Secretary of Labor,	*	
Complainant,	*	
	*	
v.	*	OSHRC Docket No. **00-0462**
	*	
Noble Drilling Services, Inc., and	*	
Noble Drilling (U.S.) Inc.,	*	
Respondent.	*	

Appearances:

Kathleen G. Henderson, Esquire
U. S. Department of Labor
Office of the Solicitor
Birmingham, Alabama
For Complainant

Michael A. McGlone, Esquire
Lemle & Kelleher, LLP
New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Noble Drilling Services, Inc. (NDS), and Noble Drilling (U.S.), Inc. (NUS), are engaged in exploring for and developing oil and gas, primarily in the Gulf of Mexico. In September 1999, the Occupational Safety and Health Administration (OSHA) conducted a comprehensive inspection of the Friede Goldman Halter Marine shipyard in Pascagoula, Mississippi, including certain vessels undergoing substantial work at the shipyard (Tr. 569). On September 8 and 9, 1999, OSHA Compliance Officers Courtney Bohannon, Thomas Savage, and Vivian Stevens inspected the vessel "NOBLE MAX SMITH" (owned by NUS) which was undergoing conversion in the shipyard. As a result of this inspection, OSHA issued NDS two citations on February 9, 2000.

Citation No. 1 is classified as serious. Item 1 alleges a violation of § 5(a)(1) of the Occupational Safety and Health Act (Act) in that the personnel baskets used to transport workers were defective in three ways: they did not have a grab rail (subparagraph (i)); they did not have their weight or maximum load capacity posted (subparagraph (ii)); and they were used to

transport materials or tools when not hoisting personnel (subparagraph (iii)).[1] Item 2 alleges a violation of § 1915.73(d) for failing to have a guardrail on a dock edge between storage trailers. Item 3 alleges a violation of § 1915.132(a) for failing to ground a large portable fan.

Citation No. 2 is classified as "other-than-serious." Item 2 alleges that prior to performing hot work, NDS/NUS failed to record tests of the atmosphere in violation of § 1915.7(d)(1).

A hearing was held in Biloxi, Mississippi, on September 26, 27 and 28, 2000. The parties submitted posthearing briefs, and the case is ready for decision.

The Secretary contends that OSHA has jurisdiction and that she established each of the alleged violations. NDS/NUS assert that OSHA is without jurisdiction under § 4(b)(1) of the Act; that standards under "shipyard employment" are inapplicable to the vessel; that "workplace" and "working conditions" cannot apply to a vessel or to work by seamen; that Noble Drilling (U.S.) is not properly a respondent; and that the facts do not support the cited violations.

For the reasons that follow, it is determined that OSHA has jurisdiction; that employees were exposed to a violation of the general duty clause while in a defective personnel platform; that the guardrail standard is inapplicable; that Noble neither knew nor should have known the equipment was ungrounded; and that test data should have been maintained.

Background

Noble Drilling Corporation, which has three employees, owns NDS and NUS (TR. 34, 463, 464). Each of the three corporations has a main office in Sugar Land, Texas (Tr. 473). NDS is the administrative arm of Noble Drilling Corporation and has approximately 120 employees (Tr. 465). NUS owns equipment and vessels and performs drilling activities in the Gulf of Mexico for Noble Drilling Corporation (Tr. 34, 463). At the time of the hearing, NUS operated 19 rigs and had over 1000 employees, mostly working in the Gulf of Mexico. NUS owned nine or ten of the rigs. Various NDC subsidiaries owned and/or operated a total of 49 mobile offshore drilling units (Tr. 464-465, 469, 471-473). Learning that some employees were employed by NUS rather than NDS on August 11, 2000, the Secretary moved to amend the

[1] Citation No. 1, item 1, subparagraph (iv) and Citation No. 2, item 1, were withdrawn by stipulation.

complaint and citations by adding Noble Drilling (U. S.), Inc., as a respondent. Noble did not oppose the motion to amend, which was granted on August 30, 2000.[2]

Beginning in December 1996, to increase marketability, NDS/NUS began converting six of its older "submersible" mobile offshore drilling units (MODUs) into "semi-submersible" MODUs. A MODU submersible is a drilling rig ballasted down at the drilling location where the hull contacts the sea floor. From there, the submersible can drill down to a maximum depth of 100 feet (Exh. C-1; Tr. 45, 51). The more versatile semi-submersible MODU is partially ballasted to a pre-determined floating point with anchors which run out for miles. The drilling structure is centered in a moon pool in the center of the rig from where it can drill down to a depth of 6,600 feet (Exh. C-2; Tr. 47-48, 51, 532). Converting submersibles to semi-submersibles is a substantial task, taking from fifteen to sixteen months and involving extensive and significant structural modifications to the vessel (Exh. C-6, C-7, C-28 at 72; Tr. 249). The entire conversion process was performed at the Friede Goldman Halter Marine Shipyards (FGH) located on the banks of the Pascagoula River waterway in Pascagoula, Mississippi (Exh. C-3; Tr. 54).

