SECRETARY OF LABOR, Complainant, v. CHRISTIE CONSTRUCTORS, INC., Respondent.	OSHRC DOCKET NO. 97-1835

APPEARANCES:

For the Complainant:
Cathy Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:
James Hinson, Janet M. Atkinson, Make-It-Safe Services, Inc., Foster City, California

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

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

Respondent, Christie Constructors, Inc. (Christie), at all times relevant to this action maintained a place of business at the I-5 bridge project, Vancouver, Washington, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 6, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Christie's Vancouver work site. As a result of that inspection, Christie was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Christie brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 22-23, 1998, a hearing was held in Seattle, Washington. The parties have submitted briefs on the issues and this matter is ready for disposition.

Jurisdiction

As a threshold issue, Christie argues that the subject construction operation was located in Washington state and was, therefore, subject to the provisions of Washington's Industrial Safety and Health Act (WISHA), rather than Federal OSHA regulations.

Facts

Christie's I-5 worksite consisted of two barges anchored together on the Washington side of the Columbia River, navigable waters marking the boundary between Washington and Oregon (Tr. 70-71)[1]. The outermost barge was anchored and secured with "spuds," *i.e.* piles going through the barge and driven into the river bottom (Tr. 104, 221, 224). The second barge was secured on the shore side of the first by means of cables and ropes, forming a stationary floating platform (Tr. 221-22). No maritime or longshoring operations were performed at Christie's work site (Tr. 205).

John Spear, the Assistant Regional Administrator for federal and state operations in the Seattle Regional Office, testified that "OSHA's policy has always been that federal OSHA has jurisdiction on all navigable waters. Of any vessel or craft or construction project that's on the navigable waters." (Tr. 34). Wendy Drapeau, a compliance supervisor for WISHA, testified that when her inspectors observed probable safety violations on Christie's barge, she called in a referral to OSHA, believing that WISHA had no jurisdiction on the navigable waters of the United States (Tr. 182-83).

Washington's state plan, adopted in 1973, is described at 29 CFR 1952.120 **Subpart F**. Section 1952.122 **Level of Federal enforcement** provides that:

> . . .based on a determination that Washington is operational in the issues covered by the Washington occupational safety and health plan, discretionary Federal enforcement authority under section 18(e) of the Act (29 U.S.C. 667[e]) will not be initiated with regard to Federal occupational safety and health standards in issues covered under 29 CFR part 1910 and 29 CFR part 1926, except as provided herein. The U.S. Department of Labor will continue to exercise authority, among other things, with regard to enforcement of . . . Federal standards contained in 29 CFR 1910.15, Shipyard Industry, and 1910.18, Longshoring, as they relate to employment under the exclusive jurisdiction of the Federal government on the navigable waters of the United states, including dry docks and marine railways; . . ..

Similarly, ¶4 of Washington's 1978 agreement with OSHA provides:

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[1] Contrary to Christie's assertion in its reply brief, it is not dispositive that the barges were anchored 100-150 feet from shore rather than in a "navigable" channel of the Columbia River. OSHA's regulatory authority over the waters of the United States, granted by Congress pursuant to the Commerce Clause of the Constitution, does not depend on a stream's 'navigability'. *See; Kaiser Aetna v. U.S.*, 444 U.S. 164, 165 (1979).

Federal responsibility under the Act will continue to be retained and/or exercised among other things with regard to:

* * *

a) Enforcement of Federal occupational safety and health standards contained in the issues covered by 29 CFR 1910 Subpart B - Ship Repairing, Shipbuilding, Shipbreaking, and Longshoring, as they relate to employment under the exclusive jurisdiction of the Federal Government on the navigable waters of the United States, including dry docks, graving docks and marine railways, further defined by attached memorandum dated December 18, 1972.

The December 18, 1972 Memo (Exh. C-3) addresses state jurisdiction of "maritime related activities" under 18(b) plans, *i.e.*, longshoring, ship repair, shipbreaking, and related activities, which, when occurring on navigable waters, come under federal jurisdiction.

