

Slippery conditions shall be eliminated as they occur.

Issues

1. Whether the January 15, 1992 citation was issued with reasonable promptness?
2. Whether, under §4(b)(1) of the Act, regulations promulgated by the U.S. Coast Guard exempt the conditions cited in this matter from OSHA coverage?
3. Whether the Secretary has shown, by a preponderance of the evidence, that Catalina was in violation of 29 CFR §1918.73(k) on August 7, 1993?
4. Whether the Secretary has shown, by a preponderance of the evidence, that Catalina violated §1904.2(a)?
5. Whether the Secretary has shown, by a preponderance of the evidence, that Catalina violated §1918.91(c)?

Facts

On August 2, 1991, as cargo vehicles were being unloaded from the "Islander II," a seagoing freight barge owned by Seaway Company (Tr. 158, 237), a Catalina employee backed a front loader over its wooden chocks, and off the bow of the barge (Tr. 12, 78, 184-188, 193). As a result of the accident, on August 7, 1991, an OSHA Compliance Officer (CO), James Wilson, conducted an inspection of the barge on which the accident occurred (Tr. 28, 79). CO Wilson testified that during his inspection he was accompanied by Catalina's representative at the hearing, Mr. Radcliffe (Tr. 36, 66)¹.

¹ The complaint erroneously named the "Islander" instead of "Islander II" as the site of the August 7, 1991 inspection; however, in its brief, Catalina concedes that the error "is of no real moment." (Respondent's Brief and Argument, p. 10). Catalina was aware, through its

Bill Rubio, Seaway Company's port engineer and maintenance manager (Tr. 156), testified that Catalina employees receive and load the cargo traveling between berth 184 and Santa Catalina Island (Tr. 159-64). CO Wilson observed cargo tractor trailers being driven onto the deck of the barge during the inspection of August 7, 1991 (Tr. 56, 66-69; Exh. C-6, C-7), and photographed a Catalina employee using a forklift to place a support under the end of a trailer (Tr. 68; Exh. C-8). Catalina employees then chock the trailer wheels by hand with wooden blocks (Tr. 169, 199).

The deck of the barge was edged with angle iron which CO Wilson measured at 7-1/2 to 8" high (Tr. 73, 115-116). CO Wilson believes that the perimeter guard would not prevent the type of vehicles being operated on deck from rolling overboard (Tr. 70, 93), because of their large diameter tires, some in excess of four feet in height, and their large mass (Tr. 93).

Promptness

At the hearing, Catalina raised, for the first time, the issue of "reasonable promptness," noting that the citation in this matter was not issued until five months and eight days after the August 7, 1991 inspection.

The issue of "reasonable promptness" is an affirmative defense that must be raised in a pleading or motion prior to hearing, or tried by the consent of the parties. *Gannett Corp.*, 4 BNA OSHC 1383, 1976-77 CCH OSHD ¶20,915 (No. 6352, 1976). The only testimony on the issue of reasonable promptness is that of CO Wilson, who testified that the priority of other assignments in his case load caused the delay in the issuance of the citations (Tr. 60). That testimony was elicited by the hearing judge. Thus, the matter cannot fairly be said to have been tried by consent of the parties.

Moreover, even if timely raised, Catalina's defense lacks merit. The Commission has held that unless an employer establishes prejudice in the preparation or presentation

representative, Radcliffe, that the barge "Islander II," the site of the August 2 accident, was the subject of the OSHA inspection and citation. *See, Meadows Industries*, 7 BNA OSHC 1709, 1979 CCH OSHD ¶23,846 (No. 76-1463, 1979) (whether fair notice is provided depends on factors external to the citation, including the circumstances of the inspection).

of its defenses, a citation will not be vacated for the Secretary's alleged failure to issue it with reasonable promptness. *General Dynamics Corp.*, 15 BNA OSHC 2122, 1993 CCH OSHD ¶29,952 (No. 87-1195, 1993). An employer's unsupported general allegations do not establish prejudice; the employer must demonstrate specifically the nature of the prejudice allegedly suffered. *National Industrial Constructors, Inc.*, 10 BNA OSHC 1081, 1981 CCH OSHD ¶25,743 (No. 76-4507, 1981). In *National Industrial* the Commission held that no prejudice was established where the employer did not indicate that missing witnesses would have presented testimony different from that in the record. *Id.* at 1084.