The last of the six submersible MODUs to be converted was the MAX SMITH. Originally built in 1980, the MAX SMITH was never self-propelled. It was towed into the FGH shipyard by several towing vessels and removed from service (Tr. 44). After the hull was stripped of its existing drilling equipment and the living accommodations were removed, the MAX SMITH was put on dry dock. The conversion added a new lower hull, three pontoons, outboard stability columns, motors, pumps, living accommodations, drilling structures, and other

[2] Although its attorney did not object to the amendment, NUS maintains that it is not properly a party. The argument is tantamount to seeking reconsideration of the Order Amending Pleadings which added NUS as a respondent. Both respondents were owned and controlled by one corporation, and each had overlapping responsibility for conversion of the vessel at a common worksite. NUS owned and operated the vessels for NDC, while NDS had the engineering functions and provided guidance on the conversion. Even O'Neil Mendoza, the project manager for the rig conversion, was confused about which entity employed him and other employees. He reported to NDS, but his payroll was met through NUS. Most of the employees were employed by NUS, but both companies had employees exposed to the alleged hazards (Tr. 33-34, 460-472, 570). The companies had interwoven control and concurrent responsibilities at the shared worksite. After reconsideration, it is determined that NUS was properly added as a respondent in this case. (See *Vergona Crane Co*., 15 BNA OSHC 1782, 1783, where the Commission held that two related employers with a common worksite and interrelated and integrated operations were properly cited as a single entity.)

parts constructed at the FGH shipyard (Tr. 64-65, 82). The process changed the rig from 224 feet to 340 feet in length and added almost 6,000 gross tons of weight (Exhs. C-29 at 3-A, C-33).

The new lower hull was completed, and on September 6, 1999, the MAX SMITH came off dry dock. This process involved submerging the dry dock to allow the MAX SMITH to float (Tr. 76). Tugboats moved it to dockside, and it was moored at the north end of the FGH shipyard dock. Once tied to the dock, smaller pieces of the hull structure were added (such as the T-tank) (Tr. 44, 65, 76, 106). New machinery was continually being installed and tested. By the time of OSHA's inspection on September 8 and 9, 1999, the MAX SMITH was moored to the dock, and the conversion to a semi-submersible was eighty-five percent completed (Tr. 76, 89, 116, 237).

Approximately 300 people worked on the MAX SMITH's conversion; 50 of these were the MAX SMITH's rig crew (Tr. 107). The rig crew consists of employees assigned to work and live on board a particular rig when engaged in drilling; however, no crewmembers lived or slept aboard the MAX SMITH during the conversion (Tr. 94, 103). NDS/NUS employees painted and installed and welded equipment, while the FGH employees constructed and installed the new structural components (Tr. 90, 92, 103). The MAX SMITH was not under propulsion, under tow, or on course through a body of water at the time of OSHA's inspection (Tr. 104, 117).

DISCUSSION

Jurisdiction of OSHA on the MODU
No Preemption Pursuant to § 4(b)(1)

Prominently tried and briefed in this case was the jurisdictional issue. NDS/NUS contends that since the vessel was regulated by the U. S. Coast Guard, OSHA is without jurisdiction over the companies, their employees, or the MAX SMITH pursuant to § 4(b)(1) of the OSH Act (29 U.S.C. 653(b)(1)) which provides in relevant part:

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

A decision in this case could be appealed to the United States Court of Appeals for the Fifth Circuit. The parties disputed whether a vessel undergoing conversion at a shipyard

presented distinguishable facts from the then-precedent of *Mallard Bay Drilling, Inc. v. Herman*, 212 F. 3d 898, 900 (5th Cir. 2000), *writ granted*, 121 S. Ct. 1075 (2001). The Fifth Circuit determined that the Coast Guard had exclusive authority over the working conditions of seamen, even when on an uninspected vessel. On January 9, 2002, the United States Supreme Court reversed. In concluding that OSHA had jurisdiction over working conditions of the uninspected vessel, the Court held, *sub nom.*, *Secretary of Labor v. Mallard Bay Drilling, Inc.*, 70 U.S.L.W. 4066, 4068 (January 9, 2002):

> Because the Guard has neither affirmatively regulated the working conditions at issue in this case, nor asserted comprehensive regulatory jurisdiction over working conditions on uninspected vessels, the Guard has not "exercised" its authority under § 4(b)(1).

The vessel in *Mallard Bay*, as in the instant case, was a drilling rig. Following statutory definitions, the Court determined that the drilling rig was not an "inspected vessel" over which the Coast Guard would assert a "comprehensive regulatory authority."[3] The Court further noted that on the uninspected vessel, the Coast Guard's authority to regulate working conditions was statutorally limited to the areas related to fire extinguishers, life preservers, flame arresters or backfire traps, means for ventilation, and emergency locating equipment. 46 U.S.C. § 4102. The same conclusions apply to the instant case. Since the MODU MAX SMITH was an "uninspected vessel" pursuant to 46 U.S.C. §§ 2101 and 3301, the Coast Guard did not assert comprehensive jurisdiction over it. Also since the working conditions at issue here involve personnel platforms,

[3] As defined in 46 U.S.C. §§2101(43) and 3301(1994 ed. and Supp. V) the drilling rig did not fit within the following categories of "inspected vessels," which include: "(1) freight vessels, (2) nautical school vessels, (3) offshore supply vessels, (4) passenger vessels, (5) sailing school vessels, (6) seagoing barges, (7) seagoing motors vessels, (8) small passenger vessels, (9) steam vessels, (10) tank vessels, (11) fish processing vessels, (12) fish tender vessels, (13) Great Lakes barges, (14) oil spill response vessels." By definition the rig was then an "uninspected vessel."

guardrails, the grounding of an electric fan, and recordkeeping by a competent person, the conditions do not fit within the categories which the Coast Guard regulates on uninspected vessels.[4] Following the dictates of *Mallard Bay*, *supra*, the Coast Guard has not "exercised" its authority to regulate the MAX SMITH. Section 4(b)(1) does not preclude OSHA's jurisdiction in this case.

"Workplace" Under § 4(a) of the Act

Additionally, as did the employer in *Mallard Bay*, NDS/NUS contends that OSHA is without jurisdiction over the MAX SMITH because it is not a "workplace" as defined by § 4(a) of the Act, which provides:

> 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, the Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone.

The *Mallard Bay* employer (and NDS/NUS) argued that the Act does not apply to vessels on which seamen work in the territorial waters of the United States. The Supreme Court rejected the argument, holding at 70 U.S.L.W. 4068:

> We think it equally clear that Rig 52 was a "workplace" as that term is defined in §4(a) of the Act. The vessel was located within the geographic area described in the definition: "a State," 29 U.S.C. § 653(a), namely Louisiana. Nothing in the text of § 4(a) attaches any significance to the fact that the barge was anchored in navigable waters.

The same conclusion is even more compelling, here, because Nobel's MODU was moored to the dock in Pascagoula, Mississippi, and was not engaged in navigation.

---

[4] The conditions OSHA cited do not relate to the areas included in 46 U.S.C. § 4102. Nor does the Coast Guard otherwise regulate the conditions. Lieutenant Commander William Daughdrill, Chief of Commercial Vessel Safety, 8th Coast Guard District, New Orleans, Louisiana, testified that the Coast Guard would not inspect a vessel, such as the MAX SMITH, even for such items as a fire extinguisher since the rig was in shipyard status undergoing construction or renovation. It was "not in operation in its normal course of business" (Exh. C-28 at 154, at 255). Daughdrill confirmed that the Coast Guard does not regulate personnel baskets, guardrails on docks, electrical grounding, or atmospheric tests prior to welding (Tr. 173-174, 177, 179). If he saw a hazardous working condition on a vessel under construction in a shipyard, he would notify OSHA (Exh. C-28 at 194).

Finally, NDS/NUS's last jurisdictional argument that the Act cannot apply to a vessel flagged to a foreign country, in this case to Panama, is rejected. While undergoing conversion on November 24, 1998, NDS/NUS surrendered the MAX SMITH's latest certificate of inspection issued by the Coast Guard on January 26, 1998 (Exh. C-30). A certificate of inspection signifies that a vessel has been examined by the U. S. Coast Guard and is built, equipped, and operated in compliance with the applicable laws and regulations of the United States (Exh. C-28 at 45; Tr. 476). When a vessel surrenders its certificate of inspection, the Coast Guard no longer schedules any type of routine inspections of the vessel (Exh. C-28 at 64). The MAX SMITH was reflagged as a Panamanian vessel on September 6, 1999, when it received a Panamanian certificate of registry (Tr. 535). The Act places no significance on whether an otherwise covered employer, which is located within the geographical area of a State, is owned by a foreign or international company; whether he or she is citizen of a foreign country; or whether the vessel is flagged to a foreign country. Section 4(a) of the Act does not preclude OSHA's jurisdiction in this case.

Citation No. 1

> The Secretary has the burden of proving, by a preponderance of the evidence:
>
> (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 violations (*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).

Item 1: Alleged Serious Violation of § 5(a)(1)

Citation No. 1, item 1, alleges a § 5(a)(1) violation for exposing NDS/NUS's employees to falls from a "deficient" crane-hoisted personnel basket. NDS/NUS used crane-hoisted personnel baskets (also referred to as personnel boxes or personnel platforms) to move the employees between the dock and the deck of the MAX SMITH (Tr. 7). According to the Secretary, the facts that the baskets did not have a usable grab rail for employees to hold onto

while being hoisted up 100 feet; or a plate or other permanent marking which showed the weight of the basket, its rated load capacity, and its maximum intended load; or that employees were not prohibited from hoisting tools and equipment when not hoisting personnel, constituted a recognized hazard in violation of § 5(a)(1) of the Act, which provides:

(a) Each employer –

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

To prove a violation of § 5(a)(1), the so-called "general duty clause," the Secretary must show that: "(1) a workplace condition or activity presented a hazard, (2) the employer or industry recognized it, (3) it was likely to cause serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate it." *Kokosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996).

The general duty clause was enacted to cover serious hazards which are not addressed by a specific standard. Although the construction standards regulate personnel baskets (§ 1926.550(g)), no standard covers use of personnel baskets in the shipbuilding industry. Section 5(a)(1) is not preempted by a specific standard.

Alleged Hazard of Riding in a Personnel Basket Without a Grab Rail

Citation No. 1, item 1, subparagraph (i), relates to the hazard of riding in a personnel basket which does not have an inside grab rail. CO Bohannon inspected two of the three cited personnel baskets and found that neither had usable grab rails (Tr. 583). Mendoza admitted that there were no grab rails inside the baskets he rode (Tr. 141).

Personnel baskets constituted one of the three ways employees accessed the MAX SMITH from the dock. NDS/NUS used the baskets when the elevators were not working. The baskets lifted personnel daily to weekly (Tr. 87, 131, 584). During OSHA's inspection, a NDS/NUS employee was observed operating the crane to lift a basket over 100 feet in the air (Tr. 585, 601). The employees being transported held onto the side of the basket with their fingers, hands, or with their arms extended outside of the basket. These could be bruised,

crushed, or cut should the basket bump into or hit something on the dock or the rig's deck. The basket was maneuvered within the tight quarters of these areas (Exh. C-11, C-12; Tr. 423, 582). The hazard is properly classified as serious because of the potential for crushed and broken bones (Tr. 587).

Recognized Hazard: An employer must be provided with an adequate warning that it is violating the general duty clause, *i.e.*, the hazard must be recognized. Under § 5(a)(1) a "hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997). The Secretary "must show that knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.*, 12 BNA OSHC 1968, 1970-71 (No. 79-3286, 1986). The lack of grab rails in the personnel baskets could be openly observed and was known to NDS/NUS supervisors.

The Secretary's expert in shipbuilding safety, John Fleming, who had forty years' experience in the shipbuilding industry,[5] testified that the personnel baskets used on the MAX SMITH should have had grab rails, giving employees something to hold onto inside the basket (Tr. 422, 427). He based this conclusion on his long tenure in the shipbuilding industry and on his knowledge of what outside sources of information were utilized within that industry. While at Ingalls Shipbuilding, Fleming relied in particular upon the precursor to the American National Standard Institute (ANSI) standard A10.28-1998, "Safety Requirements for Work Platforms Suspended from Cranes or Derricks" (Exh. C-26), to assist him in designing personnel boxes with interior grab rails. In his opinion, the requirements of ANSI A10.28 were well known to the shipbuilding industry as guidance for the fabrication and use of suspended work platforms (Tr. 422-423, 428, 432). ANSI A10.28, ¶5.8 provides (Exh. C-26):

---

[5] Fleming has been an outside safety consultant since June 1994. Prior to that he was a safety representative for Ingalls Shipbuilding in Pascagoula for over 33 years (Tr. 386). He has been a certified member of the American Society of Safety Engineers since 1972, has held offices within the organization, and is currently serving as vice-president of Region IV (Louisiana, Mississippi, Alabama, Georgia, Florida, and Puerto Rico) (Tr. 376-377, 383). He has conducted training on the three alleged hazards relating to personnel baskets, both while he was at Ingalls and in his current safety business (Tr. 446).

> A grab rail shall be provided all the way around the inside of the suspended work platform to minimize hand exposure.

That language is mirrored in OSHA's standard § 1926.550(g)(4)(ii)(B), which governs crane hoisted platforms for the construction industry, and states: "A grab rail shall be installed inside the entire perimeter of the personnel platform." The requirement of the construction standard does not apply to ship repairing, shipbuilding and ship breaking and related employment, even though the underlying activity here is construction. Yet, reference to parallel hazards addressed in OSHA standards applicable to other industries may support industry recognition when knowledgeable persons in the field rely upon them. Likewise, "[i]ndustry standards and guidelines such as those published by ANSI are evidence of industry recognition." *Kokosing Construction Co., Inc., supra,* 17 BNA OSHC at 1873. The hazard of having crushed or broken bones, which occurs because employees must hold onto the outside of a moving work basket, is recognized. Employees were faced with the alternative of either exposing their hands or arms outside the basket or of having no handhold while being hoisted 100 feet into the air.

The "Secretary has the burden of coming forward with evidence on the feasibility issue." *Whirlpool Corp. v. OSHRC,* 645 F. 2d 1096, 1098 (D. C. Cir. 1981), *cert. denied,* 457 U. S. 1132 (1982). The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enterprises, Inc.,* 19 BNA OSHC 1161, 1190 (Nos. 91-3144, 2000). The abatement suggested by the ANSI and the OSHA construction standards of placing a grab rail inside the perimeter of each personnel basket could readily be implemented and was feasible.

The Secretary has shown that riding in a personnel basket without an inside grab rail constitutes a recognized hazard in the shipbuilding industry; that lack of a grab rail can result in serious injury; and that installation of a grab rail is a feasible method of abatement. The Secretary established a § 5(a)(1) violation for instance (i).

Alleged Hazard of Riding in a Personnel Basket
Without Posted Maximum Load Capacity (ii)

Hoisting Materials when Not Hoisting Personnel (iii)

Item 1, subparagraphs (ii) and (iii), relate to the potential hazard of overloading or damaging the personnel basket, which could make the basket more likely to fail while transporting employees between the rig and the dock.

Subparagraph (ii) asserts that the personnel baskets did not have a load capacity plate posted, a fact which CO Bohannon observed and which Mendoza confirmed (Exh. C-10; Tr. 143, 577). Subparagraph (iii) alleges that the personnel baskets were also used to hoist materials when not hoisting personnel. CO Bohannon observed the basket being hoisted with equipment from the dock to the main deck of the MAX SMITH while personnel were not in the basket (Tr. 572-573). Bohannon observed that the inside of the basket contained a deformed, crushed pipe, indicating to him that something had knocked hard against the pipe (Tr. 586-587). The employer's rigger, Milton Anderson, told Bohannon that he "frequently" lifted materials separately from personnel in these baskets (Tr. 584).

As stated, there must be adequate warning to an employer before it is charged with knowledge sufficient to support a § 5(a)(1) violation. The lack of a posted maximum load capacity was obvious and known to project manager Mendoza. Likewise, supervisors knew that material was being hoisted daily to weekly in personnel baskets.

The Secretary relied on much the same proof submitted for subparagraph (i) to prove recognition of the hazards for (ii) and (iii). The Secretary's expert witness Fleming stated that the personnel baskets should have the maximum weight capacity posted on the baskets to prevent their being overloaded by the employees and their tools. Employees and supervisors could then be knowledgeable about the amount of weight to be transported in terms of the total weight of the personnel and tools. This was basic knowledge in the industry. Also, Fleming testified that a personnel basket which lifts equipment and materials could be weakened or damaged by the repeated heavy lifting of materials. The basket could become unsafe for personnel transport. He had concern that the chokers used to attach the platform to the basket could be overloaded because personnel carriers are not designed for that type of heavy lifting. These potential hazards were understood to be safety hazards by the industry. Fleming stated that there are baskets/boxes designed for moving material only (Tr. 420, 424-426). Both ANSI standard A10.28-1998, ¶¶ 5.3

and 8.2 (governing crane hoisted platforms), and OSHA's construction standard at § 1926.550(g)(4)(iii)(A) and (C) address these alleged hazards.

