Secretary of Labor,
Complainant,
v.

St. James Stevedoring Co., Inc.,
Respondent.

OSHRC Docket No. **98-1731**

APPEARANCES

David Q. Jones, Esq.
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

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Law Offices of Gerald R. Cooper &
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New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

St. James Stevedoring Co., Inc. (St. James), operates five barges mounted with cranes on the Mississippi River in Convent, Louisiana, to perform midriver cargo transfers between oceangoing vessels and river barges. Based on a review of St. James's safety programs, the Occupational Safety and Health Administration (OSHA) issued a serious citation on August 26, 1998 (Tr. 25). St. James timely contested the citation. St. James refused to allow an inspection of its operation claiming that the U. S. Coast Guard had preemptive jurisdiction.

The citation alleges that St. James violated 29 C.F.R. § 1918.66(a)(1) for failing to have its cranes annually surveyed and quadrennially tested; 29 C.F.R. § 1918.97(b) for failing to have at least one person certified to perform first aid; and 29 C.F.R. § 1918.100(a) for failing to develop and implement a written emergency action plan. The citation proposes total penalties of $3,550.

The hearing was held on March 12, 1999, in New Orleans, Louisiana. St. James admits that it was an employer in a business affecting commerce (Tr. 4). The parties filed post-hearing briefs.

St. James denies the alleged violations and argues preemption under § 4(b)(1) of the Occupational Safety and Health Act (Act) based on the jurisdiction of the U. S. Coast Guard. Having considered the record, OSHA has jurisdiction; the alleged violation of § 1918.66(a)(1) is vacated as not established; and the violations of §§ 1918.97(b) and 1918.100(a) are affirmed.

The Inspection

St. James operates five crane-mounted barges in the Mississippi River in Convent, Louisiana, to load and unload cargo midriver to and from vessels and river barges (Tr. 7, 14, 26). The five crane barges[1] are designated as the *Bulk I, Bulk II, Bulk III, Ashley* and *Margret* (Tr. 11). In size, the barges range from 150 to 200 feet long and 50 feet wide. Each barge is equipped with a pedestal boom crane with a large clamshell bucket for use in handling bulk materials. The pedestal provides the operator with a clear view of the boom moving from the ship's hold to the river barge alongside, or from the river barge to the ship's hold (Tr. 15-16). The crane barges are not self-propelled, but are moved into position by tugboats. Once alongside a ship, the crane moves fore and aft by cables and winches to the desired location (Tr. 16-17). The crane barges have registration documents from the U. S. Coast Guard, which are stamped annually (Tr. 17, 66-67).

The employees aboard the crane barges are more or less permanently assigned. The employees assist in handling lines and anchors; operating the crane and mobile equipment for moving cargo and positioning the barges alongside the ships; and lifting covers on the hopper barges (Tr. 18).

After receiving an informal employee's complaint, OSHA compliance officer (CO) Barry Buuck initiated an inspection of St. James (Tr. 24, 47-48). This was St. James's first OSHA inspection (Tr. 54). CO Buuck arrived on June 18, 1998, but left because of a possible refusal to allow the inspection (Tr. 24). He returned, however, on July 12, 1998, and met with Vice-President Paul Morton and Operations Manager Burton Gonzales. CO Buuck reviewed various safety programs and remained at the office for approximately two and one-half hours (Tr. 26, 42,

[1] St. James also operates a barge named *Leslie* which does not have a crane (Tr. 12).

46). Because of rain, Buuck returned to his office without making a visual inspection of the operation (Tr. 24). When he telephoned to continue the inspection, CO Buuck was advised that St. James refused further inspection, claiming OSHA lacked jurisdiction (Tr. 25). OSHA did not seek an inspection warrant, but issued the serious citation based on Buuck's review of St. James's records (Tr. 48). The employee's complaint which precipitated the inspection was not confirmed and was not involved in the conditions cited (Tr. 57-58).

Discussion

OSHA's Jurisdiction

Application of § 4(a)

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

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

St. James argues that the Act's jurisdiction does not extend to its crane-mounted barges. *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983) (court determined that the Act's regulations did not apply to the working conditions of seamen on vessels in navigation in a case involving a Coast Guard licensed engineer employed on Texaco's deep sea fleet who had complained of discrimination under § 11(c) of the Act).