Discussion

OSHA's underlying authority to enforce the Act with respect to workplaces located on navigable waters is not disputed. *Cf., Tidewater Pacific Inc.*, 17 BNA OSHC 1923 (No. 93-2529, 1997). Rather Christie maintains that such authority was delegated to Washington State pursuant to Washington's adoption of its own occupational safety and health plan, as contemplated by §18 of the Act. Christie maintains that OSHA's agreement with Washington State specifically limits OSHA's current enforcement authority to maritime activities taking place on navigable waters. Christie argues that the construction activities which are the subject of this action are not maritime activities, and that the application of Federal jurisdiction is improper.

The Secretary argues that the Department of Labor retains jurisdiction of all activities affecting the safety and health of workers on the navigable waters of the United States, and that its failure to specifically list non-maritime construction activities under §1952.122 is not fatal.[2]

This judge agrees. In *Department of Labor and Industries of the State of Washington, v. Dirt & Aggregate, Inc.*, 837 P.2d 1018, the Supreme Court of Washington found that WISHA had no jurisdiction to enforce worker's safety laws in a national park, despite OSHA's failure to specifically exclude federal enclaves from WISHA coverage under §1952.122 **Level of Federal enforcement.** The court in that case noted that the language in OSHA's agreement with Washington State "does not purport to define the

[2] Complainant points out that Federal maritime jurisdiction is exclusive and cannot be delegated to the States. The Secretary, however, has not shown a nexus between the construction activities which are the subject of this action and traditional maritime activities. It is not clear, therefore, that maritime jurisdiction would attach. Because the parties to the Secretary's agreement with Washington State agree on the scope of OSHA's jurisdiction over this matter, resolution of this issue is unnecessary.

universe of exclusive federal jurisdiction and actually contains language ('among other things') demonstrating the opposite intent" *Id*. at 1022.

The Washington State plan does not specifically reserve federal jurisdiction over the enforcement of 29 CFR part 1926 on all vessels located on the navigable waters of the United States. However, representatives of both Washington State and the Department of Labor agree that jurisdiction in such cases generally, and in this matter specifically, lies with Federal OSHA. I find that the testimony reflects the original intent of both the Secretary of Labor and the State of Washington, and that OSHA retains jurisdiction over non-maritime construction occurring on vessels located on the navigable waters of the United States.

Alleged Violation of §1926.106(d)

Citation 1, item 1 alleges:

29 CFR 1926.106(d): A lifesaving skiff was not immediately available at locations where employees were working over or adjacent to water:

a. A lifesaving skiff was not provided at the 1-5 bridge construction project on the Columbia River in Vancouver, Washington.

Facts

On September 12, 1997, when OSHA Compliance Officer (CO) Charles Penrod arrived at Christie's I-5 work site, he found that there was no lifesaving skiff at the barge (Tr. 72-73). Penrod stated that a skiff was required to ensure the rescue of any employee who might fall into the swift, cold river (Tr. 73-74). Gary Boswell, Christie's superintendent on the I-5 bridge project (Tr. 198), admitted that the designated work activities made "momentary" employee exposures necessary, *i.e.* for tightening guy wires (Tr. 208). Boswell testified that 95% of the work was planned to keep employees away from the edge of the barge (Tr. 208, 240). William Hansford, a safety inspector with WISHA, testified that he observed Christie employees working at the edge of the barge prior to referring the matter to OSHA (Tr. 466; Exh. C-12)[3].

Discussion

The cited standard provides:

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

[3] In its reply brief, Christie contends that OSHA's failure to identify the exposed employees prejudices its defense. In light of Superintendent Boswell's admissions, I find the contention without merit.

It is undisputed that there was no lifesaving skiff available at Christie's work site, where employees were working over and/or adjacent to water. The cited violation has been established.

Penalty

A penalty of $1,750.00 was proposed for this item.

Christie is a small employer, with 27 employees, and no history of prior OSHA violations (Tr. 75).

CO Penrod testified that because of the cold water and the swift current, an employee falling into the river was likely to drown, and stated that the violation was, therefore, classified as "serious" (Tr. 73-74). Penrod testified that Christie did have life rings on the barge with 90 feet of line; only with a skiff could rescue efforts exceed that distance (Tr. 77). Penrod stated that nine employees were working on the barge, none of whom were wearing properly fastened life jackets (Tr. 74). Penrod believed that the probability of an accident occurring was high, and that the gravity of the violation was severe (Tr. 81).