The Secretary has shown that riding in a personnel basket without a posted maximum load capacity and transporting bulk material in a personnel carrier are recognized hazards in the shipbuilding industry. Abatement would be simple and easily achieved, and NDS/NUS quickly corrected both deficiencies.

NDS/NUS states that the crane had a lifting capacity of between 150 to 600 tons. As Fleming explained, the concern is not that a 50-ton crane would be overloaded. The concern is for the structural integrity of the basket and its lifting apparatus. NDS/NUS regularly transported equipment and materials in a basket intended as a personnel carrier for ten to twelve employees and their tools, such as welding equipment (Tr. 128). Personnel baskets are designed and treated differently from a basket designed for the rougher and heavier work of lifting only materials and equipment. The hazard created by using personnel baskets to hoist heavy equipment is that the basket could fail while lifting employees due to weakened welds or damage caused by impact with equipment within the basket. Falls from a basket during hoisting could result in serious injury or death. The violation is classified as serious. The Secretary has established a § 5(a)(1) violation for instances (ii) and (iii) of item 1.

Item 2: Alleged Serious Violation of § 1915.73(d)

Citation No. 1, item 2, alleges that NDS/NUS employees were exposed to falls of more than 5 feet into water because an approximate 77-inch dock edge was unguarded, in violation of § 1915.73(d). The standard provides:

> When employees are exposed to unguarded edges of decks, platforms, flats, and similar flat surfaces, more than 5 feet *above a solid surface*, the edges shall be guarded by adequate guardrails meeting the requirements of § 1915.71(j) (1) and (2), unless the nature of the work in progress or the physical conditions prohibit the use or installation of such guardrails (emphasis added).

The unguarded area was created when four NDS/NUS storage trailers (also referred to as storage boxes) were removed from the rig and placed on the dock. Two trailers were placed with a 77-inch gap between them at the dock edge. NDS/NUS employees periodically used the

trailers to store and retrieve equipment and other useful items. When opened, the trailer door swung out over the river all the way back against the side of the trailer (Exh. C-16; Tr. 154, 159, 344-345). In order to retrieve a fully opened door, an employee would reach his or her upper torso out and over the water (Tr. 155). Lonnie Williams, who identified himself as a Noble foreman, informed CO Stevens that the trailers had recently been moved to the dock (Tr. 341-343). Inside the trailer CO Stevens found parts, pieces of equipment, and general supply items belonging to NDS/NUS (Tr. 343). According to Mendoza, the storage trailers contained certain materials discarded from the rig. The area of the dock edge near the trailer door was littered with materials which constituted tripping hazards. Because the door of the storage trailer was placed so close to the water, NDS/NUS employees were exposed to the hazard of falling off the edge of the dock into the water. Employees did not wear life preservers or have other fall protection available at the trailer area (Exh. C-16; Tr. 151, 155, 158). Neither the shipyard nor NDS/NUS installed guardrails. While the shipyard owned the dock, the trailers were owned and used by NDS/NUS.

The standard requires guardrails for fall distances of 5 feet or more above a "solid surface." The unguarded dock edge was approximately 5 to 7 feet above the water of the Pascagoula River. The water was 38 to 40 feet deep at that area (Tr. 216). NDS/NUS challenges the applicability of the cited standard. It argues that all substances are classified as solid, liquid, or gas and that a fall into water cannot be considered a fall onto a "solid surface." "Even the riverbed is composed of "marshy substances, quicksand-like substances, etc." and is not "solid" (Resp. Brief, p. 13). It is determined that NDS/NUS is correct. The standard is inapplicable to falls into water. Commission precedent permits reference to other standards to aid in the interpretation of an undefined, broad term in a cited standard. *A. L. Baumgartner Const. Inc.*, 16 BNA OSHC 1995, 2001 (No. 92-1022, 1994). The standard at issue, § 1915.73(d)(3) itself, references § 1915.71(j). The term "solid surface" is used there to address fall hazards from scaffolding. Section 1915.71(j)(1) provides in part:

> Platforms supported or suspended more than 5 feet above a *solid surface, or at any distance above water*, were not provided with railings (emphasis added).

Similarly, 1915.71(j)(3) governs omission of a railing and requires:

> . . . employees working more than 5 feet above *solid surfaces* shall be protected by safety belts and lifelines . . . and employees working *over water* shall be protected by buoyant work vest . . . (emphasis added).

As illustrated by these standards, the Secretary distinguishes "solid surfaces" from "water." The Secretary could have used an inclusive term. For example, in the construction standard of § 1926.501(b)(1), which requires protection from falls of 6 feet or more to a "lower level," the Secretary clarified that "liquids" are meant to be included within the definition of "lower level."[6] While severe injuries may be sustained simply from striking the water from a substantial distance, falls into water present the additional hazard of drowning and the Secretary may have chosen to address water hazards in a different way. In any event, in the context of the cited standard, the undersigned cannot interpret a riverbed lying in 30 feet of water to be a "solid surface." The standard does not apply to the conditions cited. Item 2 is vacated.

Item 3: Alleged Serious Violation of § 1915.132(a)

Citation No. 1, item 3, alleges that a large, portable electric fan used on the MAX SMITH was not grounded in violation of § 1915.132(a), which provides:

> (a) The frames of portable electric tools and appliances, except double insulated tools approved by Underwriters' Laboratories, shall be grounded either through a third wire in the cable containing the circuit conductors or through a separate wire which is grounded at the source of the current.

The Secretary contends that the metal frame of the 110-volt portable fan could create an electrical hazard because the fan was not grounded. It is undisputed that the fan was missing the grounding prong on its electrical cord and thus was not properly grounded (Tr. 8). The fan was owned by FGH, and FGH apparently brought the fan on board the MAX SMITH. It is unknown whether a NDS/NUS employee or a shipyard employee plugged it in, but the fan was used by NDS/NUS employees to help ventilate painting fumes (Tr. 331, 611, 622). The fan was located at the entry way and was the only means of ventilation for the otherwise closed 20- by 40- foot

[6] OSHA's preamble to § 1926.501(b)(1) states that the term "lower level surface" includes liquids and water (Vol 59 Fed Reg, p. 40,681).

room. The next day it was used at the same location where NDS/NUS employee Donald Jefferson was welding and fabricating a door for the storage room (or ET locker).

The fan provided some air circulation for the storage room, but NDS/NUS's safety training specialist, Sean Stoleson, physically adjusted the fan to blow more air into the room (Tr. 164-165, 623). COs Savage and Bohannon observed the fan near the door. They were concerned about employees having to access the room passing within a close distance of the fan. The deck of the rig was metal, and an electrical short in the metal fan could cause a serious shock someone touching the fan (Tr. 283-286). Bohannon placed his electrical testing device on the fan and determined that there was a grounding problem (Exh. C-18; Tr. 165-166, 251, 592, 625).

The major point of contention for this item is whether NDS/NUS should have known of the violation. An employer should seek to assure itself that equipment used by its employees is safe. The Secretary has the burden to show that an employer's failure to discover a violative condition was due to lack of reasonable diligence where the employer maintained an adequate inspection program. *Trinity Marine Nashville Inc.*, 19 BNA OSHC 1015, 1017 (No. 98-0144, 2000), *rev'd on other grounds*, 19 BNA OSHC 1673 (5th Cir. 2001). Although NDS/NUS introduced scant evidence of an inspection program, the record supports that it had a crewmember with safety responsibility on board (Tr. 170). The Secretary acknowledges, however, that the violation was not obvious, unless the fan was unplugged, which it was not. NDS/NUS contends that since the fan was already operating, it should not have to unplug the fan to determine if the grounding pin was present. It claims it would be unreasonable to require a full inspection of each cord brought aboard by the employees of another employer. In the final analysis the determination is a factual one. The fan blowing air into a room is a different type of use than, for example, working with a borrowed tool that is continually handled by an employee. Considering the surrounding circumstances, the Secretary has failed to show that NDS/NUS had constructive knowledge of the fan's grounding problem. The violation of § 1925.132(a) is vacated.

Citation No. 2
Item 2: Alleged Nonserious Violation of § 1915.7(d)(1)

Citation No. 2, item 2, alleges that although NDS/NUS's competent person performed atmospheric tests, the tests were not recorded as required by § 1915.7(d)(1), which provides:

> (d) *Recordkeeping.* (1) When tests and inspections are performed by a competent person, Marine Chemist, or Certified industrial Hygienist as required by any provisions of subparts B, C, D, or H of this part, the employer shall ensure that the person performing the test and the inspection records the location, time, date, location of inspected spaces, and the operations performed, as well as the test results and any instructions.

The parties agree that NDS/NUS's "competent person" Sean Stoleson conducted atmospheric tests inside the newly painted 40- by 20-foot storeroom before the welding "hot work" was begun (Tr. 185, 272). The parties agree that the data related to the tests was not recorded. The parties also agree that if Part 1915, subparts B, C, D, or H, require atmospheric tests to be made, the failure to record the test data violated the standard. NDS/NUS claims that since the tests were not required, it had no duty to record data from them.

Among other standards, the Secretary points to a subpart B standard, § 1915.12(b)(1)(ii), as one which required NDS/NUS to conduct atmospheric tests. That standard states:

> *Flammable atmospheres.* (1) The employer shall ensure that spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases are . . . (ii) Tested by a competent person prior to entry by an employees to determine the concentration of flammable vapors and gases within the space.

The storeroom had two doors--one where the fan was--and one at the other end of the room that remained closed, and no windows (Tr. 272). The fan was the only means of ventilation (Tr. 272). The term "space" used in § 1915.12(b)(1)(ii) is defined in § 1915.11(b), which provides:

> *Space* means an area on a vessel or vessel section or within a shipyard such as, but not limited to: cargo tanks or holds; pumps or engine rooms; storage lockers; tanks containing flammable or combustible liquids, gases, or solids; rooms within buildings; crawl spaces; tunnels; or access ways. The atmosphere within a space is the entire area within its bounds.

The storeroom meets the definition of a "space." The question remains whether the storeroom "contained or had contained" combustible or flammable liquids or gases. On September 7, 1999, NDS/NUS's employees painted the storeroom with Intergard 475, a white

paint which has a flashpoint of 77 degrees Fahrenheit and was flammable (Exh. C-24). The next day, September 8, 1999, a new door was to be welded and installed for the storeroom (Exhs. C-17, C-22; Tr. 165, 177, 275). Therefore, Stoleson tested the atmosphere of the storeroom right before the welding was to begin. The test showed a lower exposure limit (LEL) reading of zero (Tr. 170, 182).

The fact that the atmosphere tested zero does not mean that it had not contained a combustible or flammable liquid or gas during and after it was painted on September 7, 1999. Referring to the flammable paint, CO Savage explained "there was a flammable material that had been introduced into the space on a previous day. And, while that coating or paint is curing, then it's gong to be giving off vapors that could create a flammable atmosphere" (Tr. 281). The paint fumes were strong even outside the storeroom on September 8. The atmosphere was required to be tested pursuant to § 1915.12(b)(1)(ii). The test data should have been recorded so that the next shift of employees had information or possible safety instructions, even if the test results were within acceptable levels (Tr. 279-280). Since a subpart B standard required the tests, §1915.7(d)(1) required the data to be recorded. The violation is affirmed as other that serious.

Penalty Assessment

The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act requires that when assessing penalties, the Commission gives "due consideration" to: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

NDS/NUS is a large employer with over 1,000 employees. The employers had a safety program and were cooperative during the investigation (T. 321, 360, 595). The gravity of transporting employees in a defective personnel basket was high due to the possibility of hands

and arms being hit and crushed or employees falling from the basket. The recommended penalty did not include a reduction for history since NDS was cited within the past three years (1998) (Tr. 595). However, when the violation occurred, the case was on appeal to the Review Commission and was not yet final (Tr. 599). "Until a citation becomes a final order, it may not be considered as evidence of a history of previous violations for the purpose of penalty assessment." *Vanco Construction, Inc.*, 11 BNA OSHC 1058, 1062 (No. 79-4945, 1982). Based on these factors, a penalty of $ 3,750.00 for the violation of Section 5(a)(1) is assessed. No penalty is recommended or assessed for the nonserious violation of § 1915.7(d)(1).

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

It is hereby ORDERED:

1. Citation No. 1, item 1, subparagraphs (i), (ii), and (iii), alleging a serious violation of Section 5(a)(1) is affirmed and a penalty of $3,750.00 is assessed. Subparagraph (iv) was withdrawn by joint motion of the parties and is vacated.

2. Citation No. 1, item 2, alleging a serious violation of § 1915.73(d), is vacated.

3. Citation No. 1, item 3, alleging a serious violation of § 1915.132(a), is vacated.

4. Citation No. 2, item 1, alleging an "other" than serious violation of § 1915.7(b)(2)(i), is withdrawn by joint motion of the parties and is vacated.

5. Citation No. 2, item 2, alleging an "other" than serious violation of § 1915.7(d)(1), is affirmed and no penalty is assessed.

/s/

NANCY J. SPIES
Judge

Date: February 25, 2002