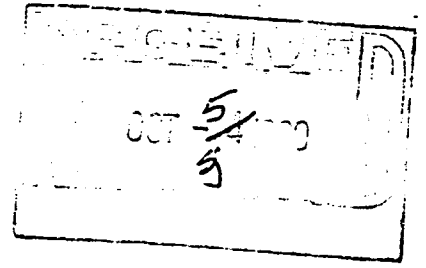


ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P. O. BOX 21149
JUNEAU, ALASKA 99802



STATE OF ALASKA, DEPARTMENT)
OF LABOR,)
)
Complainant,)
)
v.)
)
COOK INLET AQUACULTURE)
ASSOCIATION,)
)
Contestant.)

Docket No. 89-781
Inspection No. Ot-8666-473-88

DECISION AND ORDER

I. INTRODUCTION

This case arises from the accidental drowning of Shawn Davis, an employee of Cook Inlet Aquaculture Association (CIAA), on September 19, 1988, at Packers Lake, Kalgin Island, Alaska.

The accident was investigated by the occupational safety and health section of the State of Alaska, Department of Labor (Department). As a result of its investigation, the Department issued three citations to CIAA for violations of Alaska occupational safety and health codes.

Citation No. 1, Item 1a, alleges CIAA violated General Safety Code 01.0105(a)(2) by failing to adopt and post an appropriate code of safe practices and procedures. Citation No. 1, Item 1b, alleges CIAA violated General Safety Code 01.0105(a)(1) by failing to implement an accident prevention program that

included a daily inspection of job equipment and activities. The two alleged violations were grouped together into a single citation which was classified as "serious" and a monetary penalty of \$1,000 was assessed.

Citation No. 2, Item 1a, alleges CIAA violated General Safety Code 01.0407(a) by failing to require the wearing of life jackets by employees working over or near water. Citation No. 2, Item 1b, alleges CIAA violated General Safety Code 01.0407(c) by failing to provide ring buoys with at least 90 feet of line on boats operated at Packers Lake. These two alleged violations were also grouped into a single "serious" citation and a monetary penalty of \$1,000 was assessed.

Citation No. 3 alleges CIAA violated AS 18.60.058 by failing to report a fatal accident to the Department's occupational safety and health office within 24 hours after learning of the occurrence of the accident. This alleged violation was classified as "other than serious" and no monetary penalty was assessed.

CIAA contested Citations No. 1 and 2 and subsequently filed a formal answer denying all the allegations in the Department's complaint. A hearing was held before the Alaska Occupational Safety and Health Review Board in Anchorage on February 21, 1990. Board members J. C. Wingfield, Donald F. Hoff, Jr., and Lawrence D. Weiss were present. The Board's hearing officer was Robert W. Landau, Esq. The Department was represented by Assistant Attorney General Toby N. Steinberger. CIAA was represented by Douglas Pope, Esq.

At the outset of the hearing, CIAA's counsel filed a motion to dismiss the citations based on (1) lack of jurisdiction, and (2) inapplicability and/or vagueness of the cited code provisions. The Department opposed CIAA's motion to dismiss and additionally requested leave to amend Citation No. 1, Item 1a. The Board took the motions under advisement and agreed to hear evidence and arguments regarding the jurisdiction issue as well as the underlying code violations.¹ Both sides submitted evidence in the form of witness testimony and documentary exhibits. At the conclusion of the hearing, the record was left open for additional discovery on the jurisdiction issue and for the submission of closing arguments in written post-hearing briefs.

Following the hearing, the Department formally filed a motion to amend the pleadings, which was opposed by CIAA. Upon the filing of CIAA's post-hearing brief, the Department further moved to strike portions of the affidavit of Thomas Mears attached to CIAA's post-hearing brief.

¹ At the hearing, the parties disagreed about whether Citation No. 3 was properly in contest before the Board. The Department contended that CIAA's notice of contest challenged only Citations No. 1 and 2 and therefore Citation No. 3 was automatically affirmed by operation of law. CIAA contended that its formal answer denying all allegations placed each citation in contest.