At the hearing Catalina alleged that it was prejudiced by the absence of a witness who would have testified "favorably to its position," regarding the August 2 accident, but who left the country four and one half months after the inspection (Tr. 53). It was not explained, however, how that testimony would differ from that adduced at the hearing. In its post hearing brief Catalina appears to abandon its claim of prejudice. No basis exists on this record to vacate the citation.

Exemption

Catalina maintains that perimeter guarding is governed by Coast Guard regulations covering the design and construction of vessels, and that the cited OSHA standard, therefore, is inapplicable to the cited conditions. Catalina functionally claims an exemption under §4(b)(1) of the Act, which prohibits application of the Act to working conditions over which other Federal agencies "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

In order to establish a §4(b)(1) exemption, however, it must be shown that an agency other than OSHA has the statutory authority to regulate the health and safety of certain workers, and that the other agency has exercised its statutory authority in such manner as to exempt the cited working conditions. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1992 CCH OSHD ¶29,758 (No. 89-1017, 1992).

Jurisdiction over longshoring activities is expressly delegated to the Secretary. *See*; Pub.L. 85-742, Act of August 23, 1958 (33 U.S.C. 941); §4(b)(2) of the Act. That the U.S. Coast Guard has no statutory authority to prescribe or enforce occupational health

and safety regulations applicable to longshoring work conditions is well settled, *California Stevedore and Ballast Co.*, 1 BNA OSHC 1757, 1973-74 CCH OSHD ¶17,931 (No. 1132, 1974), and was recognized at the present hearing by Commander Joseph P. Brusseau of the U.S. Coast Guard Marine Safety Office (Tr. 257-8).

Catalina, however, argues that enforcing §1918.73(k) for longshoring personnel would necessarily result in conflicting dual regulation of vessel design and construction, responsibility for which is delegated to the Coast Guard pursuant to Title 46 U.S.C. 3301.

This judge finds no such conflict. Permanent railings and sideboards are named in the standard as means of complying with the perimeter guarding requirement; however, where longshoring employers do not control the vessel being loaded, they may rely on non-structural alternatives to fulfill their obligations under the Act. Timbers, for example, are specifically listed in the standard.

Catalina has failed to establish that its workplace on board the "Islander II" is exempted from the operation of the Act.

Alleged Violation of §1918.73(k)

Catalina maintains that the eight inch angle iron on the perimeter of the "Islander II's" deck was sufficient to comply with the cited standard, in that the plain language of the regulation requires only that guarding be suitable to prevent unpowered vehicles from inadvertently rolling overboard.

Catalina's argument is insupportable. Section 1918.73(k) states that means sufficient to prevent vehicles from rolling overboard be provided when mechanically powered vehicles *are being operated* on open deck type barges. Its intent clearly is to protect against the occurrence of the very kind of accident which took place on August 2, 1991.

The eight inch iron on the "Islander II" was inadequate to prevent a front loader from being inadvertently backed over the barge's bow on August 2. No structural changes were made to the barge between that time and the August 7 inspection (Tr. 199-200, 216; Exh. C-3, C-7). Catalina employees also operated vehicles on the inadequately guarded deck on August 7, 1991.

The Secretary has established that Catalina violated §1918.73(k) on August 7, 1991.

Penalty

A penalty of \$1,500.00 is proposed. Catalina is a small employer, with 16 workers. It has no record of prior citations. OSHA gave Catalina no credit for good faith because of its failure to maintain accident and illness records, and to institute illness and injury prevention programs required under California law (Tr. 80-82).

The gravity of the violation is moderately severe. The violation was properly characterized as serious, because drowning and death are the probable results of an accident (Tr. 82). Only two equipment operators working from the Wilmington terminal driving cargo trailers onto the barge, however, were exposed to the hazard (Tr. 162), and the likelihood of an accident occurring is deemed small; in the history of Catalina Freight Line, no other vehicle has ever gone over the side (Tr. 196).

Taking into account the relevant factors, this judge finds that the gravity of the violation was overstated. A 20% reduction in the penalty is deemed appropriate. A penalty of \$1,200.00 is assessed.

Alleged Violation of §1904.2(a)

CO Wilson testified that during the August 7, 1991 inspection he asked to see Catalina's accident and illness records, and was told that there were no such records. No records antedating the accident were subsequently provided (Tr. 75).

Catalina admits that OSHA 200 logs were not maintained prior to the inspection (Tr. 106), but argues that none were required, as its workers sustained no occupational illnesses or accidents in 1991 prior to the August 2 accident. Section 1904.2(a)'s reporting requirements are not limited, however, to the 1991 calendar year, nor are they obviated by the absence of recordable injuries or illnesses.

Section 1904.2(a) states that "the log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200." Those instructions require that annual summary totals from the last page of the No. 200 log be certified by a responsible party. "Even though there were no injuries or illnesses during the year, zeros must be entered on the totals line, and the form posted" no later than February 1 of the following calendar year. The logs must be maintained for five years following the end of the calendar year to which they relate. (Exh. 1, Complainant's post-hearing brief).

Catalina failed to certify the absence of recordable injuries or illnesses in 1990 on a form No. 200 or its equivalent, and so is in violation of the cited standard.

A penalty of \$300.00 is proposed. As noted above, Catalina is a small employer with no history of violations. The violation has been abated and Catalina has submitted its No. 200 form for 1991. The gravity of the violation is low. There is no evidence that the failure to maintain the required log misled Catalina employees about the nature of their working conditions. The proposed penalty is deemed excessive. A penalty of \$100.00 will be assessed.

Alleged Violation of §1918.91(c)

The cited section requires that slippery conditions be eliminated as they occur.

During his inspection CO Wilson observed and photographed three pools of oil on the deck of the barge "Islander II" (Tr. 74; Exh. C-8). The oil was in plain view. CO Wilson also observed one Catalina employee on the deck of the barge (Tr. 120). Catalina introduced no evidence in rebuttal.

Citation 2, item 2, alleging a violation of §1918.91(c) will be affirmed as an "other than serious" violation, without penalty.

Conclusions of Law

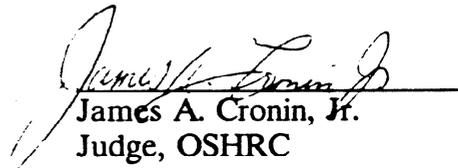
1. Complainant's issuance of the January 15, 1992 citation 5 months and 8 days after the OSHA inspection did not prejudice Respondent in the presentation of its case. No cause exists to vacate any portion of the citation.
2. No regulations promulgated by the U.S. Coast Guard exempt the conditions cited in this matter from OSHA coverage under §4(b)(1) of the Act.
3. The Secretary has shown, by a preponderance of the evidence, that Catalina was in violation of 29 CFR §1918.73(k) on August 7, 1991.
4. The Secretary has shown, by a preponderance of the evidence, that Catalina violated §1904.2(a).
5. The Secretary has shown, by a preponderance of the evidence, that Catalina violated §1918.91(c).

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

ORDER

1. Serious Citation 1, item 1, alleging violation of §1918.73(k) is AFFIRMED, and a penalty of \$1,200.00 is ASSESSED.
2. Other than serious Citation 2, item 1, alleging violation of §1904.2(a) is AFFIRMED, and a penalty of \$100.00 is ASSESSED.
3. Other than serious Citation 2, item 2, alleging violation of §1918.91(c) is AFFIRMED without penalty.


James A. Cronin, Jr.
Judge, OSHRC

Dated: June 18, 1993