Penrod testified that no credit was allowed for good faith because of the gravity of the violations (Tr. 75), but that Christie was cooperative, and corrected the violations which could be immediately addressed (Tr. 93). At the closing conference Christie told Penrod that arrangements had been made to obtain a skiff, which would be on the site that afternoon (Tr. 73). Boswell testified that skiffs had been provided from Christie's rented derrick barge prior to September 10; when the barge was returned, Christie ordered a skiff, which was delivered on the afternoon of September 12 (Tr. 232-33; Exh. R-4).

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Factors to be considered in determining the gravity include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The Secretary showed that Christie employees were exposed to a drowning hazard[4] for short periods over a period of at least two days. I find, however, that the CO overstated the gravity of the cited violation, in that the probability of an accident occurring during those brief periods was low. I also find that Christie was engaged in a good faith effort to obtain the required skiff before the OSHA inspection. Taking

[4] Christie's contention that there is no real danger of drowning is without merit. Christie contends that an employee in the water would be captured by a "camel," or guardrail around the base of a restaurant pier 200 feet downstream. As pointed out by Safety Inspector Hansford, a man in the water could be swept by, or drown before reaching the camel (Tr. 393).

into account the relevant factors, I find that the proposed penalty is excessive and that a penalty of $1,000.00 is appropriate.

Alleged Violation of §1926.605(b)(2)

Citation 1, item 2 alleges:

29 CFR 1926.605(b)(2): A ramp meeting the requirements of paragraph (b)(1) of this section was not provided where employees could not step safely to or from a wharf, float, barge or river towboat:

a. The guardrail on the ramp between the tower crane structure and the work barge was of insufficient height, as was the midrail, at the I-5 bridge project on the Columbia River in Vancouver, Washington.

b. The midrail was missing on the first level of the tower crane below the bridge walkway, at the I-5 bridge project on the Columbia River in Vancouver, Washington.

Facts

CO Penrod testified that a ramp between the tower crane and the barge was inadequately guarded (Tr. 78). Penrod stated that one of the uprights had slipped; as a result the hand rail was not taut, and sagged to within 27 inches of the ramp deck in some places (Tr. 79, 163; Exh. C-5, R-2). The midrail was 10 inches from the ramp deck (Tr. 80). Penrod testified that the hand rail as it was configured would provide no stability (Tr. 80). Employees used the walkway to access the barge, crossing six or seven feet of water between the end of the barge and the outside face of Christie's tower crane (Tr. 139, 153).

Penrod also stated that there was no midrail on the first level of the tower crane itself (Tr. 79).

Discussion

The cited standard provides:

> Unless employees can step safely to or from the wharf, float, barge, or river towboat, either a ramp, meeting the requirements of paragraph (b)(1) of this section, or a safe walkway, shall be provided.

Paragraph (b)(1) states that ramps "shall be of adequate strength, provided with side boards, well maintained and properly secured." "Safe walkway" is not defined.

The cited standard does not appear to be applicable, in that it contains no handrail requirements. The Secretary argues that to be safe, a walkway must have 42" high handrails, with a midrail 21" high, as is required under the fall protection standard at §1926.502(b). The Secretary's conclusion is, however, not incontrovertible.

Section 1926.605 regulates marine operations. Fall protection, as from an unguarded barge, is addressed by requiring water rescue equipment; *See,* 1926.605(d). Section 1926.605(c) requires a 3-foot

clear walkway, *or* a grab rail or taut handline where employees are exposed to falls from covered lighters or coamings more than 5 feet high. It is not clear that the guardrail standards at §1926.502(b) were meant to be applied to barge walkways. It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC*, 613 F.2d 1227, (3rd Cir. 1980).

Because the standard did not provide Christie with notice that it was required to provide handrails conforming to §1926.502(b) on its walkway, the cited violation is vacated.

Alleged Violation of §1926.605(d)(2)

Citation 1, item 3 alleges:

29 CFR 1926.605(d)(2): The employer did not ensure that there was, in the vicinity of each barge in use, at least one portable or permanent ladder which reached from the top of the apron to the surface of the water:

a. Ladders reaching from the decks of barges to the surface of the water were not provided on either of the two work barges in use on the I-5 bridge project on the Columbia River in Vancouver, Washington.

Facts

CO Penrod testified that there was no ladder from the water to the deck of the barge, and that an employee who fell in would be unable to climb out of the water (Tr. 82-83; Exh. C-6). Superintendent Boswell admitted that no ladder was provided, but testified that the tower crane supports extend 15 feet below water level; Boswell stated that Christie employees regularly climb the tower crane supports in lieu of ladders (Tr. 245-46).

Discussion

The cited standard requires:

> The employer shall ensure that there is in the vicinity of each barge in use. . . at least one portable or permanent ladder which will reach the top of the apron to the surface of the water. If the above equipment is not available at the pier, the employer shall furnish it during the time that he is working the barge.

Christie admits that the required ladder was not provided, but argues that the tower crane supports provide an alternative means to access the apron of the barge from the water. Respondent alternatively contends that the violation should be vacated because the ladder cage constitutes adequate alternative fall protection.

The Commission has held that "when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated." *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335 (No. 15983, 1978). The terms of the standard require a ladder; ladders are extensively regulated under §1926.1053. Maximum loads, rung cleat and step spacing are all defined. Christie made no showing that the tower supports were as safe as an OSHA approved ladder. The cited violation therefore, will be affirmed.

Penalty

A penalty of $1,750.00 is proposed for this item.

The Secretary failed to take into account the availability of an alternative (though not equivalent) means of protection, and so overstated the gravity of this violation. It has not been shown that the failure to provide a ladder gave rise to a "substantial probability" of death or serious physical harm, as required by §17k of the Act, where, as here, Christie's tower supports were available as an alternative means of access to the barge.

The violation will be affirmed as an "other than serious" violation, without penalty.

Alleged Violation of §1926.605(d)(3)

Citation 1, item 4 alleges:

29 CFR 1926.605(d)(3): Employees walking or working on the unguarded decks of barges were not protected with U.S. Coast Guard-approved work vests or buoyant vests:

a. Employees aboard the work barges at the I-5 bridge construction project on the Columbia River in Vancouver, Washington were not protected by their buoyant vests in that they were not zipped or otherwise secured.

Facts

CO Penrod testified that he observed Christie employees working within three feet of the edge of the barge without their vests zipped up (Tr. 84, 158). Penrod stated that the employees were not protected by their buoyant vests, because the jacket could be lost in a fall into the water (Tr. 85). Boswell admitted that Christie did not require ironworkers to fasten their vests (Tr. 288). Boswell further admitted that it would be difficult for an ironworker in the water to keep his arms down to keep the vest in place while attempting to rid himself of his tool belt, or aid in any rescue attempt (Tr. 287).

Discussion

The cited standard provides:

> Employees walking or working on the unguarded decks of barges shall be protected with U.S. Coast Guard-approved work vests or buoyant vests.

The evidence clearly establishes that an unfastened life vest will not provide the protection contemplated by the standard. The violation is established.

Penalty

A penalty of $1,750.00 was proposed for this item. The violation is correctly classified as "serious", in that the probable result of an accident would be drowning (Tr. 85). Because Christie made no efforts to ensure that its employees properly fastened their life vests, no further mitigation of the penalty is appropriate. The proposed penalty will be assessed.

Alleged Violation of §1926.50(d)(1)

Citation 2, item 1 alleges:

29 CFR 1926.50(d)(1): First-aid supplies approved by the consulting physician were not accessible when required:

a. First aid kits were not available aboard the work barges on the I-5 bridge project on the Columbia River in Vancouver, Washington.

Facts

CO Penrod testified that there were no first aid supplies on the barge and so were not immediately accessible (Tr. 87). Penrod admitted that there was a first aid kit at the job trailer, 300 feet from the barge, two or three minutes away (Tr. 87-88, 164).

