United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant, v. Henry Marine Service, Inc., Respondent.	OSHRC Docket No. 18-0680

Attorneys and Law Firms:

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JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act). Respondent, Henry Marine Service, Inc. (Henry Marine), is towboat operator on the Mobile River in Bucks, Alabama. On October 7, 2017, a fatal accident occurred on its tugboat, the M/V JAMIE H (JAMIE H), prompting an inspection by the Occupational Safety and Health Administration (OSHA) Mobile Area Office. As a result of that inspection, the Secretary of labor, on March 27, 2018, issued Henry Marine a Citation and Notification of Penalty alleging ten serious and two other than serious violations of the Act and regulations thereunder. The Secretary proposed a total penalty of $51,739.00 for the Citation. Henry Marine timely contested the Citation. Prior to the filing of dispositive motions, the Secretary withdrew all but Items 1a and 7a, Citation 1.

The parties each filed dispositive motions pursuant to Rule 56 of the Federal Rules of Civil Procedure. Remaining in dispute are two citations alleging serious violations of the general industry standards at 29 C.F.R. §§ 1910.22(c) (Item 1a, Citation 1) and 1910.132(a) (Item 7a, Citation 1). In its motion, Henry Marine contends the cited standards are preempted under § 4(b)(1) of the Act, 29 U.S.C. §

653(b)(1), by regulations promulgated and enforced by the Coast Guard. Henry Marine argues, alternatively, the Secretary cannot meet his burden with regard to the alleged violation of § 1910.22(c). The Secretary responds, at the time of the alleged violations, the Coast Guard had not exercised its authority over the cited conditions such that preemption under § 4(b)(1) does not apply. In his motion the Secretary contends there are no material facts in dispute as to all elements of his prima facie case and Henry Marine cannot meet its burden of proof on its affirmative defenses. Both parties filed responses to the opposing parties' motion. For the reasons that follow, Henry Marine's Motion for Summary Judgment is **GRANTED** on the ground the Secretary lacked jurisdiction to issue the citations. Accordingly, Items 1a and 7a, Citation 1 are **VACATED.**

FACTUAL BACKGROUND

The JAMIE H is a tugboat owned and operated by Henry Marine. On October 7, 2017, an employee of Henry Marine was found dead in the water surrounding the JAMIE H. The decedent had been returning after his normal shift to stay on the vessel during Hurricane Nate which was predicted to make landfall in the area that night.[1] The decedent did not return to the JAMIE H in a timely manner and was found in the water near the vessel by the captain. No one witnessed the decedent fall into the water.

At the relevant time, Henry Marine was using the JAMIE H to move barges carrying coal under a contract with Alabama Power at the Barry Steam Plan near Mobile, Alabama. The barges were owned by a third party. Henry Marine used the JAMIE H to move the barges to an area where Alabama Power employees could unload them. The JAMIE H's crew consisted of a captain, a crane operator, a skid steer operator, and two deckhands. Deckhands were not involved in any of the loading or unloading operations and performed work only on the barges or the JAMIE H. The decedent was one of the deckhands.

When not in use, the JAMIE H was moored at a dock owned by Alabama Power near the Barry Steam Plant. Henry Marine had used the dock to moor the JAMIE H since 2005. Crew members accessed the JAMIE H from the dock in one of two ways, depending on water level. When the water level was such the fleet (or upper) deck of the JAMIE H was level with the dock, the crew would open a swing gage and step over the gap between the dock and the vessel onto the fleet deck. If the fleet deck and dock were not level, the crew would open the swing gate and use a ladder, affixed to the dock, to climb to the vessel's main (or lower) deck. Either method required stepping over the gap between the dock and the JAMIE H. Since 2005, Henry Marine has provided its employees no other equipment or method to access the JAMIE H from the dock.

[1] The undersigned takes judicial notice Hurricane Nate made landfall at the mouth of the Mississippi River at approximately 7 p.m. on October 7, 2017. It made a second landfall west of Biloxi, Mississippi, after midnight on October 8, 2017, according to reports of the National Weather Service. *https://www.weather.gov/mob.nate.* Neither party disputes Hurricane Nate had an impact on the sited worksite on the evening of October 7, 2017.

On October 12, 2017, upon notification of the Secretary of the fatal accident, Compliance Safety and Health Officer (CSHO) Stephen Yeend of the Mobile Area OSHA Office conducted an inspection of the worksite. CSHO Yeend measured the distance from the dock to the fleet deck to be 43 inches; the distance from the ladder to the main deck to be 41 inches; and the distance from the fleet deck to the water below to be 9 feet, 6 inches. CSHO Yeend concluded employees accessing the JAMIE H by either method were exposed to the hazard of hitting objects while falling to the water below. Based on this conclusion, CSHO Yeend recommended citations be issued to Henry Marine for failure to provide a safe means of access to a working surface in violation of § 1910.22(c) and for failure to provide personal protective equipment in the form of a personal flotation device to employees in violation of § 1910.132(a). Respondent timely contested. At the completion of formal discovery, the parties each filed a motion for summary judgment on both citation items.

ANALYSIS

Standard on Summary Judgment

Summary judgment is properly granted only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving for summary judgment has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

In *Ford Motor Company—Buffalo Stamping Plant,* 23 BNA OSHC 1593 (No. 10-1483, 2011), the Commission reversed the ALJ's order granting summary judgment to the employer and remanded the case to the ALJ for further proceedings. In doing so, the Commission set forth the standards for judges considering summary judgment motions:

> In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . Rather, the role of the judge is to determine whether any such disputes exist. . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them.

Id. (citations and footnote omitted.)

Requirements for Preemption Under § 4(b)(1)

Section 4(b)(1) of the Act provides that the Act does not apply to "working condition of employees with respect to which other Federal agencies…exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. § 653(b)(1). Congress included § 4(b)(1) in recognition of the authority of other federal agencies over specific

industries. Under Commission precedent, for preemption to apply, three conditions must be met. A federal agency must "possess the statutory authority to regulate the cited condition and must also have taken some action to exercise that authority by promulgating standards or regulations having the force and effect of law." *Tidewater Pacific Inc*., 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997), *citing Alaska Trawl Fisheries, Inc.,* 15 BNA OSHC 1699, 1703 (No. 89-1192, 1992); and *Northwest Airlines, Inc*., 8 BNA OSHC 1982, 1989-91 (No. 13649, 1980). Having satisfied these first two elements, an employer claiming preemption must also establish the other federal agency's regulations cover the cited working conditions. *Id*. "In effect, OSHA's jurisdiction over the workplace as a whole is preserved, while the redundant regulation of particular working conditions proscribed by section 4(b)(1) is avoided." *Id., citing Southern Pacific Transportation Co. v, Usery*, 539 F.2d 386, 391-92 (5th Cir. 1976); and *Northwest Airlines, Inc.* 8 BNA OSHC at 1989-90. In *Chao v. Mallard Bay Drilling, Inc*., 534 U.S. 235, 241 (2002), the Supreme Court adopted the same interpretation of § 4(b)(1). The party claiming preemption under § 4(b)(1) of the Act has the burden to establish its applicability.

Coast Guard Regulation of Towing Vessels

The Coast Guard's governing statute requires the Coast Guard to

> administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States, covering all matters not specifically delegated by law to some other executive department

14 U.S.C. § 2(3) (2000). Congress further delineated that authority by dividing vessels into two categories: "inspected vessels" and "uninspected vessels." The Coast Guard has broad statutory authority to regulate the occupational health and safety of seamen aboard these listed vessels. *See* 46 U.S.C. § 3306 (1994). Prior to 2004, 46 U.S.C. § 3301 (1994) contained a list of 14 vessels subject to inspection by the Coast Guard. In 2004, Congress enacted the Coast Guard Maritime Transportation Act of 2004 in which it added to the list of inspected vessels "towing vessels." 46 U.S.C. § 3301(15) (2004). Under 46 U.S.C. § 3306(j) Congress gave the Coast Guard authority to "establish by regulation a safety management system appropriate for the characteristics, methods of operation, and nature of service of towing vessels."

In 2009, prior to the formal promulgation of regulations applicable to the inspection of towing vessels, the Coast Guard instituted its "Towing Vessel Bridging Program" (TVBP) (see Exhibit 12 of Respondent's Motion for Summary Judgment). The purpose of the TVBP was to "ease the transition and ensure that both the Coast Guard and the towing vessel industry are informed and prepared to meet the new requirements to be finalized in Subchapter M [of the Coast Guard regulations]." The intent of the Coast Guard under the program was to "examine every uninspected towing vessel (UTV) that will be inspected under Subchapter M." These examinations were to verify compliance with Subchapter B and C

regulations that were applicable to towing vessels at the time. Once compliance with these regulations was verified, the towing vessel was issued a decal. The JAMIE H received a decal under this program in December 2012 (Exhibit 13 of Respondent's Motion for Summary Judgment).

On August 11, 2011, the Coast Guard issued a Notice of Proposed Rule Making proposing regulations specifically applicable to towing vessels. 76 Fed. Reg. 49,976 (August 11, 2011). After a period of notice and comment, the Coast Guard issued the final Subchapter M regulations June 20, 2016. [2] Inspection of Towing Vessels; Final Rule, 81 Fed. Reg. 40,004 (June 20, 2016). The regulations took effect on July 20, 2016. Under these regulations, the Coast Guard will conduct inspections and issue certificates of inspection (COIs) for compliant towing vessels. A vessel operator requests an inspection to obtain a COI pursuant to the requirements of 46 C.F.R. § 136.210. The regulations set out a "phase in" period for obtaining COIs. 46 C.F.R. § 136.202. For operators of more than one towing vessel, the regulation sets out dates by which an increasing percentage of the operator's fleet must have a COI. Operators of only one towing vessel were required to have a COI by July 20, 2020. 46 C.F.R. § 136.202(b). All new towing vessels were required to have a COI before entering service. 46 C.F.R. § 136.202(c). Prior to obtaining a COI, a towing vessel is to remain compliant with all regulations to which it was subject as an uninspected vessel until July 20, 2018, or the date upon which it obtains a COI, whichever is later. 46 C.F.R. § 136.172. According to the preamble to the regulation, this provision was added "[i]n response to comments regarding the cost of requirements in parts 140 through 144, and concern about being able to meet those requirements soon after the rule is make effective…" 81 Fed. Reg. at 40,021. Section 136.172 was added "to ensure that we do not leave a gap after the rule becomes effective but before most requirements in parts 140 through 144 are implemented." *Id*.

The Secretary does not dispute the JAMIE H was a towing vessel as that term is defined in the Coast Guard Maritime Transportation Act, subject to the Coast Guard's Subchapter M regulations. [3] The Secretary does not dispute the measurements and configuration of the JAMIE H contained in its Certificate of Documentation (Exhibit 14 to Respondent's Motion for Summary Judgment). There is no factual dispute regarding the work being performed by the JAMIE H and its crew. Nor does the Secretary contend the JAMIE H fell within any of the exceptions to applicability of the Coast Guard's towing vessel inspection regulations. Henry Marine concedes the JAMIE H did not have a COI at the time of the fatal accident or the OSHA inspection.

[2] The final regulations appear at 46 C.F.R. §§1, 2, 15, 136, 137, 138, 139, 140, 141, 143, 144, and 199.
[3] The statute defines a towing vessel as "A commercial vessel engaged in or intending to engage in the service of pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside another vessel." 46 U.S.C. § 2101(50).

Preemption of OSHA Jurisdiction Over the Cited Conditions

The Coast Guard has the statutory authority to regulate inspected vessels. *See Mallard Bay Drilling*, 534 U.S. at 242. In 1983, the Secretary of Labor formally recognized the preemption of OSHA jurisdiction by the Coast Guard with regard to inspected vessels when it entered into a memorandum of understanding (MOU) setting forth the boundaries of the authority of both agencies. Under the MOU,

> The Coast Guard is the dominant federal agency with the statutory authority to prescribe and enforce standards or regulations affecting the occupational safety and health of seamen aboard inspected vessels. Under the Vessel Inspection Laws of the United States, the Coast Guard has issued comprehensive standards and regulations concerning the working conditions of seamen abroad inspected vessels.

MOU Between the U.S. Coast Guard and OSHA Concerning the Health and Safety of Seamen on Inspected Vessels, 48 Fed. Reg. 11,366 (March 17, 1983). In 2004, towing vessels were added to those vessels subject to Coast Guard inspection. 46 U.S.C. § 3301(15). There is no dispute the Coast Guard has had the statutory authority to regulate the health and safety of seamen on towing vessels since 2004.

Henry Marine contends the third element necessary to establish preemption has also been met. To meet this element of preemption, Coast Guard regulations applicable to towing vessels must address the same working conditions addressed in the OSHA citations. *Tidewater Pacific, Inc.,* 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997), *citing Alaska Trawl Fisheries*, 15 BNA OSHC at 1703 (the working conditions at issue must be "actually covered by the agency regulations."). Henry Marine points to § 140.425 of the Subchapter M regulations as covering the working conditions addressed in the citations at issue. This regulation address "fall overboard prevention" and states:

> (a) The owner or managing operator of a towing vessel must establish procedures to address fall overboard prevention and recovery of persons in the water, including, but not limited to:
>
> (1) Personal protective equipment;
> (2) Safely working on the tow;
> (3) Safety while line handling;
> (4) Safely moving between the vessel and a tow, pier, structure, or other vessel; and
> (5) Use of retrieval equipment.

46 C.F.R. § 140.425. Henry Marine also points to § 140.430(a) which requires "Personnel dispatched from the vessel or that are working in an area on the exterior of the vessel without rails and guards must wear a lifejacket…" 46 C.F.R. § 140.430(a). The Secretary did not raise any dispute regarding the applicability of these regulations to the cited working conditions. Nor does the court find any.

Item 1a, Citation 1, alleges a violation of 29 C.F.R. § 1910.22(c). That standard requires the employer to "provide, and ensure each employee uses, a safe means of access and egress to and from walking-working surfaces." The Secretary alleges Henry Marine violated the standard when it failed to

"ensure a safe means of access was used when boarding and leaving the Jamie H which exposed an employee to injures associated with striking inanimate objects while falling up to approximately 9 feet 6 inches to the water below." The Subchapter M regulation at 46 C.F.R. § 140.425(a)(4) specifically addresses the same working condition cited – the movement between vessel and dock – and the same hazard – falling overboard – as the citation.

This is equally true regarding 46 C.F.R. § 140.430(a) and Item 7a, Citation 1. That citation item alleges a violation of 29 C.F.R. § 1910.132(a) which requires employers to provide protective equipment to employees "wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact." The Secretary alleges Henry Marine violated the standard by not providing the decedent with a personal flotation device "while stepping between the dock platform and the fleet deck of the Jamie H…" The Secretary makes clear in his response to Respondent's motion the specific hazard addressed by Item 7a is falling into the water while moving between vessel and dock. The Coast Guard regulation at 46 C.F.R. § 140.430 specifically addresses the need for personal flotation devices when working in an area where there is the possibility of falling into the water below. The Coast Guard Subchapter M regulations cover the working conditions and hazards addressed in Items 1a and 7a of the citation.

Where the parties differ is whether, at the time of the alleged violations, the Coast Guard had exercised its authority to regulate towing vessels. Henry Marine contends the Coast Guard exercised its authority to regulate the health and safety of seamen working on towing vessels upon promulgation of the Subchapter M regulations, the effective date of which predated the alleged violations. The Secretary points to § 136.172 of the Subchapter M regulations, noting because the JAMIE H did not have a COI prior to the fatal accident, it was not required to comply with those regulations until July 20, 2018, after the fatal accident. *See also* 46 C.F.R. § 140.105(a) (specifically addressing the § 140 regulations referenced herein). The Secretary argues, on the date of the alleged violation, the Coast Guard had not yet exercised its authority to regulate the working conditions of seamen on towing vessels because the Subchapter M regulations did not have the "force and effect of law" until July 20, 2018. There is no factual dispute the JAMIE H had not received a COI prior to the fatal accident. The issue to be resolved is whether the Coast Guard's promulgation of regulations for which it explicitly delayed implementation constitutes an exercise of its authority as that term is used in § 4(b)(1) of the Act. This is a question of law for which no material facts are in dispute. It is appropriate for resolution on summary judgment.

An agency's promulgation of final regulations under its statutory grant of authority constitutes an exercise of that authority under § 4(b)(1) of the Act. The Commission has held it is no less an exercise of statutory authority to take the formal position that a hazard will not be the subject of regulation.

Consolidated Rail Corp., 10 BNA OSHC 1577, 1580 (No. 79-1277, 1982) *citing Southern Pacific Transportation*, 539 F.2d at 392. In *Consolidated Rail Corp*., the Commission found the Federal Railroad Administration's (FRA) policy announcement that it would not issue final regulations applicable to certain hazards constituted an exercise of authority by the expert agency in railroad safety sufficient to preempt the applicability of OSHA regulations. *Id.* In contrast, the Commission and the courts have found an announcement of the intent to regulate or issuance of a notice of proposed rulemaking to be an insufficient exercise of authority. *Southern Pacific Transportation*, 539 F.2d at 391-92; *Baltimore and Ohio Railroad Co. v. OSHRC*, 584 F.2d 1052 (D.C. Cir. 1976); *Alaska Trawl Fisheries Inc*., 15 BNA OSHC at 1704 ("the issuance of proposed regulations does not, as a matter of law, constitute an exercise of statutory authority to prescribe or enforce standards or regulations within the meaning of section 4(b)(1)"). The Commission has not directly addressed the issue presented here – whether an agency has exercised its authority upon issuance of a final regulation where that regulation sets out a delayed implementation schedule.

The issue presented here must be considered in light of the well-settled Commission precedent that "any oversight of the adequacy of another agency's enforcement activities is beyond the scope of permissible inquiry under section 4(b)(1)." *Pennsuco Cement and Aggregates, Inc*., 8 BNA OSHC 1378, 1381 (No. 15462, 1980) *citing Mushroom Transportation Co*., 1 BNA OSHC 1390, 1392 (No. 1588, 1974). In *Pennsuco Cement*, the question presented was whether OSHA lacked authority to inspect a kiln operated by Pennsuco Cement. During the time of the inspection, the Mining Enforcement and Safety Administration (MESA), which had authority to and had promulgated regulations applicable to kilns, had suspended its inspections of them. The Commission found the fact MESA had "ceased its inspections of kilns does not alter the fact that MESA had exercised its authority to regulate the safety and health of Pennsuco's employees." *Id*.

The Commission reached a similar result in *Daniel Construction Co*., 12 BNA OSHC 1748 (No. 82-668, 1986).[4] There was no dispute in *Daniel Construction* the Mine Safety and Health Administration (MSHA) regulations applied to Daniel Construction and its operations at a surface mine. At the time of the OSHA inspection, MSHA had suspended all enforcement activities pursuant to a temporary emergency appropriations bill that prohibited the agency from expending any funds on enforcement. The Commission found MSHA had exercised its authority in promulgating regulations applicable to the working conditions. Preemption applied even though MSHA was not enforcing its regulations because to do so would constitute an impermissible inquiry into the agency's level of enforcement. This was true

[4] The Commission issued a decision adopting the Judge's decision as its own.

even though it was Congress and not the expert agency that had mandated the cessation of enforcement. *Id*. at 1752.

Here too, the Secretary seeks to have the court inquire into the manner in which the Coast Guard has chosen to enforce its regulations applicable to towing vessels. The undersigned declines to do so. The Commission has recognized the Coast Guard as the agency with "special expertise in maritime hazards." *Dillingham Tug and Barge Corp*., 10 BNA OSHC 1859, 1862 (No. 77-4143, 1982). The MOU between the Secretary and the Coast Guard

> recognizes that the exercise of the Coast Guard's authority – and hence the displacement of OSHA jurisdiction – extends not only to those working conditions on inspected vessels specifically discussed by Coast Guard regulations, but to all working conditions on inspected vessels, including those "not addressed by specific regulations." [48 Fed. Reg. 11365] Thus, as OSHA recognized in the MOU, another agency may "exercise" its authority within the meaning of § 4(b)(1) of the OSH Act either by promulgating specific regulations or by asserting comprehensive regulatory authority over a certain category of vessels.

Mallard Bay Drilling, 534 U.S. at 243. Towing vessels have fallen within the category of inspected vessels under the Coast Guard's enabling legislation since 2004. In 2009, the Coast Guard developed and implemented its TVBP under which it inspected towing vessels for compliance with existing regulations and issued decals to those compliant vessels. Since July 20, 2016, the Coast Guard has had in effect comprehensive regulations applicable to towing vessels. By these actions, the Coast Guard has asserted "comprehensive regulatory authority" over towing vessels. Recognizing the history of limited regulation of towing vessels and the difficulty and cost of coming into compliance with new regulations, the Coast Guard chose to delay implementation of some of its Subchapter M regulations. This was formal action of the part of the Coast Guard under its statutory authority to regulate towing vessels. *See Consolidated Rail Corp*., 10 BNA OSHC at 1580. Doing so constituted a decision regarding the manner in which the regulations would be enforced by the dominant agency in the area of maritime safety. As such it is not a proper area of inquiry under § 4(b)(1) of the Act. *Pennsuco Cement*, 8 BNA OSHC at 1381. The Coast Guard's promulgation of its Subchapter M regulations prior to the date of the alleged violations was a sufficient exercise of its statutory authority to regulate the cited working conditions to preempt OSHA jurisdiction.

To hold otherwise would lead to anomalous results. A towing vessel operator must request an inspection under 46 C.F.R. § 136.210. It must be in compliance with the Subchapter M regulations at that time in order to pass the inspection and receive his COI. Under the Secretary's theory, if this occurs before July 20, 2018, that same towing vessel operator would have to be simultaneously in compliance with applicable OSHA regulations. Such overlapping of federal regulation is what Congress intended to

avoid when enacting § 4(b)(1). *Mallard Bay Drilling*, 534 U.S. at 241; *see also Dillingham Tug & Barge*, 10 BNA OSHC at 1862-63.

CONCLUSION

The Coast Guard has exercised its authority to regulate the working conditions cited in the violations at issue. Under § 4(b)(1) of the Act, the OSH Act does not apply to those working conditions. Respondent's Motion for Summary Judgment is **GRANTED**. Items 1a and 7a, Citation 1, are **VACATED**.

/s/

Dated: March 12, 2019

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