SECRETARY OF LABOR, Complainant, v. SEABED HARVESTING, INC., Respondent.	OSHRC DOCKET NO. 97-0417

APPEARANCES:

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

For the Respondent:
Kenneth A. Sheppard, Esq., Simburg, Ketter, Sheppard & Purdy, P.S., Seattle, Washington

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

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

Respondent, Seabed Harvesting, Inc. (Seabed), at all times relevant to this action maintained a place of business on the east side of Bainbridge Island, Washington, aboard the vessel *Lauri Ann*, where it was engaged in geoduck harvesting. Respondent admits it is an employer (Tr. 196). Seabed is engaged in a business affecting commerce and is, therefore, subject to the requirements of the Act.

On January 14, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Seabed's work site aboard the *Lauri Ann.* As a result of that inspection, Seabed was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Seabed brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 5, 1997, a hearing was held in Seattle, Washington. The parties have submitted briefs on the issues and this matter is ready for disposition.

The Inspection

Facts

OSHA Compliance Officer (CO) David Baker testified that on January 14, 1997, he observed the *Lauri Ann* anchored off Skiff Point. A diver was in the water; no tender was visible on the deck of the *Lauri Ann* (Tr. 28-30). Baker identified himself, and boarded the *Lauri Ann*, without objection (Tr. 34, 233). Doug Williams, the geoduck program manager with the Department of Natural Resources (Tr. 120), was present during the OSHA inspection, and confirmed Baker's account (Tr. 123).

Discussion

Seabed asks that the fruits of the January 14, 1997 search be suppressed. Seabed maintains that its consent to OSHA inspection is required under the terms of its licensing agreement with Washington's Department of Natural Resources (DNR). Seabed repeatedly objected to the terms of the agreement with DNR (Tr. 141-42, 221). Seabed argues that any consent to the inspection, therefore, was coerced.

The record establishes that Seabed consented to the January 14, 1997 inspection, in that it failed to raise any objections upon the CO's arrival on its work site. That Seabed had previously objected to the provisions of its contract with DNR is not relevant to these proceedings. OSHA was not a party to the contract or privy to Seabed's objection; the Commission has no jurisdiction to determine legitimacy of Seabed's contract with a third party.

The Commission has held that an employer seeking to suppress evidence obtained during a consensual inspection must present clear and convincing proof of some affirmative misrepresentation by OSHA which effectively coerced his consent. *Secretary of Labor v. Sanders Lead Company*, 15 BNA OSHC 1640, 1991-93 CCH OSHD ¶29,690 (No. 87-260, 1992). Seabed introduced no evidence of misconduct. There is no basis, therefore, for the suppression of the evidence obtained during the January 14 inspection.

Alleged Violation of §1910.422(e)

Citation 1, item 1 alleges:

29 CFR 1910.422(e): A depth-time profile including, when appropriate, any breathing gas changes, was not maintained for each diver during the dive including decompression:

a.) East Side of Bainbridge Island, off Skiff Point, aboard the dive boat Lauri Ann - Employees engaged in commercial harvesting of geoducks, on or about 14 January 1997.

Facts

At the hearing CO Baker testified that the depth-time profiles being maintained by the tender on January 14, 1997 were incomplete, in that only the divers' bottom time was being tracked (Tr. 49). No record of the divers' depth was maintained (Tr. 41-44, 51; Exh. C-3).

Both Doug McRae, Seabed's president, and Mark Wright, an independent contractor diving off the *Lauri Ann* (Tr. 157-59), used dive computers, which provide the diver with a depth-time profile. Baker testified, however, that dive computers are not a substitute for written depth-time profiles maintained by the tender (Tr. 46). In 1979 OSHA issued a written interpretation of the cited standard, publication 3036, for the guidance of affected employees (Tr. 70). Section 1910.422(e), as interpreted, requires that a written time-depth record be maintained during the dive for the benefit of the designated person in charge as an aid in carrying out the planned dive schedule and making necessary adjustments in the decompression schedule (Tr. 72).

Baker stated that he was aware of two instances where dive computers were lost or damaged during rescue operations (Tr. 47). In addition, the information stored in such computers is lost should the computer's batteries fail (Tr. 47). Baker stated that medical personnel would be unable to determine the diver's hyperbaric exposure in the event of an emergency without accurate depth records (Tr. 45, 50-51).

