UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. CONTRACTORS WELDING OF WESTERN NEW YORK, INC., Respondent.	OSHRC Docket No. 88-1847

ORDER

On July 16, 1993, the United States Court of Appeals for the Second Circuit issued its mandate remanding this case to the Commission. Pursuant to the court's order, the Commission vacates its decision in this case issued on September 6, 1991.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: September 13, 1993

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on September 13, 1993.

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Occupational Safety and Health
Review Commission
Room 420
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FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
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SECRETARY OF LABOR,

Complainant,

v.

CONTRACTORS WELDING OF WESTERN NEW YORK, INC.,

Respondent.

Docket No. 88-1847

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on September 6, 1991. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 6, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-1847

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

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v.

CONTRACTORS WELDING OF WESTERN NEW YORK, INC.,

Respondent.

OSHRC Docket No. 88-1847

DECISION

Before: FOULKE, Chairman; WISEMAN, Commissioner.*/

BY THE COMMISSION:

Contractors Welding of Western New York, Inc., was performing repairs on the Ferry Street Bridge, a metal drawbridge in Buffalo, New York, when a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA") inspected the worksite. When the CO arrived, two welders employed by Contractors Welding were standing on an abutment working on the understructure of the drawbridge. Based on the facts that the water was 15 to 20 feet deep and the employees, who were wearing work boots and heavy clothing, were standing within two feet of the edge of the abutment, the CO believed that, if a welder had fallen in, he could

*/ Commissioner Montoya did not participate in the deliberations on this case or in the issuance of this decision.

have drowned. Subsequently, OSHA issued a citation alleging that Contractors Welding had committed serious violations of a number of OSHA safety standards, including the standards at 29 C.F.R. § 1926.106(a) and § 1926.106(c).

The company contested the citation, and a hearing was held before an administrative law judge of the Review Commission. The judge found that Contractors Welding had violated the two above-cited standards. His decision on those two items of the citation has been directed for review pursuant to section 12(j) of the Occupational Safety & Health Act of 1970 ("the Act"), 29 U.S.C. § 661(j). Based on our review of the record as a whole, we affirm the judge's disposition of the item alleging a violation of 29 C.F.R. § 1926.106(c), and we reverse his finding of a violation of section 1926.106(a) and vacate that item.

I.

Section 1926.106(a) provides that: "Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket[s] or buoyant work vests." (emphasis added). The Secretary does not dispute that Contractors Welding had life vests available at the worksite. However, the welders were not wearing them at the time of the inspection, because, according to their testimony, they believed that the vests could trap small particles of molten metal, causing burns on their bodies. In addition, they believed that the vests

themselves could catch fire, which could cause serious burns.[1/] The question before us is whether the company's failure to require the welders to wear life vests constituted a violation of the standard.

This is not a case of first impression. The first time the Commission confronted this issue, it held 2-1, over a strong dissent, that there was a violation because the employees were not wearing the vests. G.A. & F.C. Wagman, 2 BNA OSHC 1297, 1974-75 CCH OSHD ¶ 18,882 (No. 1284, 1974). The majority concluded that section 1926.106(a) must be read together with section 1926.106(b), which provides that, "Prior to and after each use, the buoyant work vests or life preservers shall be inspected for defects which would alter their strength or buoyancy. Defective units shall not be used." The majority reasoned:

> [W]e note that if part (a) of the standard were interpreted to require only the provision of life jackets, the effect of part (b)'s requirement that life jackets be inspected before and after each use, would become insignificant. Furthermore, part (a) is qualified in its application to situations "where the danger of drowning exists." To give sense to the qualification, a use requirement is necessarily implicit in the standard.

2 BNA OSHC at 1298, 1974-75 CCH OSHD at pp. 22,702-03.

Three years later, a two-member Commission issued Harbert Construction Corp., 5 BNA OSHC 2076, 1977-78 CCH OSHD ¶ 22,316 (No.

[1/] There was conflicting testimony as to whether the two welders were tied off with safety belts and lanyards. The administrative law judge credited the testimony of the CO that he did not see the employees wearing belts. On review, Contractors Welding has challenged the judge's finding. In view of our disposition of this item, however, we need not address that question.

13578, 1977). A new commissioner, who had not participated in Wagman, expressed the opinion that the holding in Wagman was incorrect. However, because there were only two commissioners and they disagreed in their views concerning Harbert, there could be no majority opinion. The decision in Harbert reflects that the new commissioner therefore voted to find a violation solely on the basis that Wagman was controlling Commission precedent.

