SECRETARY OF LABOR, Complainant, v. NOBLE DRILLING, INC., Respondent.	OSHRC Docket No. 98-2105

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

Noble Drilling, Inc., ("Noble") conducts offshore oil drilling from mobile offshore drilling units ("MODUs") on the Outer Continental Shelf. Until mid-1997, one such unit, the *Paul Romano*, was in active service as a U.S. flagged, submersible vessel holding a requisite certificate of inspection, issued by the Coast Guard under the statutory authority of 46 U.S.C. § 3306 and 46 C.F.R. § 2.01-5. Having such a certificate signifies that, as a condition of operating, the MODU must comply with a comprehensive body of Federal law and regulations administered by the Coast Guard (14 U.S.C. § 2) and designed to secure the safety of individuals and property on board vessels. *See generally* 46 U.S.C. § 3301 *et seq*. This regulatory scheme limits the reach of OSHA's jurisdiction under the preemption provision of section 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1), which is intended to avoid the problems associated with overlapping regulation.[1]

[1]Section 4(b)(1) of the Act provides, in pertinent part:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Under this provision, an employer may affirmatively defend against an OSHA citation by showing that: (1) the other agency has the statutory authority to regulate the cited working

In order to effectuate its conversion to a semi-submersible MODU, Noble Drilling took the vessel out of operation and as of the summer of 1997 docked it at the Ham Marine Shipyard in Pascagoula, Mississippi. Upon its entry to the shipyard, Noble surrendered the vessel's certificate of inspection to the Coast Guard, whereupon the Coast Guard treated the vessel as "uninspected" for purposes of defining the scope of its authority.

On August 25, 1998, in the midst of the conversion process, an electronics technician employed by Noble sustained a fatal fall while attempting to descend the shaft of a newly installed elevator, which had become disabled well below the top deck due to mechanical difficulties. The technician sought to reach the elevator by climbing down the structural supports of the rails on which the elevator traveled.

Following an initial investigation of the accident by the Coast Guard, which determined that it did not have authority over the matter based on its treatment of the vessel as "uninspected," OSHA conducted an investigation and issued the citation under review. OSHA alleged violations of Part 1915 governing shipyard repair (the requirements for adequate illumination under section 1915.92(a) and for ensuring personal protective equipment under section 1915.152(a)) and violations of Part 1910 governing general industry standards (the requirements for use of fixed ladders under section 1910.27(c)(1), (4), and (6)).

Noble contested the citation, arguing that OSHA's authority to cite it was preempted by the U.S. Coast Guard, and that the five citation items had no merit. Administrative Law Judge Ken S. Welsch issued a decision in which he found that Noble did not prove its affirmative defense of preemption. However, he also concluded that the Secretary failed to prove that the cited standards were violated and ordered vacation of the citations.

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conditions and, (2) if the other agency has that authority, that the agency has exercised it over the conditions by issuing regulations having the force and effect of law. *MEI Holdings, Inc.*, 18 BNA OSHC 2025, 2025, 1999 CCH OSHD ¶ 32,011, p.47,759 (No. 96-740, 2000), *aff'd without published opinion*, 247 F.3d 247 (11th Cir. 2001).

The Secretary petitioned for review of the vacation of the citations on the merits, and Noble filed a conditional review petition on the judge's determination that the Coast Guard had not generally preempted OSHA's jurisdiction. Review was directed on both petitions. On the question of preemption, the briefing order to the parties cited the intervening decision of the Supreme Court in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002), which involved an appeal of a final decision of a Commission ALJ rejecting a somewhat similar preemption challenge to OSHA's jurisdiction over a gas and oil exploration barge.[2] The Commission also invited the Coast Guard to file an *amicus* brief addressing its authority in the context of this case.

Turning first to the Secretary's petition, we find that the ALJ correctly explained why the alleged violations were without merit and affirm the vacation of the citations for the reasons set forth in his decision. *See* attached decision. While this disposition would normally permit us to conclude our review in light of the conditional nature of Respondent's petition on the preemption issue, we nevertheless find it appropriate to consider the question.

Noble launches a broad attack on OSHA's authority over the *Paul Romano*. It claims that by the drilling rig having previously attained "inspected" status, the preemptive effect of the Coast Guard's authority on OSHA jurisdiction continued unchanged during the conversion work at the Ham Marine Shipyard. We find this argument unpersuasive.

As explained by the Supreme Court in *Mallard Bay*, "OSHA's regulations have been pre-empted with respect to *inspected* vessels, because the Coast Guard has broad statutory authority to regulate the occupational health and safety of workers aboard inspected vessels, *46 U.S.C. § 3306* (1994 ed. and Supp. V), and it has exercised that authority."[3] However, the Court also confirmed that "uninspected" vessels "present an

[2] As further elaborated *infra*, the Supreme Court in upholding the Commission judge's finding of no preemption reversed the Fifth Circuit's holding to the contrary. *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898 (5th Cir. 2000).

[3] 534 U.S. at 243. In summarizing the rule of preemption, the Court cited the "Memorandum of Understanding" signed by the Coast Guard and OSHA on March 17, 1983, 48 Fed. Reg. 11365 (1983), delineating the areas of authority of each agency. Notably the agreement

entirely different regulatory situation":

> Nearly all of the Coast Guard regulations responsible for displacing OSHA's jurisdiction over inspected vessels . . . do not apply to uninspected vessels. . . . Rather, in the context of uninspected vessels, the Guard's regulatory authority – and the exercise thereof – is more limited. . . .[T]he Guard regulates matters related to marine safety, such as fire extinguishers, life preservers, engine flame arrestors, engine ventilation, and emergency locating equipment.

534 U.S. at 243-44, *citing* 46 U.S.C. § 4102.

Because the oil and gas exploration barge in *Mallard Bay* had never been inspected by the Coast Guard nor was required to be so inspected, the Court concluded that for purposes of section 4(b)(1), the Coast Guard had not preemptively asserted comprehensive regulatory authority over the barge. Similarly, it found that the uninspected barge's inland drilling operations that gave rise to OSHA's investigation did not implicate the limited range of marine safety subjects over which the Coast Guard concededly had authority. Thus the Court affirmed the Commission judge's finding that OSHA's jurisdiction was not preempted.

The instant case is factually distinguishable from *Mallard Bay*, but we find that the distinction is not legally significant for purposes of determining OSHA's authority. Unlike the *Mallard Bay* barge, the *Paul Romano* had previously received a certificate of inspection and therefore was classified as an "inspected" vessel that was subject to the panoply of regulations promulgated and administered by the Coast Guard. Under section 4(b)(1), OSHA's jurisdiction was undoubtedly preempted during this phase of the vessel's active service. Moreover, Noble points out that once the modifications were

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provides that "[t]he Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of *seamen* aboard inspected vessels." 48 Fed. Reg. at 11365 (emphasis added). From our review of the record in the instant case, it appears that the Respondent Noble Drilling has not shown that those exposed to the cited hazards qualified as "seaman," a term with a unique legal definition. *See* OSHA Directive CPL 2-1.20 – OSHA/U.S. Coast Guard Authority Over Vessels, ¶ J.2 (Nov. 8, 1996). Therefore, we do not address the status of the exposed workers for purposes of preemption except to note that it was a part of the Respondent's affirmative defense.

concluded, as a condition for returning the vessel to service, Noble would again have to obtain certification from the Coast Guard, thus reestablishing the Paul Romano's status as an "inspected" vessel.[4] The gist of Noble's argument to us is that the Coast Guard's preemptive authority does not cease during what Noble concededly describes as "a window whereby [Coast Guard] standards are not directly applicable."

The fundamental problem with Noble's position is that it papers over the crucial fact that at the time of the circumstances giving rise to the citation, the *Paul Romano* possessed neither a certificate of inspection nor a letter of compliance issued by the Coast Guard. As succinctly explained in the Coast Guard's *amicus* submission:

> Where, as in the case of the *Paul Romano* at the time of the incident in question, the vessel does not yet have a certificate of inspection issued by the flag state because it is still undergoing shipyard conversion or repair, the Coast Guard does not inspect it until after the flag state has issued its certificate of inspection. It can not engage in commercial activity until after such certificate has been obtained. Until that time, it is not subject to Coast Guard inspection. Accordingly, the Coast Guard would treat it as an "uninspected vessel".

This leads the Coast Guard to conclude that it did not have exclusive, comprehensive authority over the *Paul Romano* during this interim period.

Noble Drilling advances no counterargument to demonstrate that the Coast Guard's position is flawed, nor is it self-evident to us that the Coast Guard's interpretation of its authority is in any way inconsistent with the language of either the statutory provisions of 46 U.S.C. Chapter 41 or the implementing regulations. Nor has the Respondent shown that the Coast Guard's position is otherwise unreasonable such that it should not be accorded "considerable weight." *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703, 1991-93 CCH OSHD ¶ 29,758, p.40,448 (No. 89-1192, 1992)(consolidated). Respondent does advance a policy argument, grounded in

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[4]While the vessel was undergoing conversion, Noble had it reflagged as a foreign (Panamanian) vessel, and as such would not receive a certificate of inspection but rather a certificate of compliance. 46 C.F.R. § 2.01-6 (a). However, the certificate of compliance for a foreign flagged vessel is the equivalent of certificate of inspection for a U.S. flagged vessel for purposes of ascertaining the exercise of the Coast Guard's authority.

longstanding Fifth Circuit precedents beginning with *Donovan v. Texaco*, 720 F.2d 825 (5th Cir. 1983), that it should not face the dilemma of complying with conflicting regulatory authority as its rig "steam[s] in and out of OSHA coverage" by simply entering or departing the ports of the United States. 720 F.2d at 829. However, we think the Supreme Court in *Mallard Bay* may have called into question the reach of the *Donovan* doctrine. This is the logical implication of the Court's reversal of the Fifth Circuit's holding below that the Coast Guard had exclusive jurisdiction over the "uninspected" barge, for that holding (now overturned) had relied in part upon *Donovan*.[5] Thus, we are reluctant to find that the *Donovan* doctrine gives Respondent's position compelling force, especially since Respondent has made no effort to explain the contours of the *Donovan*'s doctrine in the wake of *Mallard Bay*.

Finally, we note that the Respondent does not urge preemption on the alternative basis described by the *Mallard Bay* Court, namely that the working conditions under review fall within those specific categories pertaining to marine safety set forth in 46 U.S.C. that are applicable to "uninspected" vessels. But such an argument would be unavailing, in any event. The hazardous conditions associated with the subject of the citations here – the illumination of the working area, use of personal protective equipment, and the purported ladder which the judge determined was not a ladder – simply do not fall within any of the following preempted categories – fire extinguishers, life preservers, engine flame arrestors, engine ventilation, and emergency locating equipment.

In sum, we find that Noble failed to prove entitlement to the exemption. Accordingly, OSHA retained authority to investigate and issue citations against Noble

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[5]212 F.3d at 901. The Supreme Court did not explicitly cite *Donovan v. Texaco*, *supra*. However, it observed that other Courts of Appeals have construed the pre-emptive force of section 4(b)(1) more narrowly than did the Fifth Circuit and that it had granted certiorari to resolve the conflict among the circuits. The Court's opinion obviously resolved the conflict in favor of the other circuits' "more narrow[]" construction of the pre-emptive force of §4(b)(1). 534 U.S. at 240.

Drilling under applicable standards in connection with the conversion work on the *Paul Romano* during its treatment by the Coast Guard as an "uninspected" vessel.[6]

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
James M. Stephens
Commissioner

Dated: November 18, 2003

[6]We emphasize that we are addressing only the question, as framed and argued by the Respondent on appeal, of whether the previous status of the *Paul Romano* as an "inspected vessel" (together with its anticipated return to such status) continued to shield the drilling rig from OSHA's authority once it was taken out of service and underwent extensive modification in the Ham Marine Shipyard. We answer that question in the negative. However, we have no occasion to address what we perceive is a related but entirely distinct question of whether a particular condition aboard a vessel can be cited under a specific OSHA regulation notwithstanding the fact that there are Coast Guard requirements on the same subject. To the extent that the ALJ's analysis implies an affirmative answer to this question, we reserve judgment on the matter.