Williams, a master diver and owner of a private dive company, testified that he has tested a number of dive computers for Washington's Department of Natural Resources [DNR] (Tr. 126, 130-31). Williams stated that different brands of computer use different algorithms to figure the diver's depth-time profile, some of which are not accurate (Tr. 127). Some information, such as the time the diver entered and exited the water, is not recorded by dive computers. Entry and exit times are necessary to determine the surface interval and to compute residual time (Tr. 132, 151). Williams testified that, in addition to being subject to battery failure, some frequencies of radio waves, such as those used by cellular phones, may interfere with the computer's data storage (Tr. 127). Williams testified that, for all these reasons, DNR requires that its divers keep a written time-depth profile as a back-up to their dive computers (Tr. 128).

McRae testified that he uses a dive computer called the Skinny Dipper, which records his maximum depth, the duration of his depth, his bottom time, and computes the amount of time remaining until decompression is required (Tr. 205). The computer also computes any required decompression and monitors his decompression as he surfaces (Tr. 205). McRae stated that his computer provides him with his surface interval and computes available residual time at different depths (Tr. 206). The dive data is retained until the computer is manually turned off (Tr. 206).

Wright uses a Sherwood Source Module, which self activates at a depth of three feet (Tr. 167). The Sherwood records all activity, including surface intervals until it is shut off (Tr. 168). Wright stated that his computer provides a continuous low battery warning beginning during the batteries last 30 hours of life (Tr. 170).

Discussion

The cited standard requires that: "A depth-time profile, including when appropriate any breathing gas changes, shall be maintained for each diver during the dive including decompression." Seabed maintains that the Secretary's requirement that the dive profile be maintained in writing on the dive vessel extends the reach of a standard beyond the plain meaning of a regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC,* 613 F.2d 1227, (3rd Cir. 1980).

Whether a standard is constitutionally vague cannot be determined from the language of the standard viewed in isolation; other sources may provide the employer with constructive knowledge of a standard's requirements. *Corbesco, Inc. V. Dole*, 926 F.2d 422 (5th Cir. 1991). OSHA formal interpretation of the standard, publication 3036 puts employers on notice of OSHA's requirement that the dive profile be written, and be maintained on the dive vessel during the dive.

The violation has been established.

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

A penalty of $1,000.00 was proposed for this item. Seabed is a small employer (Tr. 53). CO Baker testified that Seabed had previously been cited by OSHA, but was unfamiliar with the specific circumstances (Tr. 53-54). Baker found that the severity of the violation was high, in that injuries to the diver could result in permanent injury or death (Tr. 53). No credit for good faith was allowed, although Baker testified that the *Lauri Ann* was a clean, well maintained vessel, and that Seabed was the only commercial diving operation in the geoduck industry that actually has a decompression chamber (Tr. 115).

I find that the Secretary overstated the gravity of the cited hazard. The computer generated dive profile fulfills the same function as the written profile required by the standard. The time and depth information necessary for determining decompression times is stored on the computer and can be retrieved as needed either by the diver or by medical personnel. The likelihood of stored information being lost is extremely small. I find that the severity of the violation was low.

In addition, credit for good faith should have been accorded to Seabed. The evidence establishes that Seabed was concerned about the health and safety of its employees. Its fleet was well maintained; Seabed maintained its own hyperbaric chamber; its divers did maintain dive profiles during their dives, though not in strict technical compliance with OSHA requirements.

Taking into consideration the relevant factors, I find that a penalty of $100.00 is appropriate.

Alleged Violation of §1910.425(c)(1)

Citation 1, item 2 alleges:

29 CFR 1910.425(c)(1): Each surface-supplied air diver was not continuously tended while in the water:

a.) East Side of Bainbridge Island, off Skiff Point, aboard the dive boat Lauri Ann - Employees engaged in commercial harvesting of geoducks, on or about 14 January 1997.