In considering the application of § 4(a), the Review Commission has concluded that "OSHA has authority to enforce the OSH Act with respect to vessels that are located in U. S. territorial waters." *Tidewater Pacific, Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997). The crane barges operate on the Mississippi River within the territorial boundaries of Louisiana (Tr. 8, 14-15). The standards cited at 29 C.F.R., Part 1918, regulate the health and safety of longshore and harbor workers. For the purposes of the Act, the crane barges operated by St. James were workplaces and its employees were performing longshoring work. The inspection and citation were within OSHA's statutory jurisdiction.

Application of § 4(b)(1) Preemption

Section 4(b)(1) 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.

To be preempted by another agency's regulations, the Review Commission has determined:

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

Rockwell International Corp., 17 BNA OSHC 1801, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996).

"Exercise," as used in § 4(b)(1), requires an actual assertion of regulatory authority as opposed to the mere possession of authority. Where the employer claiming the exemption satisfies its burden of proving that another agency has exercised its authority, OSHA's jurisdiction will be preempted only as to those working conditions actually covered by the other agency's regulations. *Alaska Trawl Fisheries, Inc*., 15 BNA OSHC 1699, 1703-1704 (No. 89-1192, 1992). OSHA's jurisdiction over the workplace as a whole is preserved, while the redundant regulations of a particular working condition prescribed by § 4(b)(1) is avoided. *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 392 (5th Cir. 1976).

The U. S. Coast Guard is authorized to promulgate regulations as to all matters not specifically delegated by law to some other executive department for the safety of life and property upon the high seas and waters, subject to the jurisdiction of the United States. Title 14 U.S.C. § 2. In general, the Coast Guard is the dominant Federal agency with statutory authority to prescribe and enforce standards or regulations affecting seamen aboard vessels in navigation. However, the Coast Guard's jurisdiction is not industry wide. *Alaska Trawl Fisheries, Inc., id.*,

at 1704-1705. Therefore, in the absence of an industry-wide exemption, OSHA's jurisdiction is preempted only if the Coast Guard has specifically regulated the cited condition.

In considering the Coast Guard's jurisdiction, the Review Commission has determined that, unlike its expansive coverage over inspected vessels, the Coast Guard's regulations involving uninspected vessels are limited. Where the Coast Guard has exercised jurisdiction over a specific condition with regard to employees on an uninspected vessel, OSHA is effectively barred from exercising concurrent jurisdiction. *Tidewater Pacific, Inc., id.,* at 1925-1926 (OSHA's record-keeping requirement at § 1904.1 is preempted by the Coast Guard's regulations). On the other hand, where the Coast Guard is not exercising authority, OSHA retains the authority to regulate the working conditions of employees aboard uninspected vessels. *Tidewater Pacific, Inc., id.,* at 1925 (OSHA's confined space, machine guarding and blood borne pathogens standards are not preempted by the Coast Guard); *Red Star Marine Services, Inc.,* 739 F.2d 774, 779 (2nd Cir. 1984) (OSHA's noise standard is not preempted by the Coast Guard).

Because the barges are documented vessels in navigable waters, St. James argues that under the Fifth Circuit, the barges are subject to the Coast Guard's regulations and preempted from OSHA's jurisdiction. *Clary v. Ocean Drilling & Exploration Co.,* 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.,* 720 F.2d 825 (5th Cir. 1983). Generally, these cases hold that OSHA regulations do not apply to the working conditions of employees on vessels in navigation. However, the Review Commission analyzed the same Fifth Circuit case law relied upon by St. James and concluded that it was not controlling. The Commission stated that:

> Nevertheless, with due respect to the court, we find that *Clary* and *Donovan v. Texaco* are sufficiently distinguishable from the case here presented to have left undecided the precise question of OSH Act applicability to uninspected vessels.
>
> In neither of the cases considered by the court did it differentiate between the extensive degree to which the Coast Guard regulates inspected vessels and the minimal degree to which it regulates those that are uninspected. The vessel classifications in those cases were not identified, although the court's consideration in *Donovan v. Texaco* of the MOU between the Coast Guard and OSHA suggests that the vessel there was inspected. 720 F.2d at 827 n.3. Moreover, the court relied in both cases on Commission precedent, subsequently overruled, suggesting that OSHA lacks jurisdiction

> over the working conditions of seamen. Most significantly in *Clary*, the court found that the cited OSHA construction and shipbuilding regulations did not, by their own terms, pertain to the special purpose drilling vessel on which the injured seaman worked. 609 F.2d at 1122. This fact alone would have been sufficient to decide the case. . . . Similarly, the court's finding in *Donovan v. Texaco*, that the Coast Guard's regulations included protections "parallel" to those contained in section 11(c), would have been sufficient to dismiss the Secretary's case.