AS 18.60.093 and 8 AAC 61.150 provide that a citation and penalty become final unless contested by the employer within 15 working days of receipt. Because CIAA's notice of contest was specifically limited to Citations No. 1 and 2, we conclude that under AS 18.60.093 and 8 AAC 61.150, Citation No. 3 was not timely contested and became final by operation of law. Therefore, Citation No. 3 must be affirmed.

II. FINDINGS OF FACT

1. Cook Inlet Aquaculture Association is a non-profit corporation with its main office in Soldotna, Alaska. CIAA's operations include harvesting salmon eggs in remote areas and taking them to hatcheries where the eggs are fertilized and later released into Cook Inlet waters. CIAA operates hatcheries at Eklutna near Anchorage and at Trail Lakes on the Kenai Peninsula.

2. CIAA has a regular year-round staff of ten full-time employees. In addition, CIAA hires six to eight temporary workers in the spring and another ten temporary workers in the fall. Most of the temporary workers are assigned to work in remote areas for periods of up to four months, where they monitor and count salmon and later collect salmon eggs to be taken to the hatcheries.

3. One of the remote sites where CIAA conducts salmon egg collection is Packers Lake on Kalgin Island in the middle of Cook Inlet. CIAA has been operating on Kalgin Island since 1980.

4. In the fall of 1988, CIAA assigned seven employees and one supervisor to work at Packers Lake to collect three million eggs, a 2-3 week project. The crew was housed at CIAA's base camp at the southern end of the lake. Most of CIAA's work activities, however, were at the northern end of the lake. On the northeast side of the lake, CIAA operated a fish pen in which salmon were held after being caught. The fish were then transported to the northwest side of the lake to a "spawning station" (about half a mile across the lake) where the salmon were destroyed and the eggs

removed. See Exhibit 2. CIAA operated 2 motorboats on the lake to transport employees back and forth.

5. On September 19, 1988, CIAA's supervisor at Packers Lake instructed employee Shawn Davis to pick up other workers at the fish pen and take them to the salmon spawning area across the lake. The wind and the waves had begun to pick up during the afternoon. On his final trip to the fish pen to pick up the last two remaining employees, Davis' boat made a sharp turn and became broadside to the waves, throwing him from the boat approximately 150-200 yards from shore. He was wearing chest waders but no life jacket, although there was a life jacket stored in the boat.

6. After Davis fell in the water, his boat -- a 14-foot V-bottom aluminum runabout -- continued running in circles with the throttle wide open. Several minutes later the motor stopped and the boat flipped over. The two employees standing on shore witnessed the accident but were not in a position to rescue Davis. However, they were able to get the attention of the operator of CIAA's other boat who immediately took his boat to where Davis had fallen in. The other operator attempted to rescue Davis by handing him an oar but was unable to reach him because the wind and the waves were too strong. He also tried to throw Davis a floatable seat cushion but the wind was so strong it blew the cushion back into his boat. There were no ring buoys in either boat. Shawn Davis struggled to keep his head above water but was unable to stay afloat for long and ultimately drowned.

7. The Department's occupational safety and health section learned of Shawn Davis' drowning from the Alaska State Troopers. On September 23, 1988, compliance officer Michael Otto was assigned to conduct an accident investigation of the fatality. Prior to conducting his investigation, Otto contacted the U.S. Coast Guard as well as Federal OSHA authorities to determine whether they would investigate the accident. Both agencies indicated they did not have jurisdiction over Packers Lake and therefore would not investigate the fatality.

8. During his investigation at Packers Lake, Otto examined CIAA's worksite and spoke to several employees and supervisory personnel. He determined there was no code of safe practices posted anywhere at the Packers Lake worksite or base camp. During the investigation, CIAA representatives were unable to provide Otto with a code of safe practices applicable to the operations. However, sometime after the Department had cited CIAA for not having a code of safe practices at the worksite, CIAA's counsel supplied a two-page sample code of safe practices distributed by the Department of Labor. See Exhibit 6. CIAA maintained that this code was posted at its main office in Soldotna and at the two hatcheries, but that it was not posted at Packers Lake because it had no formal office there.

9. Otto also determined CIAA did not have an accident prevention program in effect that included daily inspections of the workplace and equipment. CIAA provided a one-page "Safety Policy Statement" which employees (including Shawn Davis) were required

to sign. See Exhibit 4. However, CIAA was unable to provide a comprehensive or detailed accident prevention program. The evidence also indicated that no regular safety meetings were held, that there was no documented daily inspection of equipment and that employees generally were expected to look after their own equipment. CIAA did conduct safety orientations for new employees prior to sending them out to remote locations. Although Shawn Davis may have participated in such an orientation at the Eklutna hatchery, it was unclear whether he had been given a separate safety orientation, including boating safety, prior to joining the remote egg-take crew at Packers Lake. He did sign, however, CIAA's safety policy statement.

10. Compliance officer Otto further determined CIAA had equipped both of its boats at Packer Lake with life jackets but that there was no company rule or directive requiring employees to wear them. Loren Waldron, manager of the Eklutna hatchery, testified he consistently required employees under his supervision to wear life jackets when working on or near water, but he had never disciplined or fired anyone for not wearing a life jacket. Waldron, however, was not Shawn Davis' supervisor at Packers Lake and there was no indication that Davis or other employees at Packers Lake were required to wear their life jackets. The decision to wear life jackets at Packers Lake was left up to each individual employee.

11. Finally, upon inspection of the two boats operated by CIAA at Packers Lake, Otto determined neither boat was equipped

with a ring buoy and attached line for emergency rescue operations. In Otto's opinion, a ring buoy with line would have been the most effective way to save Davis after he fell in the water.

12. Packers Lake is approximately 2 miles long and half a mile wide. See Exhibits 1 and 9. It is located approximately 20 air miles from Soldotna. The lake is not subject to tidal influence from Cook Inlet. Packers Lake drains into Cook Inlet through Packers Creek, which is approximately 2.5 miles in length. The creek is relatively narrow and shallow, in some places narrow enough to jump across. The average depth of the creek is approximately knee deep. There is a general period of lower water on Packers Creek during July and August of each year with periods of higher water in May and June and again in September. Beavers occasionally build dams which partially obstruct the creek.

13. The evidence indicates that navigation on Packers Creek is extremely difficult. Because the creek is relatively narrow and shallow, CIAA brings its boats and employees to Packers Lake by plane rather than taking the boats up the creek. Tom Mears, CIAA's executive director, testified that in 1980 a motor boat was transported from tidewater to Packers Lake; the boat had to be paddled or dragged for much of the way. In addition, as a result of the beaver dams which partially obstruct Packers Creek, even salmon have difficulty swimming up the creek.

14. In a determination dated February 27, 1985, the U.S. Department of the Interior, Bureau of Land Management, determined that Packers Lake and Packers Creek were not navigable for the

purpose of determining title of submerged lands selected by the State of Alaska under the Alaska Native Claims Settlement Act. See Exhibit 1 to the Department's post-hearing brief. The BLM memorandum details the difficulty of navigation on Packers Creek, including a statement by Tom Mears that "Packers Creek was too shallow for boats."

15. The U.S. Coast Guard has not made an official determination as to whether Packers Lake and Packers Creek are navigable for purposes of regulatory jurisdiction. However, neither body of water is on the Coast Guard's list of navigable waters in Alaska. For this reason, the Coast Guard declined to assert jurisdiction to investigate the drowning of Shawn Davis. See Deposition of Lt. Cmdr. Gary Stock at 12, 24, 27-28. In addition, the evidence indicates that the 2 boats operated by CIAA at Packers Lake did not have Coast Guard registration numbers and were not subject to Coast Guard inspection.

16. Apart from CIAA's operations, the only other established activity at Packers Lake is a private hunting and fishing lodge accommodating up to 20 guests. The lodge operates boats on Packers Lake but there is no evidence that any of its boats have ever navigated Packers Creek or any of the other streams flowing from Packers Lake.

III. CONCLUSIONS OF LAW

A. Jurisdiction

In its motion to dismiss, CIAA contends that the Department lacks jurisdiction to enforce its citations arising from the drowning of Shawn Davis at Packers Lake. CIAA maintains that Packers Lake is part of the "navigable waters of the United States" under the exclusive safety jurisdiction of the U.S. Coast Guard.²

The Coast Guard's jurisdiction over navigable waters of the United States is set forth in 33 C.F.R. § 2.05-25 which provides in pertinent part:

(a) Except as provided in paragraph (b) of this section, "navigable waters of the United States," "navigable waters," and "territorial waters" mean, except where Congress has designated them not to be navigable waters of the United States:

- (1) Territorial seas of the United States;
- (2) Internal waters of the United States that are subject to tidal influence; and

² As a preliminary matter, the parties disagree as to who bears the burden of proof on the question of jurisdiction. While normally the Department would have the burden of proving its own jurisdiction, in this case we conclude that the issue of "jurisdiction" raised by CIAA is actually a claim of preemption under section 4(b)(1) of the Federal OSHA Act, 29 U.S.C. § 651 et seq., upon which the Alaska OSHA Act, AS 18.60.010-.105, is based. Section 4(b)(1) of the Federal OSHA Act provides that OSHA does not 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." According to the Federal OSHA Review Commission (this Board's federal counterpart), section 4(b)(1) preemption is an affirmative defense on which the employer bears the burden of proof. See Idaho Travertine Corp., 3 OSHC 1535, 1975-76 CCH OSHD ¶ 20,013 (1975). We adopt this view.

(3) Internal waters of the United States not subject to tidal influence that:

(i) Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage, or

(ii) A governmental or non-governmental body, having exercise in waterway improvement, determines to be capable of improvement at a reasonable cost (a favorable balance between cost and need) to provide, by themselves or in connection with other waters, highways for substantial interstate or foreign commerce.

The accident in question took place on Packers Lake. The evidence establishes that Packers Lake is neither a territorial sea of the United States nor an internal body of water subject to tidal influence. The evidence further makes clear that while Packers Lake itself has been navigated for commercial and recreational purposes, it has not been used as a "highway for substantial interstate or foreign commerce" due to the extreme difficulty of navigating Packers Creek which connects Packers Lake with Cook Inlet. The record before us overwhelmingly demonstrates that Packers Creek is considered to be non-navigable for any type of commercial vessel except possibly a canoe. This determination of non-navigability is based on the experience of those persons most familiar with Packers Lake and Packers Creek, including CIAA's own executive director.

We further conclude that even with reasonable improvements to Packers Creek, the waterway connecting Packers Lake to Cook Inlet would still not be "susceptible for use" as a highway

for substantial interstate or foreign commerce. Mere removal of beaver dams to assist spawning salmon is not the kind of waterway improvement that would render Packers Creek navigable. The relative narrowness and shallowness of the creek, combined with seasonal fluctuations in the water level, make clear that Packers Creek will never provide a navigable linkage for interstate commerce between Cook Inlet and Packers Lake. We consider CIAA's assertions regarding the potential navigability of Packers Creek to be speculative and unrealistic in light of the evidence regarding the difficulty of navigation on the creek.

Federal cases addressing the navigability of bodies of water for federal regulatory purposes support our conclusion that Packers Lake is not a navigable water of the United States. See, e.g., Sierra Pacific Power Co. v. F.E.R.C., 681 F.2d 1134 (9th Cir. 1982); Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 6 (8th Cir. 1979). The basic test of navigability for federal regulatory jurisdiction was established by the U.S. Supreme Court in The Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1871) as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued

highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) at 563. Applying the The Daniel Ball test to the facts before us, we conclude that while Packers Lake is navigable in fact, Packers Creek is neither navigable in fact nor susceptible of being used as a highway for interstate or foreign commerce. Therefore, Packers Lake does not come within federal regulatory jurisdiction. See also United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940).

We also find it significant that even though the Coast Guard was contacted concerning this fatality, it declined to assert jurisdiction to investigate the accident. As explained by the Coast Guard's representative, Packers Lake is not on the Coast Guard's list of navigable waters in Alaska although the Coast Guard has made no formal determination as to its navigability. We also find it significant that the Bureau of Land Management of the U.S. Department of the Interior has officially determined Packers Lake and Packers Creek to be non-navigable for the purpose of determining title to submerged lands.

We are mindful that there are many remote worksites in Alaska located on or near bodies of water which eventually flow into interstate waterways such as Cook Inlet. For purposes of federal regulatory jurisdiction, each body of water must be examined on its own facts to determine whether it is navigable in

fact and/or whether it is susceptible for use as part of continuously navigable waterway for interstate or foreign commerce. In this case, we conclude that there is clear and convincing evidence establishing that the waterway formed by Packers Lake and Packers Creek is neither navigable in fact nor susceptible for use as a highway for substantial interstate or foreign commerce. Accordingly, we conclude that the Department is not deprived or preempted of its occupational safety and health jurisdiction by the Coast Guard or any other regulatory agency.

B. Motion to Amend Pleadings

Approximately one week after the hearing in this matter, the Department moved to amend its bill of particulars for Citation No. 1, Item 1a, concerning the code of safe practices requirement. The Department's original citation had simply alleged that CIAA had no code of safe practices. This was based on a statement by CIAA's executive director to the compliance officer that CIAA had not adopted a formal code of safe practices. At the hearing, however, CIAA took the position that it did have a code of safe practices which was posted at its head office in Soldotna. See Exhibit 6.

The Department sought to amend Citation No. 1, Item 1a, to state that (1) CIAA had no code of safe practices conspicuously posted at each job site office (i.e. Packers Lake); (2) CIAA's purported code of safe practices did not cover all of its operations; and (3) CIAA's purported code failed to embrace applicable safety and health code provisions. CIAA objected to the

proposed amendment, contending that there is no authority to allow such an amendment of the pleadings and that it would be prejudiced thereby.

The Board's regulations, specifically 8 AAC 61.170(a), incorporate certain of the Alaska Rules of Civil Procedure as applicable to Board proceedings. Civil Rule 15(b) provides in pertinent part:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

In our judgment, the Department's proposed amendment merely conforms the pleadings to the evidence presented at the hearing and does not prejudice CIAA from defending against the citations. CIAA had an ample opportunity to present evidence and arguments concerning the adoption, content and posting of its code of safe practices, and in fact did so. Such evidence and arguments are discussed in our consideration of the merits of the Department's citations. Moreover, the Department does not seek to change the code provision cited; it merely seeks to add further particulars to CIAA's alleged violation of that provision. We believe that CIAA had fair notice of this alleged violation and that the proposed amendment does not prejudice CIAA's defense on the merits.

Accordingly, the Department's motion to amend Citation No. 1, It-1a, is granted.

C. Motion to Strike

The Department also moved to strike paragraphs 6 and 7 of the affidavit of Thomas Mears attached to CIAA's post-hearing brief. The Department argues that the record was closed at the conclusion of the hearing as to all issues except for the jurisdictional issue and that paragraphs 6 and 7 of the Mears affidavit should be stricken since they do not address the jurisdictional issue. CIAA asserts that paragraph 6 and 7 merely explain and clarify Mears' hearing testimony and that leave should be given to supplement the record.

Paragraph 6 of the Mears affidavit essentially asserts that compliance with the ring buoy requirement is inherent dangerous and creates an even greater hazard. The "greater hazard" defense has been specifically recognized as an affirmative defense in OSHA proceedings. See M. Rothstein, Occupational Safety and Health Law § 121 (2d ed. 1983). However, CIAA failed to raise this defense in its notice of contest, answer, or at the hearing. We believe that allowing such an affirmative defense to be raised for the first time in an affidavit attached to a post-hearing brief would be unfair and inconsistent with recognized rules of pleading. Accordingly, we grant the Department's motion to strike paragraph 6 of the Mears affidavit.