Secretary of Labor, Complainant, v. Noble Drilling (U.S), Inc., Respondent.	OSHRC Docket No. 98-2105

APPEARANCES

Kathleen G. Henderson, Esq. Office of the Solicitor U. S. Department of Labor Birmingham, Alabama For Complainant	Ken B. Ryan, Esq. Michael A. McGlone, Esq. Lemle & Kelleher, L.L.P. New Orleans, Louisiana For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Noble Drilling (U. S.), Inc., contests a five-item citation issued by the Secretary on November 30, 1998. The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer William Chandler on August 26, 27, and 28, 1998. OSHA's inspection resulted from an employee fatality on August 25, 1998, when Noble electronics technician Robert Kitzinger fell to his death in an elevator shaft aboard a mobile offshore drilling unit (MODU) located at Ham Marine Shipyard in Pascagoula, Mississippi.

The Secretary alleges that Noble was in serious violation of §§ 1910.27(c)(1), (4), and (6), which address fixed ladders (items 1, 2, and 3, respectively); § 1915.92(a) for failure to provide adequate illumination for shipboard working areas (item 4); and § 1915.152(a) for failure to ensure employees use appropriate personal protective equipment (PPE) (item 5). The Secretary proposed penalties of $5,000.00 for each alleged violation.

A hearing was held in this matter on April, 22, 23, 27, and 28, 1999, in Mobile, Alabama. Noble stipulates that it is an employer engaged in a business affecting commerce (Tr. 5). Noble contests OSHA's jurisdiction, arguing that OSHA is preempted by the U. S. Coast Guard. Noble also argues that the cited standards addressing fixed ladders are inapplicable to the cited conditions and that any violations the court may find are the result of unpreventable employee misconduct. The parties have filed post-hearing briefs.

For the reasons discussed, the court finds that OSHA had jurisdiction over the

investigation, and that items 1 through 5 are vacated.

Background

Noble engages in the business of offshore oil-drilling, which it typically performs from MODUs (Tr. 21, 25). At the time of the hearing, Noble had 47 MODUs worldwide (Tr. 731-732). In August, 1998, Noble was in the process of converting five MODUs from submersible rigs to semi-submersible rigs, in what was known as the "Eva Project." To that end, the five MODUs were docked at the Ham Marine Shipyard in Pascagoula, Mississippi (Tr. 22, 127-128).

The MODU in question, the *Paul Romano,* was originally constructed in 1981 at Ingalls Shipyard as a submersible rig, which means that it rested directly on the sea bed when used for oil- drilling (Tr. 541, 754). At the time of the accident, Noble was converting the *Paul Romano* to a semi-submersible rig, which means that it would float in the water after being anchored to the sea bed during oil-drilling (Tr. 22-23). The conversion process took approximately 16 months (Tr. 65).

The *Paul Romano* measures approximately 130 feet from the main deck to the bottom of the rig (Tr. 23). When in operation, it weighs approximately 25,000 tons (Tr. 120). The platform of the *Paul Romano* is triangular. Each side is approximately 235 feet long. The platform rests on three columns. As part of the conversion process, an elevator was installed in a forward support column of the rig. The 130-foot shaft of the new elevator ran from the main deck to the pontoon deck, with no stops in between (Exhs. C-1, C-3; Tr. 34-35, 44).

On the morning of August 25, the new elevator was malfunctioning. The elevator car was stuck just above the pontoon level of the MODU. Noble electronics technician Robert Kitzinger woke up Noble electrician Robert Wallis and informed him of the malfunction. Wallis, who had been working until the early hours of August 25 on another electrical malfunction, told Kitzinger to give him a few minutes to wake up and he would look at it (Tr. 390).

For some reason, Kitzinger decided to attempt to repair the elevator himself. He asked fellow electronics technician Ed Seger to help him. Kitzinger and Seger went to the elevator access door on the main deck, opened it, and looked down the shaft (Tr. 479). A tower (elevator mechanism) ran down the length of the elevator shaft. It was located across the circular shaft (which was approximately 6½ feet in diameter) from the access door. The tower consists of two vertical members that are supported by cross members. There is also a rack, or linear gear, located between the vertical members and attached to the elevator car (Exhs. C-4, C-5, C-6: Tr.

418).