Facts

When CO Baker arrived to inspect the *Lauri Ann*, McRae was seated inside the cabin at the voice communication box; McRae identified himself as the tender (Tr. 38). Baker testified that McRae could not, from inside the cabin, observe the area immediately around the vessel (Tr. 40; *See also*, testimony of Williams, 124-25). McRae could only see the area directly behind the vessel, he could not see to the sides or in front of the vessel, and so could not track the diver's bubbles, ascertain his physical location and depth, or continuously check his air supply. The tender could not take up any slack in the divers umbilical, or assure that the umbilical was free from being snagged or abraded (Tr. 39-40, 88, 92), and could not immediately assist the diver should a dangerous situation arise (Tr. 95). Finally McRae could not see approaching vessels, unless they were coming up on the *Lauri Ann's* stern (Tr. 118).

Mark Wright testified that Doug McRae was acting as his tender on January 14, 1997 (Tr. 174). Wright stated that it was unnecessary for McRae to be on the deck near the umbilical after the hose is played out during first few minutes of the dive (Tr. 173, 175). Wright stated that the hose remains completely extended until his return (Tr. 172, 175). Wright stated that McRae continuously monitored his breathing, and was at the communication box every time he spoke (Tr. 173). Wright admitted that the view

from the cabin is obstructed, but stated that there had never been a problem with vessels other than DNR making a dangerous approach (Tr. 176-77).

Doug McRae has worked in commercial geoduck harvesting since 1975 (Tr. 193). McRae testified that he did not believe it was necessary to monitor the diver from the deck (Tr. 210). McRae admitted that, from the communication station, he could not see the dive manifold, where the umbilical was attached, but could see the area where the lines go over the deck (Tr. 212-13). McRae stated that there was no reason to check the manifold during the dive, and there is nothing on deck which could catch or abrade the hoses (Tr. 213, 236-37). McRae admitted that in one instance, he had to fire a flare gun over the bow of another vessel to warn it away from the dive area, but stated that this hazard is relatively low (Tr. 214-15).

Applicability. It is undisputed that Seabed is an employer, and subject to the provisions of the Act. Seabed maintains, however, that it was not the employer of Mark Wright, an independent contractor, and so cannot be held liable for safety violations to which only Mr. Wright was exposed. This judge disagrees.

On January 14, 1997 the *Lauri Ann* was a multi-employer work site. The Commission has specifically held that, on a multi-employer work site, it will impose liability on an employer who creates or has control over a hazard even though none of its own employees are exposed to the hazard. *Flint Engineering & Construction Co.,* 15 BNA OSHC 2052, 1992 CCH OSHD ¶29,923 (No. 90-2873, 1992). It is clear that Seabed, as the tender, controlled the cited hazard. Mark Wright testified that he essentially entrusted his life to his tender while diving (Tr. 174). The cited standard is applicable to Seabed.

Interpretation. The cited standard requires that each diver shall be continuously tended while in the water. Complainant interprets the standard as requiring the tender to maintain visual surveillance of the dive area and equipment. Respondent argues that the term "tend" is vague, and that its maintenance of continuous radio contact satisfies the requirements of the standard.

As noted above, external sources may provide the employer with constructive knowledge of a standard's requirements. *See; Corbesco, Inc., supra.* Where an employer has actual knowledge of the existence of a hazard which the standard is intended to protect against, and fails to take steps to protect against that hazard, it may not argue that it believed it was complying with the regulation. *Id.*

In this case, Seabed admitted that its divers have been exposed to at least one of the hazards noted by the CO. McRae stated that he was forced to fire a flare over the bow of an oncoming vessel which threatened to pass over the area where its divers were working. It is undisputed that McRae could not observe the entire dive area, or spot oncoming vessels from inside the cabin (Tr. 176). The violation is established.

Penalty. A penalty of $1,000.00 was proposed for this item.

I find that the gravity for this item was overstated. CO Baker believed that two divers were exposed to this hazard (Tr. 56); however, Complainant introduced evidence pertaining to only one diver.

In addition, as discussed above, credit for good faith should have been accorded to Seabed.

Taking into account the relevant factors, I find that a penalty of $500 is appropriate.

ORDER

1. Citation 1, item 1, alleging violation of §1910.422(e) is AFFIRMED, and a penalty of $100.00 is ASSESSED.

2. Citation 1, item 2, alleging violation of §1910.425(c)(1) AFFIRMED, and a penalty of $500.00 is ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated: