

Secretary of Labor,
Complainant,

v.

Mallard Bay Drilling, Inc., LLC,
Respondent.

OSHRC Docket No. **97-1973**

APPEARANCES

Ernest A. Burford, Esq.
Office of the Solicitor
U. S. Department of Labor

Dallas, Texas
For Complainant

Patrick J. Veters, Esq.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre, L.L.P.

For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Mallard Bay Drilling, Inc.¹ (MBD), owns and operates drilling rigs and barges for oil and gas exploration from its place of business in New Iberia, Louisiana (Joint Exh. J-1). On June 16, 1997, a natural gas explosion occurred on Rig 52 (MR. BELDON), which resulted in death and serious injuries to employees and the total loss of the rig. The U.S. Coast Guard initiated an investigation on June 17, 1997. Also, at the same time, the Occupational Safety and Health Administration (OSHA) initiated its investigation.

As a result of the OSHA investigation, MBD received a serious citation alleging violations of § 5(a)(1) of the Occupational Safety and Health Act (Act) for failing to timely evacuate employees on board the drilling rig; 29 C.F.R. § 1910.120(q)(1) for failing to develop and implement an emergency response plan to handle anticipated emergencies; and 29 C.F.R. § 1910.120(q)(6) for failing to train employees in emergency response. OSHA proposed a penalty of \$6,300 for each alleged violation.

¹Subsequent to issuance of the citation, MBD changed its name to Mallard Bay Drilling, LLC (Tr. 120).

The hearing was held on April 27, 1998, in New Orleans, Louisiana. MBD stipulated that it is an employer engaged in a business affecting commerce within the meaning of the Act (Tr. 7). MBD also agrees that if OSHA's jurisdiction is not preempted by the U.S. Coast Guard, MBD withdraws its contest to the alleged violations of §5(a)(1) of the Act and 29 C.F.R. §§ 1910.120(q)(1) and 1910.120(q)(6) (Tr. 5-6). In exchange, the Secretary amends the proposed penalties to \$4,410 for each violation (Tr. 4).

MBD argues that OSHA lacks jurisdiction or its jurisdiction is preempted by the U.S. Coast Guard. Based on Review Commission precedent, OSHA's jurisdiction is not preempted.

Background

MBD is engaged in oil and gas drilling explorations in the United States, Africa and the Far East. In business since 1952, MBD's principal place of business is in New Iberia, Louisiana (Joint Exh. J-1; Tr. 122). MBD owns and operates 170 marine units, including drilling barges, such as Rig 52, crew boats and various deck barges (Tr. 96). It employs approximately 1,200 employees worldwide (Tr. 121). MBD's business primarily involves a "work-over" operation, which is work done on a preexisting well to enhance its production capabilities (Tr. 104).

MBD's Rig 52, known as MR. BELDON, was a special purpose barge; one of ten classified deep drilling barges owned by MBD in the United States (Tr. 112). It was a non-self propelled barge which was moved to location by a tug boat (Tr. 121). The stern of the barge had a "key" slot to allow the barge to position the stern-mounted derrick directly over the well. Rig 52 had three decks. The lower deck was designed to allow it to be completely submerged while on location. The second deck was mostly enclosed with steel bulkheads and accommodated generators, mud tanks, mixing vats, mud pumps, parts storage space and the control room. The upper deck of the barge consisted of a large, completely enclosed house (forward) which was the living quarters, galley and office (Joint Exh. J-1; Exhs. C-4, C-5).

Rig 52 was constructed in 1981. Construction plans were reviewed by the American Bureau of Shipping (ABS) (Exh. R-6; Tr. 19). Since initial construction, the rig has neither been classed nor reinspected by ABS. Rig 52 also received a Certificate of Documentation from the U.S. Coast Guard (Exh. R-6). The Coast Guard considered it an uninspected vessel which did

not hold a U.S. Coast Guard issued certificate of inspection nor was it required to be inspected by the Coast Guard (Exh. C-1; Tr. 28, 113, 122). *Also see* definition at 46 U.S.C. § 2101(43).

On June 16, 1997, Rig 52 was operating in the Little Bayou Pigeon, a navigable body of water in the territorial waters of Louisiana. It was located approximately 30 miles northwest of Morgan City, Louisiana (Tr. 27). Rig 52 was in the final stages of well completion, pursuant to a drilling contract with Denbury Management, Inc., owner of the well (Joint Exh. J-1, Exh. C-1). The rig had been at the location for approximately 70 days, and the well was at a depth of 13,500 feet (Tr. 121). There were 22 employees on the rig (Tr. 33).

During the final stages, Rig 52 was performing an operation called “reversing out,” which is the circulation and displacement of heavy drilling mud from the well. A calcium chloride solution is pumped into the well which displaces the mud. The mud is deposited in a shale shaker on the rig and pumped to an open hopper barge (Joint Exh. J-1). While reversing out, there were a blowout and an explosion which occurred at approximately 9:00 p.m. (Exh. C-1; Tr. 33, 65). The explosion killed and injured several employees.

The U.S. Coast Guard initiated its investigation on June 17, 1997 (Tr. 25). The U.S. Coast Guard established a command post, inspected the site and interviewed employees. The scope of the investigation was limited to vessel issues, including hazard recognition, written procedures, engineering, and overall crew competency (Tr. 26-27). As a result of its investigation, the Coast Guard made general recommendations, but no finding of violation by MBD (Exh. C-1).

The OSHA investigation was conducted by compliance officer Michael Sophrer and was limited to the emergency response requirements of § 1920.120. Other than obtaining documents furnished to the U.S. Coast Guard, OSHA did not inspect the barge or interview employees (Tr. 67-68).

Discussion

OSHA has jurisdiction under §4(a) of the Act.

Section 4(a) of the Act provides in part that:

This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Act, Johnson Island, and the Canal Zone.

MBD argues that the Act's jurisdiction does not extend to a vessel such as Rig 52 because it is not a "work place" as required by the Act. MBD cites *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983). The *Texaco* case involved a Coast Guard licensed engineer employed on Texaco's deep sea fleet who complained of discrimination under § 11(c) of the Act. The Fifth Circuit concluded that the Act's regulations do not apply to working conditions of seamen on vessels in navigation.

MBD's employees were not licensed nor had certificates from the U.S. Coast Guard (Tr. 108-109). The employees were not seamen as defined by the U. S. Coast Guard (Tr. 29-30). The employees were not performing navigational-related activities (Tr. 31). Rig 52 was considered by the Coast Guard as an uninspected vessel, although it was documented and had an official number (Tr. 28, 43). It was stationary and within the territorial boundaries of the State of Louisiana (Tr. 30). To move from location to location, the rig needed to be towed by a tug boat (Tr. 43).

In considering the application of § 4(a) of the Act, the Review Commission concluded that "OSHA has authority to enforce the OSH Act with respect to vessels that are located in U.S. territorial waters." *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997). Rig 52 was a vessel within the territorial boundaries of Louisiana. It was a workplace.

Section 4(a) of the Act is applicable.

Application of § 4(b)(1) Preemption.

Section 4(b)(1) provides that:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

The U.S. Coast Guard conducted its investigation under the authority of 46 C.F.R., Part 4, as derived from 46 U.S.C. § 6301. The Coast Guard determined that the Rig 52 accident met the definition of a marine casualty or accident. *See* 46 C.F.R § 4.03-1. The rig was a vessel in commercial service operating upon the navigable waters of the United States. (Joint Exh. J-1). It was designated by the Coast Guard as a serious marine incident because it involved one or more deaths, multiple injuries requiring medical attention, and there was damage to property in excess of \$100,000 (Exh. C-1; Tr. 26).

To prove the affirmative defense that OSHA's jurisdiction has been preempted under section 4(b)(1), the employer must show that (1) the other federal agency has the statutory authority to regulate the cited working conditions, and (2) that agency has exercised that authority by issuing regulations having the force and effect of law.

Rockwell International Corp., 17 BNA OSHC 1810, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996).

Where the employer claiming the exemption satisfies its burden of proving that another agency has exercised its authority, OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-1704 (No. 89-1192, 1992). The term "exercise," as used in § 4(b)(1), requires an actual assertion of regulatory authority as opposed to a mere possession of authority. OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Id* at 1703-1704.

In the *Alaska Trawl* case, the Commission found that, in the absence of relevant Coast Guard regulations, OSHA jurisdiction over work performed on uninspected vessels was not preempted. There was no industry-wide exemption from OSHA regulations. The Commission dismissed as dictum the implication that *Dillingham Tug & Barge Corp.*, 10 BNA OSHC 1859 (No. 77-4143, 1982), created an industry-wide exemption. *Id* at 1704-1705. Absent an industry wide exemption, OSHA jurisdiction is preempted only if the Coast Guard has specifically regulated the cited condition.

Emergency Response

The OSHA citation alleges that MBD failed to evacuate employees and failed to have an emergency response plan. MBD does not argue or identify any similar requirements enforced by the U.S. Coast Guard.

In *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1924 (No.93-2529, 1997), the Review Commission found that the Coast Guard only regulates uninspected vessels to a “minimal” degree. The Coast Guard filed an amicus brief in the *Tidewater* case disclaiming comprehensive regulation of uninspected vessels. The Coast Guard described its safety standards applicable to uninspected vessels as solely limited to those areas delineated in 46 U.S.C. Chapter 41, which regulates the (a) number, type and size of fire extinguishers; (b) type and number of life preservers; (c) flame arresters, backfire traps, or similar devices on vessels with gasoline engines; (d) ventilation of engine and fuel tank compartments; and the (e) number and types of alerting and locating equipment for vessels on the high seas. *Id* at 1924.

Chief Warrant Officer John Grez of the U.S. Coast Guard, Marine Safety Office, who conducted the investigation into the Rig 52 explosion, testified that the scope of his investigation was limited to issues of hazard recognition, written procedures, engineering and overall crew competency (Tr. 26-27). He agreed that the Coast Guard regulations for uninspected vessels did not address the same concerns regarding employee evacuation and emergency response as cited by OSHA (Tr. 35).

MBD argues that Fifth Circuit case law concludes that Coast Guard statutory authority preempts OSHA. *See Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1150 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). Generally, these cases hold that OSHA regulations do not apply to the working conditions of employees on vessels in navigation.

However, the Review Commission in *Tidewater* analyzed the same Fifth Circuit case law relied upon by MBD. As stated in *Tidewater*:

Nevertheless, with due respect to the court, we find that *Clary* and *Donovan v. Texaco* are sufficiently distinguishable from the case here presented to have left undecided the precise question of OSH Act applicability to uninspected vessels.

In neither of the cases considered by the court did it differentiate between the extensive degree to which the Coast Guard regulates inspected vessels and the minimal degree to which it regulates those that are uninspected. The vessel classifications in those cases were not identified, although the court's consideration in *Donovan v. Texaco* of the MOU between the Coast Guard and OSHA suggests that the vessel there was inspected. 720 F.2d at 827 n.3. Moreover, the court relied in both cases on Commission precedent, subsequently overruled, suggesting that OSHA lacks jurisdiction over the working conditions of seamen. Most significantly in *Clary*, the court found that the cited OSHA construction and shipbuilding regulations did not, by their own terms, pertain to the special purpose drilling vessel on which the injured seaman worked. 609 F.2d at 1122. This fact alone would have been sufficient to decide the case. . . . Similarly, the court's finding in *Donovan v. Texaco*, that the Coast Guard's regulations included protections "parallel" to those contained in section 11(c), would have been sufficient to dismiss the Secretary's case.

Inspected vessels subject to the MOU between OSHA and the Coast Guard are essentially regulated only by the Coast Guard and, consequently, would not steam in and out of OSHA coverage. As to the uninspected fleet, OSHA provides the only significant regulation of non-navigational working conditions for seamen employed on these vessels. Absent OSH Act coverage, these conditions would be completely unregulated.

Id. at 1927.

Also, MBD cites *Perry v. Falcon Drilling Company, Inc.*, 1995 WL 273538 (E.D. La., 1995) which held that OSHA regulations on stairs and stairways did not apply to FALCON Rig 16, an uninspected vessel, because of the U.S. Coast Guard's statutory authority. However, the decision in *Perry* is distinguishable from this case. The District Court found that the Coast Guard's regulations applicable for stairs and stairways precluded application of the OSHA regulations. The court stated that "OSHA regulations simply should not apply to govern safety concerns on vessels which have unique problems and concerns best addressed by the Coast Guard." In this case, there is no showing that the Coast Guard exercises authority to regulate employee evacuations and emergency response to hazardous substance releases during an explosion of a drilling rig.

Therefore, pursuant to commission precedent, OSHA jurisdiction in this case is not preempted by the U.S. Coast Guard.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

Serious Citation No. 1

1. Item 1, serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of \$4,410 is assessed.
2. Item 2, serious violation of § 1910.120(q)(1), is affirmed and a penalty of \$4,410 is assessed.
3. Item 3, serious violation of § 1910.120(q)(6), is affirmed and a penalty of \$4,410 is assessed.

KEN S. WELSCH
Judge

Date: November 10, 1998