More recently, in considering a different OSHA standard, the Commission again held that the word "provide" contained an implicit requirement that the safety equipment be used. Borton, Inc., 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982). That decision was appealed, and the court of appeals reversed the Commission's decision. Borton, Inc. v. OSHRC, 734 F.2d 508 (10th Cir. 1984). The court cited its earlier decision in Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977), stating,

> In Kennecott we rejected the argument that [the cited standard] requires employers to ensure that its employees use access ladders. We held that the plain meaning of the phrase "shall be provided" is that an employer must furnish or make available an access ladder and that the regulation could not be read as directing employers to require use of an access ladder. ... In Kennecott we declared that the term "provide" is not ambiguous. 577 F.2d at 1119. Thus, there is no need to look beyond the face of [the standard] to discover the meaning of "provide."

734 F.2d at 510. Following the court's decision in Borton, the Commission reconsidered whether "provide" means "use" in Pratt & Whitney Aircraft Group, 12 BNA OSHC 1770, 1986-87 CCH OSHD ¶ 27,564 (No. 80-5830, 1986), aff'd, 805 F.2d 391 (2d Cir. 1986), and adopted the Tenth Circuit's reasoning in Borton.

In Pratt & Whitney, the Commission noted that it had previously considered a number of cases in which the Secretary had argued that "provide" means "require the use of," and that it had read that term to mean "supply" unless related standards contained an explicit use requirement. The Commission compared the standard under which Pratt & Whitney had been cited with other standards in the same section and found that, when the drafters of the standards had wanted to impose a requirement for the employer to do more than merely furnish protective equipment, they had used terms which clearly indicated that intent. In addition, in Pratt & Whitney, the Commission examined the definitions of the term "provide" in dictionaries. In its decision, the Commission held that the word "provide" is not ambiguous and that it is commonly understood to mean "furnish" or "make available." The Commission concluded that there was no reason to believe that the term had been used in any sense other than its dictionary meaning.

The Commission's decision in Pratt & Whitney was appealed to the Court of Appeals for the Second Circuit and was affirmed in an unpublished decision. We now reaffirm our determination in Pratt & Whitney that the word "provide" is not ambiguous and that it means "make available."

The Secretary of Labor asserts that "[i]t is well-established that courts owe deference to an agency's interpretation of its own regulations," citing Udall v. Tallman, 380 U.S. 1 (1965). That case states that the Supreme Court shows great deference to an agency's interpretation when it confronts a problem of statutory construction. 380 U.S. at 16. It is not appropriate to resort to

principles of statutory construction, however, when a statute or standard is not ambiguous.[2/] Since the word "provide" is not ambiguous, the rules governing statutory construction and deference to an agency's interpretation do not apply here and it is not necessary to go beyond the face of 29 C.F.R. § 1926.106(a) to determine its meaning. The majority in Wagman therefore erred in construing section 1926.106(a) together with section 1926.106(b), and we now overrule that decision.

Even if section 1926.106(a) were ambiguous, the Secretary's interpretation would be entitled to deference only if it were a reasonable one. Martin v. OSHRC (CF&I Steel Corp.), 111 S.Ct. 1171, 1180 (1991). Here, the Secretary's interpretation of the word "provide" stretches the word far beyond its commonly-understood meaning. The interpretation thus runs counter to the principle that the Commission should not strain the plain and natural meaning of the words of a standard to alleviate a hazard. General Electric Co. v. OSHRC, 583 F. 2d 61, 67 (2d. Cir. 1978). Therefore, we conclude that the Secretary's interpretation simply is not a reasonable interpretation of the standard. Accordingly, that interpretation is not entitled to deference. Indeed, the courts of appeals that have considered the argument that "provide"

[2/] When the terms of a statute are unambiguous, inquiry goes no further. Howe v. Smith, 452 U.S. 473, 483 (1981); Caminetti v. United States, 242 U.S. 470, 485 (1917) (where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and rules which are to aid doubtful meanings need no discussion); McCord v. Bailey, 636 F.2d 606, 614-15 (D.C. Cir. 1980); cf. TVA v. Hill, 437 U.S. 153, 184 n.29 (1978) (when statute is unambiguous on its face, we do not look to legislative history for its meaning) (citing Ex parte Collett, 337 U.S. 55, 61 (1949)).

includes a requirement to use in Kennecott, Borton, and Pratt & Whitney all rejected it.

The Secretary further argues that the language of a standard is not to be construed in a way that leads to implausible results. We believe that to hold that the word "provide" means "require the use of" would be an implausible result. Since every court of appeals that has considered the question has held that "provide" does not mean "require the use of," and we know of no dictionary, including legal dictionaries, that gives--or even suggests--that meaning, it would be improper for us to expand the standard beyond its plain meaning.

The Secretary also argues that, if the standard is not read so that it implicitly requires the life vests to be worn, the standard is ineffective in achieving the remedial purposes of the Act. We share the Secretary's concern that such a holding may afford employees less protection than would be the case if we adopted the Secretary's position, because employees who are given the option of whether to use life vests or other types of safety equipment may elect not to and may therefore be exposed to drowning and other hazards. However, "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." Diamond Roofing Co. v. OSHRC, 528 F. 2d 645, 649 (5th Cir. 1973).

Although we recognize that the Secretary has formulated her interpretation of section 1926.106(a) for the laudable purpose of

protecting employees, a standard must clearly state what an employer is required to do in order to comply.

> The purpose of OSHA standards is to improve safety conditions in the working place, by telling employers just what they are required to do in order to prevent or minimize danger to employees. In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words in a standard to alleviate an unlikely and uncontemplated hazard. The responsibility to promulgate clear and unambiguous standards is upon the Secretary. The test is not what he might possibly have intended, but what he said. If the language is faulty, the Secretary has the means and the obligation to amend.

General Electric Co. v. OSHRC, 583 F.2d at 67 (quoting Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157, 161 (3d Cir. 1978)). If the Secretary wishes for standards using the word "provide" also to require the use of the equipment provided, the proper course would therefore be for her to amend those standards to make that requirement explicit. We urge the Secretary to determine which of the standards requiring an employer to provide protective equipment should also require that the equipment be used and then to fulfill her obligation to amend those standards to specify that requirement.

II.

Contractors Welding was also cited for a violation of 29 C.F.R. § 1926.106(c), which provides:

> (c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

The CO testified that, during his inspection, Contractors Welding's foreman had told him that there was not a ring buoy at the worksite. At the hearing, the company presented testimony that there were two: one, belonging to the city, was located in the pilot house of the bridge; another, owned by Contractors Welding was located on a barge moored about 40 feet from where the welders were working.

The record clearly shows that the ring buoy on the barge had only about 50 feet of line, not the 90 feet required by the standard. It therefore did not comply with the standard's requirement that there be "at least 90 feet of line."

There is a photograph in evidence that shows the city's ring buoy in the pilot house. From that exhibit, it appears that the city's ring buoy did not have 90 feet of line attached to it, either.[3/]

Contractors Welding points out that the ring buoy in the pilot house was part of the standard equipment on the bridge and argues, "[p]resumably, a ring buoy permanently maintained as safety equipment at a government bridge over a navigable waterway satisfies pertinent federal requirements." We cannot agree with that presumption. The "federal requirements" cited here are safety standards governing the construction industry. They do not apply

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[3/] In fact, it appears that the cord in the photograph is not "line" at all, but an electrical cord.

to state and local government employees. See 29 U.S.C. § 652(5)-(6). While the ring buoy may comply with whatever standards would apply to the operation of a drawbridge over navigable waters, we are unwilling to presume that the city, which operated the bridge, complied with OSHA standards that do not apply to its activities.

Even if we view all the evidence in the light most favorable to the company, we cannot say that either ring buoy had 90 feet of line attached. We therefore find that the Secretary has proved by a preponderance of the evidence that Contractors Welding was not in compliance with 29 C.F.R. § 1926.106(c).

Section 17(k) of the Act provides that a violation is serious if, as a result of that violation, there is a substantial probability that death or serious physical harm could occur. Here, the record establishes that an employee who fell into the water could drown, so the failure to have a ring buoy with adequate line could result in death. The violation was therefore serious.

Section 17(j) of the Act provides that we shall assess appropriate penalties for violations, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). The record shows that Contractors Welding had 45 or 46 employees and that the company had received several citations in the past. The Secretary proposed a penalty of $480 for this item. Having considered the evidence in the record

on the factors set forth in the statute, we find that penalty to be appropriate.

III.

For the reasons stated above, we reverse the decision of the administrative law judge and vacate item 1 of the citation alleging a serious violation of 29 C.F.R. § 1926.106(a), and the penalty proposed for that item. We affirm the judge's disposition of item 3 of the citation finding that Contractors Welding committed a serious violation of 29 C.F.R. § 1926.106(c). We assess a penalty of $480 for that item.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Dated: September 6, 1991

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, N.W.
4TH FLOOR
WASHINGTON, D.C. 20006-1246
February 28, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

Contractors Welding of Wny, Inc. OSHRC DOCKET NO. 88-1847

NOTICE IS GIVEN TO THOSE LISTED BELOW:

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Buffalo, N. Y. 14202

Richard DeBenedetto, Judge
Occupational Safety & Health Review Commission
John W. McCormack Post Office and Courthouse Room 420
Boston, MA 02109

NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on February 28, 1990. The decision of the Judge will become a final order of the Commission on March 30, 1990 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before March 20, 1990 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91.*

All pleadings or other documents that may be filed shall be addressed as follows:

Executive Secretary
Occupational Safety and Health Review Commission
1825 K St., N.W., Room 401
Washington, D.C. 20006

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

*A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D.C. 20210. If a Direction for Review is filed the Counsel for Regional Trial Litigation will represent the Department of Labor.

(1/87)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, :

Complainant :

v. : OSHRC Docket No. 88-1847

CONTRACTORS WELDING OF WNY, INC., :

Respondent :

- - - - - - - - - - - - - - - - - - -

Appearances:

Alan L. Kammerman, Esq., for Complainant
Wayne R. Gradl, Esq., for Respondent

DECISION AND ORDER

Contractors Welding of WNY, Inc. (Contractors), is charged with serious[1] violations of four construction safety standards which read as follows:

29 C.F.R. § 1926.106 -- WORKING OVER OR NEAR WATER

> (a) Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.
>
> (c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

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[1] A serious violation is deemed to exist "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

> (d) At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

29 C.F.R. § 1926.500:

> (d) Guarding of open-sided floors, platforms, and runways
>
> (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder . . . .

Contractors is a New York construction company specializing in steel erection and welding. The 4-item citation arises out of an inspection conducted by an OSHA compliance officer on July 13, 1988, at the Ferry Street Bridge in Buffalo, New York, where Contractors was engaged in repairing the steel bridge.

At the commencement of his inspection, the compliance officer conferred with Contractors' project foreman, Joseph Calleri. During their conversation, the compliance officer observed two employees positioned on a concrete bridge abutment about 3 or 4 feet below the compliance officer. Although his view was partially obstructed, he was able to see both of the employees "from the shoulders to the waist" (Tr. 50, 78). They were working on the understructure of the bridge while standing within 2 feet of the open side of the abutment, some 8 feet above

the water's edge (Tr. 17, 21-22, 25). The water was some 15 to 20 feet deep, and, according to the compliance officer's testimony, there was no fall protection being used (Tr. 22, 39, 42-44).

The compliance officer also testified that the two employees who were working on the understructure of the bridge were not wearing a life jacket (Tr. 21, 24); that he did not see any ring buoy or lifesaving skiff available at the site; and that when he questioned Contractors' project foreman concerning the ring buoy, the foreman stated that he did not have one at the site (Tr. 31).

The testimony of Contractors' witness, Charles Lewis, directly contradicts that of the compliance officer regarding safety belts. Lewis, an iron worker who "work[s] out of a union hiring hall" (Tr. 85), was employed by Contractors at the site in question. He was one of the two men observed by the compliance officer working on the abutment near the water's edge. Lewis testified that both he and his co-worker were using safety belts attached to lifelines secured to the overhead structure of the bridge (Tr. 86, 90-91).

Lewis testified at one point as to why the compliance officer did not observe them wearing safety belts when they approached the compliance officer after briefly leaving their work station as the bridge was raised for the passage of ships (Tr. 91-92):

> Q. Okay. Now, Mr. Newton testified there came a time where you and the gentleman you were working with -- Well, before we go to that, do you know the name of the gentleman you

were working with?

A. Tommy, Tommy Gombos.

Q. Okay.

A. I don't know how you spell it.

Q. And was he wearing a safety belt?

A. We both were. I insisted on it. It's just common sense.

Q. And he was tied off to the bridge as well?

A. Uh-huh.

Q. Was he also working welding that day?

A. Yes. Well, burning, welding, air arking [sic], chipping, whatever was required of the time, but we're both welders.

Q. Thank you. Now, Mr. Newton testified there came a time where you and Mr. Gombos came up top because the bridge was being raised.

A. Yeah.

Q. Okay.

A. Up and down all day.

Q. And what did you do with respect to the safety belt and the line?

A. I don't know, I hang mine on the bridge. I had a clip like there. I take it off, hang it on there to go up with the bridge. Tommy had a pail, he'd thrown his in the pail. You're not gonna wear the thing any more than you have to, especially when you're climbing up and down.

Q. And you had tools and things --

A. I got all my stuff in it, yeah.

Q. What about Mr. Gombos?

A. Same thing. In fact, he was even carrying spud wrenches, too.

Q. All right. So, it's a practice for welders then to wear safety belts that have --

A. Absolutely.

Q. -- a compartment for your tools? Okay.

A. Can't work without it.

The compliance officer conceded that because of the limited height of the bridge at the point of the abutment, guarding the open side of the abutment with a standard railing, as required by the cited 500(d)(1) standard, would have been infeasible (Tr. 42-43). The compliance officer also acknowledged that if the employees had been secured by safety belts then neither life jackets nor ring buoys would have been required (Tr. 44).

Contractors contends that under the 106(a) standard the employer's duty is limited to "providing" life jackets and does not call for the employer to require that the device be used. This argument flies in the teeth of a long line of Commission cases which hold that a standard that requires an employer to provide a safety device implicitly requires that the device be used. Barton, Inc., 10 BNA OSHC 1462, 1465, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982), and cases cited therein.

It is also argued that wearing a life jacket while welding poses a fire hazard to the welder. Michael Fitzpatrick, a representative of the Iron Workers Union, was called by Contractors and testified on direct examination that there were cases where welders using life jackets while welding suffered

severe burns (Tr. 7). However, on cross-examination the witness could recall only one instance "in the early 70's" when a welder's life jacket "caught on fire"; and he had no knowledge as to whether life jackets have since been made of nonflammable or flame-resistant material (Tr. 11).

Contractors also introduced evidence regarding an "experiment" performed by Contractors' vice president, Michael Gast, which consisted of applying a "BIC" butane lighter to a U.S. Coast Guard-approved life jacket (Tr. 110-112, 119, Exhs. R-4, R-5). Gast described the experiment as follows (Tr. 112):

> A. I held it up like so and took a lighter and went like that and it immediately caught on fire and the flame grew and we had problems extinguishing it by stepping on it, what have you. We actually had to submerge it in water to put it out.[2]

This evidence is unpersuasive for two reasons: Test results have little or no probative value unless the opposing party had the opportunity to participate in the test. Fortunato v. Ford Motor Co., 464 F.2d 962, 966 (2d Cir. 1972). The Secretary was not given such an opportunity, and no independent verification was offered. Additionally, Contractors asks us to assume that a flame from a butane lighter would have the same effect as sparks or molten globules of welding metal. The evidence does not permit such an assumption.

Even if the test results were accepted as strong evidence in

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[2] This testimony was contradicted by the compliance officer who testified that Coast Guard-approved life jackets are "noncombustible" which causes the jackets to "melt" but not burn (Tr. 62).

Contractors' favor, in order to establish the greater hazard defense, it must be demonstrated that (1) the hazards of compliance are greater than the hazards of noncompliance, (2) alternative means of protecting employees are unavailable, and (3) a variance is unavailable or inappropriate. Modern Drop Forge Co. v. Secretary of Labor, 683 F.2d 1105, 1116 (7th Cir. 1982).

Contractors argues that its employees were protected from falling into the water by using safety belts which obviated the need for using life jackets. The only witness presented by Contractors who was present at the jobsite when the compliance officer conducted his inspection was Charles Lewis whose testimony, as previously noted, is directly at odds with the compliance officer's version of the events regarding the use of safety belts. One obvious point which apparently everybody recognizes is that the use of safety belts would have rendered the use of a guardrail as well as life jackets and ring buoys unnecessary (Tr. 42-44). This being the case, one is immediately struck by the glaring incongruity in Lewis's testimony. On the one hand he claimed that both he and his co-worker were using safety belts at the time in question, yet, although he participated in the closing conference[3] with Contractors' foreman and the compliance officer, Lewis was quite certain that the two

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[3] A "closing conference" takes place at the conclusion of an OSHA inspection at which time the compliance officer confers with the employer or his representative and informally advises him of any apparent violations disclosed by the inspection. 29 C.F.R. § 1903.7(e).

main topics of discussion were life jackets and a guardrail, and he had no recollection of a discussion regarding safety belts (Tr. 59-60, 101-102, 105-106).