Kitzinger and Seger placed two 2 x 4s across the elevator shaft between the access door and the cross members on the opposite side. Kitzinger walked across the boards while Seger held them in place at the access door opening. Kitzinger began descending the cross members. He was using no fall protection. During this process, Seger repeatedly told Kitzinger that he did not think descending the elevator shaft was a good idea and that they should wait for Wallis. Kitzinger ignored Seger (Tr. 477-484).

When Kitzinger was approximately halfway down the shaft, he stopped and called to Seger that he was tired and wanted Seger to go get help. Seger told a Ham construction employee standing nearby to keep talking to Kitzinger. Seger ran to the office of Jack Frost, Noble's safety training specialist, and told him that there was an emergency situation (Tr. 488-489). When Frost got to the access door, he looked in and saw Kitzinger approximately halfway down. Kitzinger appeared extremely frightened and began to scream in panic. He started descending the cross members. After two or three steps, he stopped. Kitzinger screamed again and fell from the cross members to the top of the stuck elevator car. Kitzinger sustained fatal injuries (Tr. 233-234).

Preemption Issue

Noble argues that the *Paul Romano* is exempt from the requirements of the Occupational Safety and Health Act of 1970 (Act) because, under § 4(b)(1) of the Act, the U. S. Coast Guard preempts OSHA's jurisdiction. This is an affirmative defense and Noble has the burden of proving such preemption.

Section 4(b)(1) of the Act provides:

> 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.

In evaluating an employer's § 4(b)(1) argument, the Commission considers "(1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if that agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law." *MEI Holdings, Inc., d/b/a Martin Electronics, Inc.*, 2000 OSHRC No. 1, pp. 2-3 (No. 96-740, 2000).

Noble argues that the Coast Guard had the statutory authority to regulate Kitzinger's attempt to fix the malfunctioning elevator of the *Paul Romano*. Noble finds this authority in 46 U.S.C. § 3301, which empowers the Coast Guard "to administer laws and promulgate and enforce regulations for the protection of safety of life and property on and under the high seas and water subject to the jurisdiction of the United States[.]"

Noble contends that the Coast Guard's jurisdiction over the accident is supported by *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). In *Texaco*, a Coast Guard-licensed engineering officer employed on Texaco's deep sea fleet complained of retaliation under § 11(c) of the Act. The Fifth Circuit Court of Appeals (in whose circuit the instant case arises) states at the outset of its opinion, "It is the law of this circuit that OSHA regulations do not apply to working conditions of seamen on vessels in navigation[.]" *Texaco*, 720 F.2d at 826. The court goes on to discuss the unique circumstances of the working and living conditions of seamen, which justify special restrictions on their rights as employees. The court concludes that finding OSHA jurisdiction over the working conditions of vessels in navigation would produce the anomalous result of vessels "steaming in and out of OSHA coverage." *Id.* at 829.

The record establishes, however, that the Coast Guard itself concluded it did not have jurisdiction over the *Paul Romano* at the time of the accident. Following Kitzinger's fall, the Coast Guard visited the *Paul Romano*. OSHA compliance officer Chandler explained how it came about that OSHA, and not the Coast Guard, assumed jurisdiction over the investigation (Tr. 542-543):

> The Coast Guard indicated that the vessel did not have a certificate of inspection and that therefore, they did not have jurisdiction; that they wanted OSHA to conduct the investigation into this accident. They had conducted an initial visit to the site and then found that the man had fallen and asked OSHA for assistance.
>
> On the way down to conduct the inspection, I received a page in Hattiesburg from my office and was directed to go to the United States Coast Guard office here in Mobile. When I arrived, I met with Commander Foster and discussed the situation. We ended up calling my office, having a conference call with my [OSHA] Area Director, Clyde Payne, [OSHA Assistant Area Director] Mr. Stewart . . . and [Chief Coast Guard Investigations Officer Commander Robert] Foster and I believe Lt. Johnson who had conducted the initial Coast Guard investigation into this matter. It was discussed that the Coast Guard did not have jurisdiction on vessels unless it was--unless it was a United States vessel and had a certificate of inspection.
>
> I have later learned that the Noble-*Paul Romano* surrendered its certificate of inspection on May 27th of 1997. The next day they were re-flagged under the

> flag of Panama on May 28, 1997. That in our minds--and when I say "our," mine and Clyde Payne's and Eugene Stewart's--satisfied that we had jurisdiction.

James Gormanson, compliance manager for Noble, explained that vessels that are U. S.-owned and certificated by the Coast Guard as a U. S. vessel are required to hold a certificate of inspection in order to work on the outer continental shelf of the United States. A vessel operating under a foreign flag on the outer continental shelf of the United States must hold either a certificate of inspection or a letter of compliance issued by the Coast Guard (Tr. 732-733). At the time of the inspection, the *Paul Romano* held neither.

When the *Paul Romano* entered the Ham Marine Shipyard, Noble surrendered its certificate of inspection to the Coast Guard and announced that it intended the rig to "reflag to Panama" (Tr. 754). The Coast Guard issued the *Paul Romano* a letter of compliance on December 2, 1998, four months after the accident (Tr. 759). The rig was reflagged under Panama's flag on May 27, 1998 (Tr. 755).

At the time of OSHA's inspection, the MODU did not hold a certificate of inspection or a letter of compliance. The Coast Guard classified it as an undocumented, uninspected vessel (Tr. 754-755, 761-762). It had been in the Ham Marine Shipyard for over a year, undergoing extensive changes. The rig was located in a stationary position within the territorial boundaries of Mississippi, on the Singing River. The *Paul Romano* was not self-propelled; it had to be towed out to sea (Tr. 25). The work Noble's employees were engaged in while the rig was in the shipyard was not related to navigation. The rig was not operating upon the navigable waters of the United States.

In *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997), the Commission held "that OSHA has authority to enforce the OSH Act with respect to vessels that are located in U.S. territorial waters." Under *Tidewater,* the *Paul Romano* was a workplace subject to OSHA jurisdiction at the time of the accident.

Assuming the Coast Guard had the statutory authority to regulate the *Paul Romano,* even though it was an undocumented, uninspected rig located in a shipyard, Noble has the burden of proving the Coast Guard has issued regulations covering the cited conditions. In *Tidewater,* the Commission found that the Coast Guard regulates uninspected vessels only to a minimal degree. Relying on the Coast Guard's *amicus* brief, the Commission found that with regard to uninspected vessels, the Coast Guard's (*Id.,* 17 BNA at 1924):

> [A]uthority to regulate these vessels is, in relevant part, limited *solely* to those areas delineated in 46 U.S.C. Chapter 41, which provides for regulation

> concerning (a) number, type, and size of fire extinguishers; (b) type and number of life preservers; (c) flame arrestors, backfire traps, or similar devices on vessels with gasoline engines; (d) ventilation of engine and fuel tank compartments; and (e) number and type of alerting and locating equipment for vessels on the high seas. The Coast Guard describes the purpose of such regulations as "protect[ing], in the event of an emergency, individuals on board and . . .ensur[ing] the safe operation of the vessel," and contrasts this limited authority with the comprehensive regulation of inspected vessels authorized under 46 U.S.C. § 3306(a) (regulation of inspected vessels).

None of the five regulated types of equipment is at issue here. Conversely, the items that are at issue (ladders, lighting, and personal protective equipment for fall protection) are omitted from the limited regulations for uninspected vessels.

In *Tidewater,* the Commission notes that the respondent (like Noble in the instant case) could appeal the Commission's decision to the Fifth Circuit, where the *Texaco* decision is precedent. The Commission acknowledges that, "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may differ from the Commission's law." *Id.*, 17 BNA at 1926. The Commission proceeds to find that *Texaco,* as well as *Clary v. Ocean Drilling and Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980) (OSH Act does not apply to working conditions of seamen on vessels operating on the high seas), are distinguishable from *Tidewater* because they "have left undecided the precise question of OSH Act applicability to uninspected vessels." (*Id.*, 17 BNA at 1927, citations omitted):

> 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.

The Commission also addresses the Fifth Circuit's concern that finding jurisdiction under the OSH Act would lead to the anomaly of vessels steaming in and out of coverage. The

Commission notes that OSHA regulations apply only to those working conditions not regulated by the other agency. More pertinent to the present case, the Commission states, "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." *Tidewater,* 17 BNA at 1928.

The *Paul Romano* surrendered its certificate of inspection on May 27, 1997. It did not receive a letter of compliance until December 2, 1998. Thus, at the time of the accident it did not have a certificate of inspection or its equivalent; therefore, it was uninspected. As such, the Coast Guard had no regulations covering the cited working conditions. Noble has failed to establish that the Coast Guard preempted OSHA's jurisdiction over the *Paul Romano.*

The court finds that OSHA properly exercised jurisdiction over the rig.

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.,* 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Items 1, 2, and 3: Alleged Serious Violations of §§ 1910.27(c)(1), (4), and (6)

The Secretary alleges that Noble committed serious violations of §§ 1910.27(c)(1), (4), and (6), which provide:

> *(c) Clearance*--(1) *Climbing side.* On fixed ladders, the perpendicular distance from the centerline of the rungs to the nearest permanent object on the climbing side of the ladder shall be 36 inches for a pitch of 76 degrees, and 30 inches for a pitch of 90 degrees (fig. D-2 of this section), with minimum clearances for

> intermediate pitches varying between these two limits in proportion to the slope, except as provided in subparagraphs (3) and (5) of this paragraph.
> . . .
> (4) *Grab bars.* Grab bars shall be spaced by a continuation of the rung spacing when they are located in the horizontal position. Vertical grab bars shall have the same spacing as the ladder side rails. Grab-bar diameters shall be the equivalent of the round-rung diameter.
> . . .
> (6) *Step-across distance.* The step-across distance from the nearest edge of ladder to the nearest edge of equipment or structure shall not be more than 12 inches, or less than 2½ inches (fig. D-4).

Noble contends that the cited standards do not apply to the cited conditions because the structure Kitzinger climbed down was not a ladder within the meaning of § 1910.27. Section 1910.21(e) provides:

> As used in § 1910.27, unless the context requires otherwise, fixed ladder terms shall have the meanings ascribed in this paragraph.
>
> (1) *Ladder.* A ladder is an appliance usually consisting of two side rails joined at regular intervals by cross-pieces called steps, rungs or cleats, on which a person may step in ascending or descending.
>
> (2) *Fixed ladder.* A fixed ladder is a ladder permanently attached to a structure, building, or equipment.

As the Secretary points out, OSHA's definition of a ladder depends upon two factors: (1) its appearance and (2) whether a person may step on its cross-pieces in ascending and descending. Nowhere does the definition mention the purpose or intention behind the design of the device as being relevant. The Secretary argues that the structure inside the rig's elevator shaft meets the physical description of the ladder, and is thus covered under § 1910.27.

The Secretary's reasoning is sound in the abstract, but it does not accommodate the concrete realities of the situation. The structure at issue is the track along which the elevator car moves. It is part of the elevator's mechanism. It was not designed as a ladder and its use as a ladder was not anticipated (Tr. 348). No ready access to the structure is available. In order to reach the structure, Kitzinger had to lay two boards across the 6½ foot gap between the access door and the structure. There is no evidence that other employees, including those of the elevator company, had previously used the tower structure to access the elevator.

The Secretary cited Noble for violations of the ladder standard because the dimensions of the structure did not meet the requirements for ladders. The Secretary would have Noble ask the

elevator company to modify its elevator mechanism so that the tower structure on which the elevator runs (which is not intended to be used as a ladder and which a person must go to a good deal of trouble even to reach) complies with the ladder standard. This would require an employer to anticipate the unexpected.

> The Commission has a "responsibility to be 'reasonable' in interpreting the standards cited in cases before it." *G. E. v. OSHRC*, 583 F.2d [61, 67 (2d Cir. 1978)]. *See Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315 at 327 [10 OSHC at 1201] (8th Cir. 1981), *pet. for reh. den.* (8th Cir. January 20, 1982) (standards should be "given a reasonable and common sense interpretation"). The court in *G. E. v. OSHRC* concluded that [application of the "platform" standard to an oven top] . . . "would create considerable doubt that the standard provides to employers fair warning of the conduct which it prohibits or requires." 583 F.2d at 67-68[.]

Globe Industries, Inc., 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982).

In the present case, nothing in the ladder standard gave Noble fair warning that it was required to have the elevator company install its tower mechanism so that it not only caused the elevator to work, but that it also complied with the ladder standard in the unlikely event that an employee would decide to place boards across the shaft and use the tower to descend into the unilluminated shaft. It defies common sense to apply the ladder standard to the elevator mechanism. The court declines to do so. Items 1, 2, and 3 are vacated.

Item 4: Alleged Serious Violation of § 1915.92(a)

The Secretary alleges that Noble committed a serious violation of § 1915.92(a), which provides:

> All means of access and walkways leading to working areas as well as the working areas themselves shall be adequately illuminated.

Noble argues (with regard to items 4 and 5) that § 1915.92(a) is inapplicable to any work done on its rig because § 1915.2 states that Part 1915 does not apply to matters "under the control of the United States Coast Guard[.]" As discussed, *supra*, in the section on preemption, the Coast Guard did not have jurisdiction over the *Paul Romano* at the time of the accident. Part 1915 sets out "standards for shipyard employment" and it applies to "all ship repairing, shipbuilding and shipbreaking employments." Section 1915.2(a). Section 1915.4(j) provides that ship repair means "any repair of a vessel including . . . conversions." The *Paul Romano*, undergoing conversion from a submersible to a semi-submersible rig, is covered under Part 1915.

The Secretary specifically alleges in her citation that Noble violated § 1915.92(a) because when Kitzinger "entered the elevator shaft to perform electronic repairs on August 25, 1998, [he was] exposed to falling 104 feet due to extremely low light conditions; in that there was only one dim light bulb located atop the immobile elevator car inside the . . . elevator shaft."

The record establishes that Noble has portable lighting available for use. Rig manager Randall Abshire testified that portable "droplights" were available, and if an employee "needed a permanent light for, say, the shipyard, then Ham Marine would get with their maintenance and they would set up lights for you. If you needed lights, lights are available" (Tr. 180). Seger, who was with Kitzinger, knew that portable lights were available, stating, "All we had to do was ask for them" (Tr. 494).

The elevator shaft was not a routine working area. Noble was not required to have permanent lighting for an area that was not used as a working area. Adequate illumination was available. Kitzinger and Seger chose not to use the portable lighting. The Secretary has failed to establish Noble's noncompliance with this standard. Item 4 is vacated.

Item 5: Alleged Serious Violation of § 1915.152(a)

The Secretary alleges Noble committed a serious violation of § 1915.152(a) which provides:

> The employer shall provide and shall ensure that each affected employee uses the appropriate personal protective equipment (PPE) for the eyes, face, head, extremities, torso, and respiratory system, including protective clothing, protective shields, protective barriers, personal fall protection equipment, and life saving equipment, meeting the applicable provisions of this subpart, wherever employees are exposed to work activity hazards that require the use of PPE.

Kitzinger was not wearing personal fall protective equipment when he entered the elevator shaft. There is no evidence, however, that any supervisory personnel for Noble knew or should have known that Kitzinger was attempting to climb down the elevator shaft with or without fall protection. Electrician Wallis had told Kitzinger to wait until he got up to look at the elevator. Wallis did not consider the malfunctioning of the elevator to be a pressing issue (Tr. 388, 390). Rig manager Abshire stated that it was of no particular concern to him that the elevator was not functioning and that fixing it was not a priority (Tr. 148). Barge engineer Michael Keller was aware that Kitzinger and Seger were "fooling with the elevator, " but he

thought they were down at the pontoon level (Tr. 91). Safety training specialist Jack Frost did not know that Kitzinger was in the shaft until Seger ran into his office and told him there was an emergency situation (Tr. 235).

The record establishes that Noble had neither actual nor constructive knowledge that Kitzinger was in the elevator shaft without fall protection. Fixing the elevator was a low priority to management personnel. Wallis, the one person who gave specific instructions to Kitzinger regarding the elevator, had told him to wait until he could look at it. An employer cannot reasonably be expected to anticipate that an employee would do something so idiosyncratic as to climb down a poorly-lit elevator tower without using fall protection.

The Secretary failed to establish the element of knowledge. Item 5 is vacated.

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:

Items 1 through 5 of Citation No. 1 are vacated and no penalties are assessed.

/s/
KEN S. WELSCH
Judge

Date: March 6, 2000