Paragraph 7 of the Mears affidavit relates to the location of CIAA's job site office for the Packers Lake project.

This testimony appears to repeat and expand upon the testimony given by Mears at the hearing. However, because the testimony addresses the violation which we have permitted the Department to amend after the hearing, we believe it would only be fair to allow its submission. Accordingly, the Department's motion to strike paragraph 7 of the Mears affidavit is denied.

D. Citations and Penalties

1. Code of Safe Practices

General Safety Code 01.0105(a)(2) provides:

Each employer shall adopt a code of safe practices and procedures which applies to his operation and which embraces the applicable provisions of these regulations. It shall be the obligation of the employer to have these safe practice codes posted in a conspicuous location at each job site office.

The Department's citation, as amended, alleges that CIAA had no code of safe practices posted at its Packers Lake job site, and that the sample code of safe practices submitted by CIAA after the inspection does not fully cover its operations at Packers Lake (i.e. boating safety) nor does it include pertinent provisions of the General Safety Code. CIAA contends that its "job site office" for Packers Lake was located at its Soldotna main office where it had posted an adequate code of safe practices contained in Exhibit 6.

It is undisputed that no code of safe practices was posted at Packers Lake. CIAA has been operating at Packers Lake each spring and summer since 1980. It has established a base camp

and employees work at the lake for periods of up to four months each year. Under these circumstances, we believe it is disingenuous for CIAA to maintain that its "job site office" for Packers Lake is at its Soldotna headquarters. We think a safe practices code easily could have been posted at a conspicuous location at the work areas or base camp at Packers Lake. The requirement is not a burdensome one. Posting a safe practices code at the main office in Soldotna when many employees spend virtually all their time in the field is inadequate and insufficient to notify employees of applicable safety and health rules. CIAA's interpretation of the code provisions under these facts would negate the obvious intent of the code that employees at all work locations should be notified of applicable health and safety rules. We therefore reject CIAA's reasoning on this point.

Additionally, the sample code of safe practices submitted by CIAA in Exhibit 6 does not adequately cover the extent of CIAA's actual operations. The sample code lacks any rules or regulations pertaining to water safety or working at remote sites. While this sample code might well apply to some aspects of CIAA's operations, it was not modified or adapted to address the specific safety and health hazards encountered by CIAA's employees at Packers Lake. Accordingly, we conclude that CIAA failed to comply with the code of safe practices requirement.

2. Accident Prevention Program

General Safety Code 01.0105(a)(1) provides:

Every employer shall start and maintain an accident prevention program. The program

shall provide that personnel knowledgeable in the field of occupational safety and health shall make daily inspections of on the job equipment and activities. The employer shall insure that immediate action be taken to eliminate all hazards.

CIAA contends that it did have an accident prevention program in place and that supervisors were assigned the responsibility of inspecting equipment and activities to prevent safety hazards. A "Safety Policy Statement" (Exhibit 4) was offered as evidence of CIAA's accident prevention program.

While CIAA's safety policy statement is commendable as an indication of general policy, it does not by itself constitute a comprehensive accident prevention program. Even though supervisors are designated as responsible for prevention of accidents, there is no provision for documented daily inspections of equipment and potentially hazardous activities. It was left up to each individual employee to be responsible for his or her own safety and equipment. While certain supervisors (such as Loren Waldron), may have been more rigorous in imposing safety rules on their own crews, there is no evidence that the supervisor at Packers Lake followed the same approach. In any case, leaving safety matters in the discretion of individual supervisors is not an acceptable substitute for a comprehensive, company-wide accident prevention program. Moreover, the only kind of safety meetings held by CIAA were the safety orientations prior to the employees leaving for remote sites. While such orientations are useful, they also are no substitute for regular, ongoing safety meetings and

inspections at the remote worksite itself addressing local conditions. In sum, CIAA's safety program was inadequate and insufficient. We conclude that CIAA failed to comply with the accident prevention program requirement.

3. Life Jackets

General Safety Code 01.0407(a) provides:

Persons working over or near water, where the danger of drowning exists, will be provided with U.S. Coast Guard approved life jackets or buoyant work vests.

The Department interprets this provision to mean that employers must not only provide life jackets or buoyant vests, but that they must require employees to use them. CIAA argues that this requirement should be read literally and therefore CIAA was in compliance since it equipped its boats with life jackets. Alternatively, CIAA argues that the provision is impermissibly vague because reasonable persons could differ as to its meaning.

The evidence establishes that CIAA provided life jackets on its boats but had no company-wide rule requiring that they be worn. It was left up to individual supervisors and/or employees to decide whether to wear them or not. Additionally, it is beyond dispute that CIAA employees worked on or near water at Packers Lake, and that Packers Lake is large and deep enough that the danger of drowning exists.

In dealing with vagueness challenges to OSHA standards, both the Federal OSHA Review Commission and the Federal courts have applied an objective "reasonable person" test. See generally M.

Rothstein, Occupational Safety and Health Law § 113 (2d ed. 1983). So long as the challenged standard affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster. Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974). Whether a standard provides fair notice to an employer cannot be determined solely from the face of the standard, but the facts of each case must be considered. Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor, 647 F.2d 1177, 1185 (7th Cir. 1982). Imprecise or inartful drafting does not necessarily mean that a standard is impermissibly vague. Wisconsin Electric Power Co. v. OSHRC, 567 F.2d 735, 738 (7th Cir. 1977). An OSHA regulation does not violate due process if an employer familiar with the circumstances of the industry can be expected to have adequate warning of the conduct required. Flour Constructors, Inc. v. OSHRC, 861 F.2d 936 (6th Cir. 1988); but see Gates & Fox Co. v. OSHRC, 790 F.2d 154 (D.C. Cir. 1986). In any vagueness challenge, the ultimate question to be resolved is "whether the standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." Allis-Chalmers Corp. v. OSHRC, 542 F.2d 27, 30 (7th Cir. 1976).

While it is true that General Safety Code 01.0407(a) does not explicitly state that an employer must require the wearing of life jackets in addition to providing them to employees, we do not believe that this provision is inapplicable or impermissibly vague under the circumstances of this case. We believe a fair and

reasonable reading of this provision requires employers to not only provide life jackets but also to require that they be worn. In an emergency, life jackets that are available but not required to be worn are useless. To interpret the provision narrowly as suggested by CIAA would undermine the purpose for which the provision was drafted and would run contrary to the basic intent of Alaska's occupational safety and health laws to provide broad safety and health protection for employees. Accordingly, we conclude that General Safety Code 01.0407(a) is neither inapplicable nor impermissibly vague under the circumstances of this case.

4. Ring Buoys

General Safety Code 01.0407(c) provides:

Ring buoys with at least 90 feet of line shall be provided and readily available for emergency operations. Distance between ring buoys shall not exceed 200 feet.

It is undisputed that at the time of Shawn Davis' drowning, there were no ring buoys with line in either of CIAA's two boats on Packers Lake. CIAA, however, relying on provisions contained in other Alaska occupational safety and health codes, argues that General Safety Code 01.0407(c) should be read to require ring buoys with line only at wharfs, docks, barges, or other points adjacent to water but not in vessels if other personal flotation devices are provided.

The other OSHA codes relied upon by CIAA pertain to construction, logging and petroleum operations and are inapplicable to CIAA's activities at Packers Lake. In contrast, the General

Safety Code applies to all employers in Alaska. Moreover, all three of the industry-specific codes cited by CIAA contain the same general ring buoy requirement found in General Safety Code 01.0407(c). We must therefore reject CIAA's strained interpretation.

CIAA also argues that the ring buoy requirement does not apply if employees are provided with life jackets or other personal flotation devices. We find no basis in § 01.0407(c) or any other General Safety Code provision for making this distinction. The ring buoy requirement is stated in general terms and must be broadly interpreted to provide the maximum safety and health protection to affected employees.

Nor can we accept CIAA's argument that the ring buoy requirement is impermissibly vague. See Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156-57 (D.C. Cir. 1986). For reasons similar to those discussed in the preceding section regarding life jackets, we believe the ring buoy requirement in General Safety Code 01.0407(c) gives employers adequate notice that ring buoys must be readily available for all employees working on or near water, including employees working on boats such as Shawn Davis. Accordingly, we reject CIAA's arguments with respect to the ring buoy requirement and conclude that it failed to comply with General Safety Code 01.0407(c).

5. "Seriousness" of Violations

In its post-hearing brief, CIAA argues for the first time that the Department failed to establish that the alleged violation

created "in the place of employment a substantial probability of death or serious physical harm" pursuant to AS 18.60.095(b). While we disapprove of CIAA's late raising of this issue which prevented the Department from addressing it at the hearing or in briefing, we will nevertheless consider the issue on its merits.

Under AS 18.60.095(b), "a serious violation is considered to exist if the violation creates in the place of employment a substantial probability of death or serious physical harm." This provision is modeled after the substantially similar provision in section 17(k) of the Federal OSHA Act, 29 U.S.C. § 651 et seq. Decisions of the Federal OSHA Review Commission and the courts have consistently held it is not necessary to prove there is a substantial probability an accident will occur. It is only necessary to prove that an accident is possible and that serious harm could result. The likelihood of an accident occurring however, is an important factor in determining the gravity of the violation. M. Rothstein, Occupational Safety and Health Law § 313 (2d ed. 1983); see also Alaska OSHA Compliance Manual at IV-17 to IV-23. Furthermore, two or more non-serious violations may be grouped to form a serious violation if the combination results in a substantial probability that death or serious harm could result. Rothstein, supra, § 313 at 305; Compliance Manual, supra, at V-4 to V-5.

Applying the foregoing principles to the facts of this case, we believe that both Citation No. 1 and Citation No. 2 were properly classified as "serious" violations. From the fact that

CIAA failed to provide ring buoys on its boats at Packers Lake or require that employees wear their life jackets, it is reasonable to infer that in the event of an accident there was a substantial probability that drowning or serious physical harm could result. We believe the death of Shawn Davis illustrates this point.

Likewise, from the fact that CIAA had no code of safe practices addressing boating safety and did not conduct daily inspections to examine equipment or hold regular meetings to discuss hazardous activities, it is also reasonable to infer that an accident was more likely to happen and that serious injury or death could result. We think there is a good chance that the drowning of Shawn Davis might have been prevented if CIAA had posted and enforced appropriate boating safety rules, including the wearing of life jackets, and had provided a comprehensive accident prevention program including daily inspections of equipment and regular safety meetings concerning hazardous activities.

6. Penalties

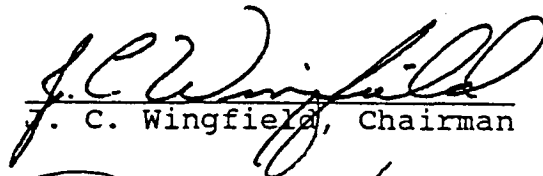
At the hearing, CIAA stated that it did not dispute the penalty amounts assessed by the Department in the event that the alleged violations were upheld. We find no reason to disturb the Department's penalty assessments.

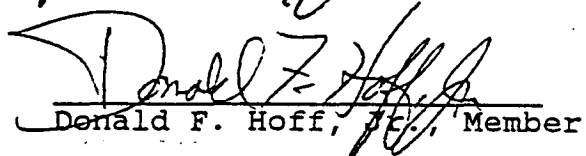
IV. ORDER

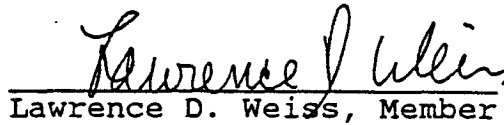
Based on the foregoing findings of fact and conclusions of law, we hereby AFFIRM the citations and penalties issued by the Department to Cook Inlet Aquaculture Association.

DATED this 3rd day of October, 1990.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD


J. C. Wingfield, Chairman


Donald F. Hoff, Member


Lawrence D. Weiss, Member