Lewis's testimony was not without other points of incredibility. Focusing on a part of his previously quoted testimony, it is to be noted that when he was asked on direct examination to explain what he did with the safety belt and lifeline when he and his co-worker had to temporarily leave their work station while the bridge was raised, he seemed uncertain at first:

> A. I don't know, I hang mine on the bridge. I had a clip like there. I take it off, hang it on there to go up with the bridge. Tommy had a pail, he'd throw his in the pail. You're not gonna wear the thing any more than you have to, especially when you're climbing up and down.
>
> Q. And you had tools and things --
>
> A. I got all my stuff in it, yeah.
>
> Q. What about Mr. Gombos?
>
> A. Same thing, in fact, he was even carrying spud wrenches, too.

Lewis's statement is not free from improbability. Given the relatively substantial size and weight of safety belts, serious doubt is raised that an ordinary "pail" would have the capacity to hold a safety belt and the tools of a welder. Moreover, it is incredible that employees would risk losing their equipment by hanging them on a bridge that was about to be raised over a 15- or 20-foot-deep span of water. The compliance officer had ample opportunity to observe the two employees "from the shoulders to

the waist" while they were engaged in repairing the bridge. His testimony as to the absence of a life belt is credible.

With respect to the 106(c) standard requiring ring buoys, the compliance officer testified that he did not observe any ring buoys at the site, and that when he questioned Contractors' foreman as to whether a ring buoy was available at the site, the compliance officer was informed that there was none (Tr. 31). Contractors argues that the evidence establishes there were two ring buoys at the site; one was located in the pilot house some 150 feet away from where the employees were working, and the other was located on the barge that was moored 40 feet away, as supported by the testimony of Charles Lewis and Michael Gast, the latter having visited the jobsite daily as Contractors' field manager (Tr. 93-94, 108-110). The compliance officer acknowledged that he did not inspect either the pilot house or the barge (Tr. 67). The issue here is whether Contractors has presented sufficient evidence to overcome the admission made to the compliance officer by Contractors' foreman.

Contractors introduced a photograph (Exh. R-1) depicting the ring buoy located in the pilot house. When Gast was cross-examined as to the length of the line shown in the photograph he answered that he was "not sure how long the line is" (Tr. 114). Although the photograph shows the line hanging in several loops, the amount of the line is such that it may reasonably be inferred it falls far short of the 90 feet required by the standard. When Gast was questioned as to the line located on the barge, he said

it was approximately 50 feet (Tr. 116). Even if this testimony were to be credited, it hardly demonstrates full compliance. But the record raises serious doubts about the truthfulness of the statements themselves.

Contractors' answer to the complaint specifically refers to only one ring buoy, located in the pilot house:

> Defense to Part VI of the Complaint
>
> A co-owned life ring was available from start of project through completion. It was attached to a wall in the main pilot house located in the center of the bridge of which it is less than 90' in any direction to end of water and work areas. See attached employee's statement.

Not only is there no mention of a second ring buoy located on the barge, it is significant to note that the pilot house ring is described as "co-owned." When Gast, Contractors' vice president, was cross-examined regarding the pilot house ring, the following colloquy occurred (Tr. 115-116):

> Q. Well, do you know how many feet of line the company had attached to this ring buoy?
>
> A. That's not our ring buoy. That's the city owned ring buoy. I can tell you how much rope is on our buoy.
>
> Q. Where was your buoy?
>
> A. On the barge about 40 feet away from the work area.

One would think it natural under the circumstance for Contractors to have called its job foreman to appear as a witness in its behalf since he apparently was the person who was in charge at the time of the OSHA inspection and had discussions with the compliance officer regarding the various items in

dispute. The fact that Contractors did not produce the foreman gives rise to the presumption that his testimony, if produced, would be unfavorable.[4] U.S. v. Mahone, 537 F.2d 922 (7th Cir. 1976).

With respect to the 106(d) standard calling for a lifesaving skiff, Contractors contends that the barge shown in the photograph marked as Exh. C-1, which was used as a work platform by both Contractors and a painting subcontractor (Tr. 68, 94), satisfied the requirements of the standard. There is no ground in logic or law for accepting this view. In its answer, Contractors described the boat as a 12-foot barge "hooked to cables under the [bridge] structure."[5] The testimony establishes that it was a flat-bottomed barge; the photographic evidence demonstrates that it was apparently wider than its 12-foot length. When Gast was cross-examined as to the barge's mobility should an emergency situation arise, the following exchange took place (Tr. 117):

> Q. So that the way that the barge moved was via pulling on a line?
>
> A. You could do it either way. You could pull yourself along the bridge, the cables, use a line, numerous ways.
>
> Q. Well, I'm not sure if I understand what you mean by the term "use a line." Can you explain how that moves the barge by using a line?

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[4] A written statement by Lewis's co-worker, Thomas Gombos, which is attached to Contractors' answer is excluded as hearsay.

[5] Michael Gast, Contractors' vice president, testified that the barge was secured to the bridge by rope (Tr. 110).

A. Sure. You could throw it to somebody somewhere else, you could secure it somewhere else and pull it or you could let if float to that position.

Q. Okay. Then if I understand the situation, the barge didn't have like anything like a motor --

A. No, it was not motored.

Q. -- or some other way of maneuvering it other than with the lines that you've been explaining, right?

A. Or you could pull yourself along the structure.

A "skiff" is defined as a small light sailing ship, a light rowboat, or a small fast powerboat. Webster's Third New International Dictionary, 1971 edition. Given the intended use under the standard, a flat-bottomed barge propelled by a person or persons pulling on a rope manifestly does not qualify as a skiff.

All four items of the citation relate to safeguarding against the danger of drowning. As previously noted, the use of life jackets and ring buoys would have been redundant if the employees had been secured by safety belts (Tr. 44). Inasmuch as the use of a railing along the open-sided abutment (the fourth item of the citation) has been acknowledged as infeasible, and the use of safety belts has also been acknowledged as an alternative means of protection, which would not be required if the Secretary's charges relating to the life jackets and ring buoys are to be sustained, therefore, in order to avoid a duplication of charges, the fourth item of the citation shall be

vacated.

The Secretary proposes to assess $480 for each of the remaining three items which relate to safeguarding against the potential danger of drowning. If an employee had fallen into the water without any of the safety devices in place, there was a substantial probability that serious physical harm or death could have resulted from the existing working conditions. The Secretary's penalty recommendations are in accord with the criteria set out in 29 U.S.C. § 666(j).[6]

FINDINGS OF FACT

1. Two of Contractors' employees worked near the edge of a concrete bridge abutment, some 8 feet above water that was at least 15 feet deep.

2. Although there was a danger of drowning, the employees did not wear life jackets or buoyant vests.

3. Life jackets or buoyant vests were not infeasible due to claimed fire hazard.

4. A ring buoy with at least 90 feet of line was not readily available at Contractors' worksite.

5. A lifesaving skiff was not available where Contractors' employees were working adjacent to water.

6. Contractors' employees did not have any kind of fall

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[6] Section 17(j), 29 U.S.C. § 666(j), provides:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

protection while working near the edge of the concrete bridge abutment.

7. Guarding the open edge of the concrete bridge abutment by the use of a standard railing was infeasible; however, an alternative means of protecting the employees from falling in the water was available in the form of safety belts which Contractors' employees did not use.

8. If Contractors' employees had used safety belts neither life jackets nor ring buoys would have been required.

9. The failure to take protective measures while working over or near water exposed Contractors' employees to serious injury or death and Contractors should have known of the violative conditions.

CONCLUSIONS OF LAW

1. Contractors seriously violated the standards at 29 C.F.R. §§ 1926.106(a), (c), and (d), and a penalty of $480 is appropriate for each of the three violations.

2. The charge of violating the standard at 29 C.F.R. § 1926.500(d)(1) is not warranted.

ORDER

It is ordered that the citation is affirmed to the extent indicated, item 4 of the citation alleging violation of section

1926.500(d)(1) is vacated, and a total penalty of $1,440 is assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: February 23, 1990
Boston, Massachusetts