Tidewater Pacific, Inc., *id*., at 1927.

In a more recent case, the District Court in *Perry v. Falcon Drilling Company, Inc.*, 1995 U.S. Dist. LEXIS 6656 (E.D. La., 1995) held that OSHA's regulations on stairways did not apply to *Falcon Rig 16*, an uninspected vessel, because of the Coast Guard's statutory authority. The decision in *Perry* is distinguishable from this case. The District Court in *Perry* stated that "OSHA regulations simply should not apply to govern safety concerns on vessels which have unique problems and concerns best addressed by the Coast Guard." In this case, there is no showing that the Coast Guard exercises authority to regulate crane inspections, first aid, and emergency plans aboard midriver cargo transfer barges. Also, see this court's decision in *Mallard Bay Drilling, Inc., LLC*, 18 BNA OSHC 1668 (No. 97-1973, 1998), petition for review filed Fifth Circuit (Feb. 25, 1999), which neither party cited.

St. James's Barges Are Uninspected Vessels

In the *Tidewater Pacific* case, the U. S. Coast Guard filed an amicus brief unequivocally disclaiming comprehensive regulation of "uninspected" vessels. *Id.*, at 1924. "Uninspected" vessels are defined by the Coast Guard as non-recreational vessels not subject to the Coast Guard's safety inspection and certification authority. 46 U.S.C.A. § 2101(43). It includes such vessels as tugboats, towing vessels, and barges.

There is no dispute that the crane-mounted barges operated by St. James are documented by the Coast Guard (Tr. 17, 66). However, the documentation is not shown to involve Coast Guard inspection and certification. St. James does not argue that the crane barges are other than uninspected vessels. The barges are not self-propelled and need to be towed into place by a

tugboat. The barges are operated solely upon the Mississippi River within the territorial boundaries of the State of Louisiana.

St. James argues that the employees aboard the crane barges are seamen (Tr. 17). They are employed in a more or less permanent status and contribute to the function of the barges, notwithstanding that some jobs are not traditionally considered classic sailor jobs. The employees handle mooring lines, lower anchors, clean decks, and maintain navigation lights (Tr. 18). However, there is no evidence that the employees were licensed or had certificates from the U. S. Coast Guard. The employees' activities were more related to St. James's midriver cargo transfer work as opposed to performing navigational-related activities. The employees operate the cranes and engage in the loading and unloading of cargo.

In the present case, the cited working conditions are not navigational, which is the traditional area of Coast Guard expertise. The OSHA citation alleges conditions involving crane certifications, first aid certificates, and emergency response plans.

The barges operated by St. James are uninspected. The Coast Guard's regulations applicable to uninspected vessels preempt OSHA's regulations to the extent OSHA's regulations are redundant.

The Conditions Cited Are Not Preempted

The U. S. Coast Guard described its safety standards applicable to uninspected vessels as "minimal" and limited solely to those areas delineated in 46 U.S.C., Chapter 41. *Tidewater Pacific, Inc., id.,* at 1924. Chapter 41 regulates the (a) number, type, and size of fire extinguishers; (b) type and number of life preservers; (c) flame arresters, backfire traps, or similar devices on vessels with gasoline engines; (d) ventilation of engine and fuel tank compartments; and (e) the number and type of alerting and locating equipment for vessels on the high seas.

The citation in this case is not shown to encompass any areas regulated and enforced by the U. S. Coast Guard. The Coast Guard regulations for uninspected vessels do not address the same concerns regarding crane inspections, first aid certificates and emergency plans as cited by OSHA. St. James does not show or argue any similar requirements enforced by the Coast Guard.

OSHA's jurisdiction over St. James's crane barges is not preempted by the U. S. Coast Guard for the conditions cited.

Alleged Violations

The Secretary has the burden of proving a violation.

> 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).

Part 1918 applies to longshoring operations and related employments aboard vessels. "Vessel" includes "every description of watercraft" used for transportation on water. *See* § 1918.2 (definitions). St. James's business is transferring cargo midriver by its crane barges to and from ships and river barges. Part 1918 is applicable to St. James's operations.

At the hearing, St. James argued that it was not aware of the Part 1918 standards. On June 25, 1997, OSHA published the current longshore standards in Part 1918, which recodified under different numbers existing standards such as § 1918.66 and § 1918.97, and implemented new standards such as § 1918.100. The new Part 1918 became effective on January 25, 1998. 62 Fed. Reg. 40202. The OSHA inspection of St. James occurred on June 18, 1998. St. James argued that the new Part 1918 was not published in the Code of Federal Regulations until July, 1998 (Exh. R-6).

St. James's argument is rejected. An employer is presumed to know the requirements of the regulations upon publication in the Federal Register. Also, as noted, the requirements under § 1918.66 and § 1918.97 had existed prior to January, 1998. 39 Fed. Reg. 22074 (June 19, 1974).

Item 1 - Alleged Violation of § 1918.66(a)(1)

The citation alleges that St. James failed to have the cranes used in its midriver transfer operation annually inspected and tested every four years by an accredited agency. Section 1918.66(a)(1) states:

> The following requirements shall apply to the use of cranes and derricks brought aboard vessels for conducting longshoring operations. They shall not apply to cranes and derricks forming part of a vessel's permanent equipment.
>
> (1) Certification. Cranes and derricks shall be certified in accordance with part 1919 of this chapter.

Part 1919 requires maritime certifications of annual surveys and quadrennial tests by an accredited agency of cargo gear and material handling devices such as cranes (Exh. C-1; Tr. 28-29). CO Buuck testified that his review of St. James's safety programs found no record of annual crane inspection certifications and only one quadrennial test (*Margret*). The remaining test records, dated in 1993, were within five years (Tr. 28). CO Buuck was told that St. James performed its own annual inspections and contracted the quadrennial tests to the National Cargo Bureau, Inc., which is accredited.

Paul Morton, Vice President of St. James Management Company, acknowledged that St. James inspected its own crane barges (Tr. 8, 11). Burton Gonzales, Plant Manager for St. James Management, also testified that St. James conducted its own annual inspections using a form from the American Crane Manual (Exh. R-2; Tr. 74-75). Gonzales also testified that he thought quadrennial inspections were to be conducted every five years (Tr. 75-76).

Section 1918.66(a)(1) does not apply to St James's cranes. By its terms, the standard applies to cranes which are "brought aboard vessels for conducting longshoring operations." It specifically excludes cranes "forming part of a vessel's permanent equipment." The cranes operated by St. James are permanently mounted on the barges and constitute part of the barges' equipment (Tr. 8, 15, 16). The National Cargo Bureau, Inc., who performed the quadrennial tests, identified the cranes as permanently mounted (Exhs. R-3, R-4). The Secretary failed to show that the cranes were not permanently mounted. CO Buuck did not observe the barges or cranes.

The alleged violation is vacated.

Item 2 - Alleged Violation of § 1918.97(b)

The citation alleges that St. James had no employee available who held a current valid first aid certificate in case of an injury aboard the five barges. Section 1918.97(b) provides that:

> A first aid kit shall be available at or near each vessel being worked. At least one person holding a valid first aid certificate, such as is issued by the Red Cross or other equivalent organization, shall be available to render first aid when work is in progress.

CO Buuck testified that he was told "they thought one of the men was a volunteer fireman that might have first aid training" (Tr. 31, 37). He was not provided any documentation, such as a first aid certification (Tr. 31, 37-38).

Morton testified that St. James has three employees who are "first responders" trained to conduct first aid (Tr. 63). Morton, however, did not testify when the three employees became first responders. He also testified that at the time of OSHA's inspection, there were no first aid certificates in the St. James's office (Tr. 80).

During the hearing, St. James listed employees with first aid or CPR certificates along with copies of three cards (Exh. R-1; Tr. 68-69). However, the list of employees does not identify when they received first aid certification. Two of the attached cards show an issuance date after OSHA's citation. The third card does show that Kenny Wilkins completed "BLS" training of the American Heart Association in March, 1998. However, Wilkins did not testify to explain the training and, according to Gonzales, Wilkins told him that he did not have a certificate in first aid (Tr. 83). Therefore, no weight is given to Morton's testimony and the list of employees.

Gonzales testified that three employees (Kenny Wilkins, Earl McGee and Ronnie Barlow) were certified in first aid at the time of OSHA's inspection (Tr. 72-73). He stated that he was aware of the information but did not provide it to CO Buuck (Tr. 80).

Gonzales's testimony is also given no weight. Upon examination, Gonzales conceded that he did not know whether Barlow, a superintendent, had a certificate showing completion of first aid training (Tr. 83). Also, as stated, Gonzales testified that Wilkins told him that he did not have a card (Tr. 83). It was Wilkins to whom St. James was referring when CO Buuck was told

an employee might have first aid training (Tr. 85). Finally, Gonzales stated that McGee had first aid training in the Reserves, but that he had not seen a certificate of completion (Tr. 84).

The standard requires an employer to assure that at least one employee is holding a valid first aid certificate, such as from the Red Cross. Although the record shows that employees currently are certified, there is no credible evidence that at least one employee held a valid first aid certificate at the time of OSHA's citation. See *CMC Electric, Inc.*, 1995-97 CCH OSHD ¶ 31,297 (No. 96-0619, 1997) (case involves a similar requirement under § 1926.50(c)). Also, there is no showing that St. James considered any employee available to render first aid, if necessary. It maintained no record of certified employees. Without such knowledge, St. James could not be assured that a certified first aid person was available when work was in progress on its five barges.

First aid treatment is necessary to give an injured employee some level of medical attention while waiting for professional medical treatment. Because its longshoring operations are conducted midriver, it is unlikely that timely medical attention could be obtained, making it more important that St. James have someone available who is certified in first aid. Although the standard does not require that the employer maintain copies of the certificates, it is reasonable to expect an employer to know which employees hold valid first aid certificates.

The violation of § 1918.97(b) is affirmed as serious.

Item 3 - Alleged Violation of § 1918.100(a)

The citation alleges that St. James failed to develop and implement a written emergency action plan to ensure employees' safety from fire and other emergencies aboard the crane barges. Section 1918.100(a) provides:

> This section requires all employers to develop and implement an emergency action plan. The emergency action plan shall be in writing (except as provided in the last sentence of paragraph (e)(iii) of this section) and shall cover those designated actions employers and employees must take to ensure employee safety from fire and other emergencies.

Under Subpart (b), the emergency action plan must contain procedures for emergency escape, operating critical functions, accounting for all employees, rescue and medical duties, reporting the fire or other emergency, and contacting persons for further information. During the inspection, CO Buuck was not shown a written emergency plan. He was told that St. James did not have a written emergency action plan, except for two lines addressing hurricane procedures (Tr. 32, 38-39, 51).

At the hearing, St. James introduced a written emergency plan developed in 1988 and provided to the U. S. Coast Guard (Exh. R-5; Tr. 78). The plan discusses the procedures to take during a fire aboard the ship, river barge or the crane barges while transferring ammonium nitrate. The St. James's emergency plan describes the use of the alarm system, the notification to employees, the use of the radio to contact shore and tugboats, the wearing of respiratory equipment and instructions for evacuation.

The emergency plan presented by St. James fails to comply. It was developed in 1988 and only addressed the transfer of ammonium nitrate. The plan was not shown to be currently enforced by St. James or to encompass a fire emergency involving other types of cargo transfers. The plan was not shown to CO Buuck during his inspection. Also, the plan does not address other potential emergencies in midriver transfers, such as collisions or storms.

The violation is affirmed as serious. St. James should have known it had to have emergency procedures in place for its midriver transferring operations. Without emergency procedures, employees were exposed to possible serious injury or death.

Penalty Considerations

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, the Commission is required to consider the size of the employer's business, the history of previous violations, the employer's good faith, and the gravity of the violation when determining an appropriate penalty. Gravity is the principal factor to be considered.

St. James is considered a medium-sized employer because it employed approximately 80 employees (Tr. 12). This was St. James's first OSHA inspection (Tr. 54). Although it refused an on-site inspection, St. James appeared cooperative and it reasonably believed that the U. S. Coast

Guard had jurisdiction. St. James did provide OSHA with copies of its safety programs, which were not shown to be deficient. St. James is entitled to credit for size, history and good faith.

A penalty of $525 is reasonable for violation of § 1918.97(b) (item 2). During the OSHA inspection, St. James failed to show it had at least one employee certified in first aid. The gravity is considered moderate. St. James's 80 employees worked midriver and were not in a position to receive timely medical attention, if necessary.

A penalty of $525 is reasonable for violation of § 1918.100(a) (item 3). The emergency plan offered by St. James was not shown to be currently enforced or that it encompassed potential emergencies, other than a fire during transfers of ammonium nitrate. The gravity is considered moderate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Serious Citation No. 1

1. Item 1, violation of § 1918.66(a)(1), is vacated and no penalty is assessed.
2. Item 2, violation of § 1918.97(b), is affirmed and a penalty of $525 is assessed.
3. Item 3, violation of §1918.100(a), is affirmed and a penalty of $525 is assessed.

KEN S. WELSCH
Judge

Date: October 11, 1999