Discussion

The cited standard requires that "first-aid supplies approved by the consulting physician shall be easily accessible when required." Nothing in the standard requires that such supplies be "immediately" available as maintained by the Secretary. Christie's first aid kit was within minutes of the barge, and was easily accessible. The cited violation is vacated.

Alleged Violation of §1926.351(b)(4)

Citation 2, item 2 alleges:

29 CFR 1926.351(b)(4): Welding cables in use were in need of repair:

a. The work lead was frayed on the arc welder aboard a work barge on the Columbia River in Vancouver, Washington.

Facts

CO Penrod testified that one of the work leads for an arc welder on the barge was frayed approximately 18 to 24 inches from the machine, and the bare wires or conductors were showing (Tr. 88-89, 147; Exh. C-7). Penrod testified that Christie employees had to walk by the coiled cable , and could have been shocked if they touched the lead (Tr. 90). Boswell testified that the defective cable had not been reported to him, and that he had not had an opportunity to discover the damage to the lead (Tr. 257). The lead was replaced during the OSHA inspection (Tr. 89).

Discussion

The cited standard provides that "[c]ables in need of repair shall not be used."

Complainant maintains that employees' were exposed to a shock hazard because of their proximity to, and possible contact with the damaged cable. The standard, however, prohibits only the *use* of a damaged cable. The facts will not support the cited violation, and it is vacated.

Alleged Violation of §1926.404(b)(1)(i)

Citation 2, item 3 alleges:

29 CFR 1926.404(b)(1)(i): Employer did not use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:

a. Ground fault circuit interrupters or a written assured equipment grounding conductor program were not in use on the I-5 bridge project on the Columbia River in Vancouver, Washington.

Facts

CO Penrod testified that electrical power was supplied to the barge by means of a number of extension cords running up to the bridge (Tr. 90-91). Employees were using electrical drills, impact wrenches, and a Skilsaw during the OSHA inspection (Tr. 92). Penrod did not see any ground fault circuit interrupters in use (Tr. 91). Penrod's GFCI tester did not trip when he tested the cords (Tr. 305-06). Boswell told Penrod that Christie did not have an assured equipment grounding conductor program (Tr. 91).

Discussion

Complainant established that Christie's employees used electrical equipment without either ground fault circuit interrupters or an assured equipment grounding conductor program. The cited violation will be affirmed.

Alleged Violation of §1926.550(g)(4)(ii)(I)

Citation 2, item 4 alleges:

29 CFR 1926.550(g)(4)(ii)(I): The personnel platform was not conspicuously posted with a plate or other permanent marking which indicated the weight of the platform and its rated load capacity or maximum intended load:

a. The personnel platform on the deck of a work barge, available for use on the I-5 bridge project on the Columbia River in Vancouver, Washington, was not posted or marked with its weight and rated capacity.

Facts

CO Penrod testified that he observed a personnel platform, or man basket on the barge deck. The platform was not labeled with the total gross weight and rated capacity (Tr. 95, 97). Penrod testified that superintendent Boswell told him the basket was not in use (Tr. 97, *See* testimony of Boswell at 261). Penrod admitted that he did not know whether the basket had ever been used (Tr. 152).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that employees had access to the violative condition. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Complainant admits there was no evidence that the basket had ever been used. The Secretary failed to make out its *prima facie* case, and this item is vacated.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.106(d) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.605(b)(2) is VACATED.

3. Citation 1, item 3, alleging violation of §1926.605(d)(2) is AFFIRMED as an "other than serious" violation, without penalty.

4. Serious citation 1, item 4, alleging violation of §1926.605(d)(3) is AFFIRMED, and a penalty of $1,750.00 is ASSESSED.

5. Other than serious citation 2, item 1, alleging violation of §1926.50(d)(1) is VACATED.

6. Other than serious citation 2, item 2, alleging violation of §1926.351(b)(4) is VACATED.

7. Other than serious citation 2, item 3, alleging violation of §1926.404(b)(1)(i) is AFFIRMED without penalty.

8. Other than serious citation 2, item 4, alleging violation of §1926.550(g)(4)(ii)(I) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: