UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Seward Ship's Drydock, Inc., Respondent.	OSHRC DOCKET NO. 09-1901

Appearances:

Evan Nordby, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

William Mede, Esq., Turner & Mede, PC, Anchorage, Alaska
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an investigation of a Seward Ship's Drydock, Inc. ("Respondent") worksite in Seward, Alaska between April 14, 2009 and September 29, 2009. As a result of that investigation, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging fourteen violations of the Act. Respondent timely contested the Citation. During the trial in Anchorage, Alaska on March 23-25, 2011, the parties submitted two *Partial Settlement Agreements* which fully resolved Citation 1, Items 2 and 5.[1] (Tr. 10,

1 The *Partial Settlement Agreements* were formally approved on August 23, 2011.

606, 705). Therefore, only Citation 1, Items 1, 3, 4a, 4b, 6, 7, 8, 9; Citation 2, Item 1; and Citation 3, Items 1, 2, and 3 remained in dispute at the conclusion of the trial. Each party filed timely post-trial briefs.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Tr. 341; Ex. C-34); *Complaint* and *Answer*; *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of a specific regulation promulgated under Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Section 5(a)(1) of the Act (a/k/a the "General Duty Clause") states that "each employer 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." 29 U.S.C. §654(a)(1). To establish a *prima facie* violation of Section 5(a)(1), Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1995-96 CCH OSHD ¶31,207 (No. 92-2596, 1996). In addition, the evidence must show that the employer knew, or with the exercise of reasonable diligence, could have known of the hazardous

condition. *Otis Elevator Company*, 21 BNA OSHC 2204, 2007 CCH OSHD ¶32,920 (No. 03-1344, 2007).

A violation was serious if there was a substantial probability that death or serious physical harm could have resulted from the condition. 29 U.S.C. 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident had occurred, serious physical harm or death could have resulted. *Whiting Turner Contracting Co*., 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). If the possible injury addressed by the cited regulation is death or serious physical harm, a violation of that regulation is serious. *Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

When Complainant alleges a repeat violation, it has the burden of establishing that the past and present violations were substantially similar. *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). Complainant makes a *prima facie* showing of substantial similarity by establishing that the both violations were for failure to comply with the same regulatory standard, or that the employer failed to protect employees from similar hazards. The burden then shifts to Respondent to rebut that showing. *Monitor Construction Co*., 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

A violation is "willful" if it is "committed 'with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.'" *Kaspar Wireworks, Inc.*, 18 BNA OSHC 2178, 2000 CCH OSHD ¶32,134 (No. 90-2775, 2000)*; Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). The employer's state of mind is the key issue. *AJP Construction, Inc*., 357 F.3d 70 (D.C. Cir. 2004). Complainant must show that Respondent had a "heightened awareness" of the illegality of its conduct. *Id*. Heightened awareness is more than simple awareness of the conditions constituting the alleged violation; such evidence is already necessary to

establish the basic violation. *Id.* Instead, Complainant must show that Respondent was actually aware of the unlawfulness of its action or that it "possessed a state of mind such that if it were informed of the standards, it would not care." *Id.*

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995).

Discussion

Respondent performs repair work on ships, both in drydock and while floating, at its facility in Seward, Alaska. (Tr. 13). On April 14, 2009, OSHA received an employee complaint by telephone concerning welding and confined space safety issues for repairs being performed on the *Paula Lee*, a 270-feet-long, 76-feet-wide, deck barge. (Tr. 13, 61, 311, 489-490, 575; Ex. C-1). OSHA Compliance Officers Matt Pauli and John Casper were dispatched to Seward, Alaska the same day to begin an investigation. (Tr. 57-58, 382). They physically inspected the working conditions on and around the *Paula Lee* for two days: April 14-15, 2009. (Tr. 57-58, 103). Their investigatory findings serve as the basis for the citations proposed in this case.

Several witnesses testified at trial: (1) Matt Pauli, an OSHA Compliance Safety and Health Officer ("CSHO"); (2) Henry Hogge, a welder employed by Respondent on the *Paula Lee* project; (3)

John Casper, an OSHA Compliance Safety and Health Officer ; (4) Joseph Graham, a Certified Marine Chemist; (5) Scott Ketcham, the OSHA Anchorage Area Director; (6) Kenneth Willis, Respondent's Production Manager; (7) Larry Williams, Respondent's Ship Superintendent and Shipyard Competent Person; (8) Bruce Whitmore, a welder employed by Respondent on the *Paula Lee* project; (9) Bernie Lewis, Respondent's Welding Supervisor; (10) John Moreno, Respondent's Paint Crew Foreman; and (11) Philip Dovinh, a Senior Marine Chemist and testifying expert on shipyard work and shipyard safety. (Tr. 54, 279, 340, 378, 445, 485, 505, 584, 608, 706, 726, 733).

Citation 1 Item 1

Complainant alleged a serious violation of Section 5(a)(1) of the Act in Citation 1, Item 1 as follows:

> *Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck-by hazards:*
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> *(a) Paula Lee Barge, Weather Deck, Port-Stern: On or about April 15, 2009 and at times prior thereto, whip protection was not provided at one (1) header on the compressed air hose manifold operating at 108 p.s.i.g. This condition exposed employees to struck-by hazards in the event the hose released from the connection point.*
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> *(b) Paula Lee Barge, Weather Deck: On or about April 15, 2009 and at times prior thereto, whip protection was not provided at a ventilation (Copus) blower operating with an entry pressure of 108 p.s.i.g pressure. This condition exposed employees to struck-by hazards in the event the hoses released from the termination point at the blower.*
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> *(c) Paula Lee Barge, Port-Stern Mooring Bit: On or about April 15, 2009 and at times prior thereto, whip protection was not provided at a compressed air line segment operating at 108 p.s.i.g. adjacent to the port-stern mooring bit. This condition exposed employees to struck-by hazards in the event the hoses released from the connection point.*
>
> *(d) Paula Lee Barge, Weather Deck, Midship: On or about April 15, 2009 and at times prior thereto, whip protection was not provided at compressed air line segments operating at 108 p.s.i.g. This condition*

> *exposed employees to struck-by hazards in the event the hoses released from the connection point.*

During the inspection, CSHO Pauli observed numerous compressed air lines on the deck of the *Paula Lee* which were powering various tools used by Respondent's employees. (Tr. 152-161; Ex. C-15). The lines were an inch thick, had metal fittings on each end, and were charged with 108 pounds of pressure. (Tr. 162, 536; Ex. C-15). Most of the air lines were equipped with keeper clips, which served as a secondary means of keeping the air hoses connected, to protect employees in the area from loose lines "whipping" around. (Tr. 274-278).

CSHO Pauli observed four charged air lines on the *Paula Lee* deck which lacked keeper clip protection. (Tr. 152-161, 274; Ex. C-15). The condition of the four lines was in plain view to anyone who walked by. (Tr. 164). This posed a hazard to Respondent's employees and supervisors, who walked and worked all over the deck, in that energized air lines which accidentally became disconnected could strike them. (Tr. 163, 694). The whipping lines could have caused contusions, broken bones, or even loss of consciousness. (Tr. 163).

Respondent recognized the hazard associated with loose, charged, air lines as Respondent's Production Manager, Kenneth Willis, testified that Respondent buys approximately 1,500 keeper clips each year, that he had personally observed an energized air hose while disconnected, and conceded that they can "wave a little." (Tr. 537-538, 556). Even if additional clips were unavailable, safety wire could have been used to secure the hoses in the event they unexpectedly became disconnected. (Tr. 164). Therefore, multiple feasible means of abatement existed.

Respondent argued that Citation 1 Item 1 is preempted because a specific regulation addresses the condition which was cited. Specific regulations promulgated under Section 5(a)(2) of the Act can preempt the General Duty Clause, but only with respect to hazards, conditions, or practices expressly covered by the specific standards. *Con Agra, Inc*., 11 BNA OSHC 1141, 1983 CCH OSHD ¶26,420 (No. 79-1146, 1983). When the abatement required by specific standards does not eliminate the

hazard addressed by a general duty clause citation, no preemption will be found. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991). The court rejects Respondent's argument that this violation is preempted by 29 C.F.R. §1915.131(h) because that standard only addresses the requirement to visually inspect air hoses, not the recognized practice of attaching keeper clips to the hoses in the event they accidentally become disconnected. (Tr. 165).

Complainant established the elements required to prove Citation 1, Item 1. Therefore, it will be AFFIRMED. However, based on the fact that Respondent had keeper clips on all but four lines, and the court's acceptance of its argument that the clips frequently came off despite their best efforts to maintain them, the proposed penalty for Citation 1, Item 1 will be reduced to $500.00.

Citation 1 Item 3

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

> *29 C.F.R. §1910.134(d)(1)(iii): The employer did not identify and evaluate the respiratory hazard(s) in the workplace to include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form (applicable to shipyard employment by 29 CFR 1915.154): Paula Lee Barge: On or about April 14, 2009 and at times prior thereto, respiratory hazards for welders and helpers working in confined spaced had not been evaluated. This condition exposed employees to inhalation hazards.*

The cited standard provides:

> *29 C.F.R. §1910.134(d)(1)(iii): The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH.*

The *Paula Lee* contained multiple, empty, interior tanks, or "voids", which were underneath the main deck and accessible only through manholes approximately 19 inches wide. (Tr. 516, 519; Ex. C-4). Respondent's employees entered the voids through the manholes and performed welding

repairs. (Tr. 126, 213, 592, 649-650). During the inspection, CSHO Pauli asked Respondent's Shipyard Superintendent, Larry Williams, for a copy of Respondent's respiratory hazard evaluations for the voids and was told that Respondent had none, and instead relied on the Marine Chemist Certificate and his own daily atmospheric tests. (Tr. 175-176). Joseph Graham, the Marine Chemist hired by Respondent to assess the safety of performing hot work inside the *Paula Lee* voids, confirmed that as part of his ship inspection and issuance of the Marine Chemist Certificate, he evaluated the respiratory hazards posed to Respondent's employees. (Tr. 463; Ex. C-3). His evaluation and inspection revealed normal oxygen levels, no carbon monoxide, and no explosivity, and thus the Marine Certificate on its face indicated an evaluation of respiratory hazards with no conditions which required correction. (Tr. 454; Ex. C-3). He further testified that the entire barge was covered by his inspection and subsequently issued Marine Chemist Certificate. (Tr. 472). Therefore, the court concludes that Respondent did evaluate the respiratory hazards on the *Paula Lee*. Accordingly, Complainant failed to establish that Respondent violated the requirements of the cited standard. Citation 1, Item 3 will be VACATED.

Citation 1 Item 4a

Complainant alleged a serious violation of the Act in Citation 1, Item 4a as follows:

> *29 C.F.R. §1910.334(a)(2)(i): Portable cord and plug-connected electrical equipment and flexible cord sets (extension cords) were not visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage to outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket):*
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> *(a) Paula Lee Barge, Crane Turnstile: On or about April 15, 2009 and at times prior thereto, the employer had not performed a visual inspection of an Americ #100 ventilation fan which was observed to have defective strain relief. This condition exposed employees to electrical shock hazards from the 120 volt circuit;*
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> *(b) Paula Lee Barge, Crane Turnstile: On or about April 15, 2009 and at times prior thereto, the employer had not performed a visual inspection of a flexible cord used to power an Americ #100 ventilation*

fan. The flexible cord was observed to have defective strain relief at the plug device. This condition exposed employees to electrical shock hazards from the 120 volt circuit.

The cited standard provides:

29 C.F.R. §1910.334(a)(2)(i): Portable cord- and plug-connected equipment and flexible cord sets (extension cords) shall be visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage to outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket). Cord- and plug-connected equipment and flexible cord sets (extension cords) which remain connected once they are put in place and are not exposed to damage need not be visually inspected until they are relocated.

CSHO Casper conceded during his testimony at trial that Citation 1, Item 4a was based solely on the fact that the two cords identified in the citation item were damaged. (Tr. 434-435). OSHA presented no evidence to affirmatively establish that Respondent had failed to conduct a visual inspection of the cords. (Tr. 434-435). Furthermore, CSHO Casper acknowledged that Respondent's Tool Room Operator told him that he conducted visual inspections of tools and equipment as they were returned. (Tr. 435). The mere existence of defective electrical cords on a jobsite is insufficient to affirmatively establish that the employer failed to visually inspect electrical equipment. Accordingly, Citation 1, Item 4a will be VACATED.

Citation 1 Item 4b

Complainant alleged a serious violation of the Act in Citation 1, Item 4b as follows:

29 C.F.R. §1910.334(a)(2)(ii): When there was a defect or evidence of damage that could expose an employee to injury, the defective or damaged item was not removed from service until the repairs and tests necessary to render the electrical equipment safe had been made:

(a) Paula Lee Barge, Crane Turnstile Void: On or about April 15, 2009 and at times prior thereto, an Americ #100 ventilation blower with damaged strain relief, was not removed from service. This condition exposed employees to electrical shock hazards from the 120 volt service;

> *(b) Paula Lee Barge, Crane Turnstile Void: On or about April 15, 2009 and at times prior thereto, a flexible extension cord for the Americ #100 blower had damaged strain relief. This equipment was not removed from service. This condition exposed employees to electrical shock hazards from the 120 volt service.*

The cited standard provides:

> *29 C.F.R. §1910.334(a)(2)(ii): If there is a defect or evidence of damage that might expose an employee to injury, the defective or damaged item shall be removed from service, and no employee may use it until repairs and tests necessary to render the equipment safe have been made.*

CSHO Casper observed and photographed cords on a ventilation fan and a blower with damaged strain relief, which were being used by Respondent's employees on the *Paula Lee,* as the outer sheathing had pulled away, exposing interior conductor wires. (Tr. 399, 405; Ex. C-22). Employees were observed walking by the fans frequently during the inspection, and both cords were in plain view. (Tr. 404, 408). Employees who contacted the exposed interior wiring could have received an electrical shock. (Tr. 402, 407). Wet conditions onboard the *Paula Lee* increased the likelihood of shock from contact with the exposed conductor wires. (Tr. 404). It was unclear how long the condition had existed, but Respondent had an electrician onboard who was actively addressing electrical deficiencies. (Tr. 430, 436, 443, 615-616).

The court finds that the standard applied to the cited condition, the terms of the standard were violated, employees working and walking in the area of the cords were exposed, constructive knowledge was established in that Respondent could have known of the condition with the exercise of reasonable diligence, and a serious injury which could have resulted if an employee had been shocked. Accordingly, Citation 1, Item 4b will be AFFIRMED. Based on the totality of the circumstances, including the fact that Respondent had an electrician onsite actively addressing electrical problems and

deficiencies at the time, the penalty for Citation 1, Item 4b will be reduced to $1,000.00.

Citation 1 Item 6

Complainant alleged a serious violation of the Act in Citation 1, Item 6 as follows:

> *29 C.F.R. §1915.73(e): When employees are working near the unguarded edges of decks of vessels afloat the employer did not provide them with personal flotation devices. Paula Lee Barge: On or about April 15, 2009 and times prior thereto, employees were working next to the unguarded edges of the weather deck while the vessel was afloat. This condition exposed employees to drowning and hypothermia hazards.*

The cited standard provides:

> *29 C.F.R. §1915.73(e): When employees are working near the unguarded edges of decks of vessels afloat, they shall be protected by personal flotation devices, meeting the requirements of §1915.158(a).*

Some of Respondent's employees and supervisors were observed during OSHA's inspection working near cluttered, unguarded edges of the deck of the *Paula Lee* without wearing personal flotation devices (PFDs). (Tr. 186-190, 348; Ex. C-26). There were gaps of several feet between the *Paula Lee* and the pier, as well as on the other side of the ship between the *Paula Lee* and another barge tied to the *Paula Lee*. (Tr. 191-192, 315; Ex. C-26). Production Manager Kenneth Willis acknowledged that Respondent did have employees on the deck of the *Paula Lee* who were not wearing PFDs, and that there was no guarding around most of the outer edges of the deck. (Tr. 561-562). Ship Superintendent, Larry Williams, testified that there were no PFDs on the deck, but that they were "available" on the pier. (Tr. 698). The standard clearly applied and was violated.

Each of Respondent's employees photographed and observed working without PFDs near the outer edges of the deck of the *Paula Lee* were exposed to this condition, which was open, obvious, and in plain view of the three supervisors working on the ship. An employee who fell into the water, especially during the wet and snowy conditions at the time, would have been subject to hypothermia

and drowning. (Tr. 194, 416). The court finds that employees were exposed to the risk of serious injury, and knowledge by the Respondent of the hazardous condition was established. Accordingly, Citation 1, Item 6 will be AFFIRMED. The snowy and wet conditions observed in the investigative photographs, combined with the clutter virtually everywhere on deck, increased the likelihood that one of the employees would have actually fallen overboard. Accordingly, the proposed penalty of $1,500.00 for Citation 1, Item 6 will remain unchanged.

Citation 1 Item 7

Complainant alleged a serious violation of the Act in Citation 1, Item 7 as follows:

> *29 C.F.R. §1915.91(a): Good housekeeping conditions were not maintained at all times. Hose and electric conductor were not elevated over or placed under walkways or working surfaces or covered by adequate crossover planks:*
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> *(a) Paula Lee Barge: On or about April 15, 2009 and times prior thereto, equipment including air hoses, electric cables, and welding leads were cluttered on the weather deck. This condition exposed employees to tripping and fall hazards.*
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> *(b) Paula Lee Barge: On or about April 15, 2009 and at times prior thereto, electrical cords and cables and welding leads (including connection points) were not elevated to keep the equipment out of the standing water that had accumulated on the weather deck. This condition exposed employees to electrical shock hazards.*

The cited standard provides:

> *29 C.F.R. §1915.91(a): Good housekeeping conditions shall be maintained at all times. Adequate aisles and passageways shall be maintained in all work areas. All staging platforms, ramps, stairways, walkways, aisles, and passageways on vessels or drydocks shall be kept clear of all tools, materials, and equipment except that which is in use, and all debris such as welding rod tips, bolts, nuts, and similar material. Hose and electric conductors shall be elevated over or placed under the walkway or working surfaces of covered by adequate cross-over planks.*

The conditions on the deck of the *Paula Lee* were extremely cluttered, with multiple air hoses, tires, electrical cords, work materials, and equipment scattered all over the walking and working

surface. (Tr. 328, 405, 408; Ex. C-28). Respondent's Production Manager, Kenneth Willis, testified that housekeeping on the *Paula Lee* was "terrible" and acknowledged that significant portions of the clutter were Respondent's own materials and equipment. (Tr. 546, 577). One of Respondent's welders described the *Paula Lee* deck as "a mess." (Tr. 635). The court's own review of photographs of the deck confirmed the witness descriptions in that virtually every part of the deck was covered with hoses, material, tools, equipment, and other clutter. (Ex. C-1, C-10, C-28). The cited standard applied and was violated.

Respondent had fifteen employees walking and working on the *Paula Lee* deck during the course of the inspection, who were exposed to serious slip, trip, and fall hazards. (Tr. 415, 614). Ship Superintendent, Larry Williams, testified that he personally traveled all over the ship. (Tr. 660). Therefore, Complainant established employee exposure, employer knowledge, and the seriousness of the violation. Accordingly, Citation 1, Item 7 will be AFFIRMED. However, based on the totality of the circumstances, including the fact that Respondent had employees working on cleaning up the deck, the penalty will be reduced to $2,500.00.

Citation 1 Item 8

Complainant alleged a serious violation of the Act in Citation 1, Item 8 as follows:

> *29 C.F.R. §1915.111(a): Defective gear for rigging and materials handling was not removed and repaired or replaced before further use: Paula Lee Barge: On or about April 14, 2009 and times prior thereto, a hook latch (mouse) on one end of the four-way, wire rope, lifting bridle sling was broken and still in use. This condition exposed employees to struck-by hazards from lifting loads using defective lifting equipment.*

The cited standard provides:

> *29 C.F.R. §1915.111(a): All gear and equipment provided by the employer for rigging and materials handling shall be inspected before each shift and when necessary, at intervals during its use to ensure that it is safe. Defective gear shall be removed and repaired or replaced before further use.*

Respondent was using a pier crane and attached metal container to move work equipment, tools, and materials on and off the *Paula Lee*. (Tr. 358, 699; Ex. C-30). The container was secured to the crane using a sling with four hooks, one of which was defective in that the hook safety latch was rusted and had been bent back. (Tr. 416-418; Ex. C-30). It was unclear how long the safety latch on the sling hook had been damaged. (Tr. 438). The defective hook latch increased the likelihood that one of the containers full of materials could have fallen while being moved between the *Paula Lee* and the pier. If the container had accidentally slipped off the hook, or more likely some of the materials and equipment fell out because the defective hook disconnected, it could have seriously injured or killed one or more of the employees walking and working in the area. (Tr. 420, 546-547; Ex. C-30). The standard applied, was violated, and created a serious hazard.

The condition was open and obvious and could have been easily discovered, with the exercise of due diligence, by simply examining the hooks each time the container was loaded and unloaded. As there was no way to predict when or where the container or its contents would fall, all of Respondent's employees traveling back and forth between the deck and pier (the same relative path over which the container was moved) were exposed to the hazard. Accordingly, Citation 1, Item 8 will be AFFIRMED. However, the court finds that the likelihood of an actual accident occurring as a result of one broken safety latch to be low. (Tr. 546-547). Therefore, the penalty for Citation 1 Item 8 will be reduced to $500.00.

Citation 1 Item 9

Complainant alleged a serious violation of the Act in Citation 1, Item 9 as follows:

> *29 C.F.R. §1915.504(b)(8): The employer did not post a fire watch when a Marine Chemist, a Coast Guard authorized person, or a shipyard Competent Person as defined in 29 CFR 1915 subpart B requires that a fire watch be posted: Paula Lee Barge, Turnstile Void: On or about April 14, 2009 and times prior thereto, no dedicated fire watch was posted during hot work (welding) operations. This condition exposed employees to burn hazards in the event materials or clothing caught fire while performing hot work.*

The cited standard provides:

> *29 C.F.R. §1915.504(b)(8): The employer must post a fire watch if during hot work any of the following conditions are present...(8) A Marine Chemist, a Coast Guard authorized person, or a shipyard Competent Person, as defined in 29 C.F.R. Part 1915, Subpart B, requires that a fire watch be posted.*

One of the things that the Marine Chemist Certificate required for Respondent's welding activities, or "hot work," on the *Paula Lee* was to "maintain dedicated fire watch with extinguisher." (Tr. 90, 253-254; Ex. C-3). The Marine Chemist Certificate did not specify where or how many dedicated fire watchers or extinguishers were required, so OSHA conceded that those details were left to the discretion of the Shipyard Competent Person, Larry Williams. (Tr. 254, 256). CSHO Pauli maintained, however, that there should have been enough fire watchers to observe each area in which hot work was being performed, and that the water hose located on the pier was not adequate fire extinguishing equipment. (Tr. 196-197, 255). OSHA maintained initially that each void should have had a dedicated fire watch, but later agreed that a fire watch who roamed from opening to opening with quick access to firefighting equipment would have been acceptable. (Tr. 255, 259-260).

Joseph Graham, the Marine Chemist who issued the Certificate, explained that the fire watch he required for this job did not necessarily have to be immediately observing each welder at all times, but they should have been "dedicated" in that they had no other duties to distract them from fire watch obligations. (Tr. 455-456). CSHO Pauli and Mr. Graham's testimony were consistent with the language of 29 C.F.R. §1915.504(c) in that "the employer must not assign other duties to a fire watch while the hot work is in progress." Even Respondent's Production Manager Kenneth Willis ultimately acknowledged that he understood the term "dedicated fire watch" on a Marine Chemist Certificate to mean an employee was required to do nothing else but perform fire watch duties. (Tr. 549). Marine Chemist Graham also clarified that "…with extinguisher" meant quick access to a fire extinguisher or fire hose, and that having a garden-type water hose located on the adjacent pier was not sufficient. (Tr.

456-457).

On April 15, 2009, CSHO Pauli observed welding activities being performed in several voids, with no observable employee dedicated to fire watch and no fire extinguishers or fire hoses anywhere in the area. (Tr. 351). Respondent argued that John Moreno, Respondent's Paint Foreman, and the welders' helpers inside each void were performing fire watch duties. (Tr. 255-256, 352, 699-700, 729-730). Respondent also argued that in the event of a fire, Mr. Moreno and/or a welder's helper could have exited the void, traveled across the deck of the *Paula Lee*, crossed over the gap onto the pier, obtained the water hose from the pier, dragged the water hose back across the gap onto the ship, traveled back to the void, and then addressed the fire. (Tr. 352-353).

The court rejects Respondent's argument as not compliant with the cited standard or the regulatory description of "fire watch duty" in 29 C.F.R. §1915.504(c). The record clearly established that none of the individuals identified by Respondent were "dedicated" to fire watch, as they were performing numerous other duties, and did not have any type of fire extinguishing equipment near them. (Tr. 352, 699-700, 729-730). The cited standard applied and was violated. In addition, Respondent possessed direct knowledge of its failure to assigned employees to dedicated fire watch duty.

Ten to fifteen welders and welder's helpers were exposed to the lack of a dedicated fire watch, which could have caused an unnecessary delay in responding to a fire, resulting in serious burns or death. (Tr. 198). Citation 1, Item 9 will be AFFIRMED. The multiple locations on the *Paula Lee* where hot work was being performed, combined with no apparent effort to watch for fires or ensure the proximity of firefighting equipment, increased the likelihood of a fire not being promptly extinguished. Accordingly, the proposed penalty of $1,200.00 for Citation 1, Item 9 will remain unchanged.

Citation 2 Item 1

Complainant alleged a willful violation of the Act in Citation 2, Item 1 as follows:

> *29 C.F.R. §1915.15(c): A competent person did not visually inspect and test each space certified as "Safe for Workers" or "Safe for Hot Work" as often as necessary to ensure that atmospheric conditions within that space were maintained within the conditions established by the certificate:*
>
> *(a) Paula Lee Barge, Crane Turnstile Void: On or about April 14, 2009 and at times prior thereto, the competent person did not test each space as often as necessary to maintain safe conditions. This condition exposed employees within the space to Carbon Monoxide levels equaling and exceeding 40 parts per million (ppm);*
>
> *(b) Paula Lee Barge, Starboard Ballast Tank: On or about April 14, 2009 and at times prior thereto, the competent person did not test each space as often as necessary to maintain safe conditions. This condition exposed employees within the space to Carbon Monoxide levels equaling and exceeding 35 ppm.*

The cited standard provides:

> *29 C.F.R. §1915.15(c): Tests to maintain the conditions of a Marine Chemist's or Coast Guard authorized person's certificate. A competent person shall visually inspect and test each space certified as "Safe for Workers" or "Safe for Hot Work," as often as necessary to ensure that atmospheric conditions within that space are maintained within the conditions established by the certificate after the certificate has been issued.*

Respondent's employees were performing welding repairs inside several voids on the *Paula Lee* which were accessible only by 19-inch manhole openings. (Tr. 233, 513, 519-520, 566; Ex. C-4). For this project, Respondent elected to obtain and operate under a Marine Chemist Certificate for the hot work it needed to perform inside the confined spaces. (Tr. 95, 449-450; Ex. C-3). Once a shipyard employer elects to obtain and operate under a Marine Chemist Certificate, compliance with the terms of the Certificate is mandatory. (Tr. 776-777). *See also* 29 C.F.R. §1915.14. Joseph Graham, the Marine Chemist who inspected the *Paula Lee*, commonly evaluates various safety issues, including confined space entry, respiratory hazards, fire safety, and toxicity issues. (Tr. 447, 463). He and other Marine Chemists document their findings on a Marine Chemist Certificate, which is left at the vessel

for the Shipyard Competent Person to follow and enforce. (Tr. 82, 95, 448, 646-647; Ex. C-3). The *Paula Lee* voids had previously either been empty or contained only water, and therefore were not as hazardous as the voids Mr. Graham inspects on other types of ships. (Tr. 238). For example, tank barges often carry combustible and flammable liquids in their voids.[2] (Tr. 475-476, 748-749). The court finds that the cited standard applied to the conditions in that it implemented certain requirements for shipyard hot work in confined spaces where Respondent elected to operate under a Marine Chemist Certificate. [3]

The manholes for each void were left open during welding to help dissipate welding fumes and for running hoses, electrical cords, and air duct sometimes used for ventilation. (Tr. 236-237; Ex. C-4). On April 14, 2009, CSHO Pauli observed welding smoke rising from the crane turnstile void manhole. (Tr. 68, 76, 112; Ex. C-4, C-26). Upon closer examination, he saw that the interior area of the crane turnstile void was very smoky, with very low visibility, while employees were inside performing welding repairs with no ventilation.[4] (Tr. 73; Ex. C-4). CSHO Pauli used his Industrial/Scientific ITX4 Gas Meter to check the oxygen level, hydrogen sulfide level, carbon monoxide level, and explosivity inside the crane turnstile void. (Tr. 71-72, 77, 208; Ex. C-4). The hose attached to his meter was lowered approximately 10 feet down into the 15-foot void, and indicated the presence of carbon monoxide. (Tr. 77, 79; Ex. C-4, pp. 3, 4, 5). Although the detected level was below the

2 Also referred to by witnesses as "tanks" because the term "void" in the industry means an empty tank. (Tr. 516).

3 Respondent raised an argument at trial, for the first time in this proceeding, that the *Paula Lee* Marine Chemist Certificate was void by the time of OSHA's inspection because the ship had been moved from drydock to water (and secured to the pier) three days earlier. Complainant objected to the untimeliness of this new assertion and argued that if Respondent was allowed to raise new defenses at trial, Complainant would be prejudiced and therefore should be allowed to amend certain citations to allege violations of alternative regulations. Respondent then objected to Complainant's attempts to amend its complaint and citations at the last minute as untimely. The court rejected both parties' last minute assertions on this issue as untimely, not previously disclosed in response to related discovery requests, and in violation of the court's Scheduling Order. The court also notes that the record clearly established that: (1) Respondent posted the Marine Chemist Certificate at the entrance point to the ship from the pier *after* the *Paula Lee* was refloated, (2) Respondent's Shipyard Superintendent and Shipyard Competent Person, Larry Williams, continued to reference the Marine Chemist Certificate terms on his own Daily Inspection Log *after* the *Paula Lee* was refloated, and (3) Respondent continued to operate under the stated terms of the Marine Chemist Certificate *after* it was refloated. (Tr. 27-48, 574).

4 Other than natural air flow in and out of the 19-inch manhole.

permissible exposure limit ("PEL"), CSHO Pauli was concerned about the presence of carbon monoxide inside the void. (Tr. 96-97, 125). He then asked Respondent to remove the welders from the void. (Tr. 80, 528).

Over the next two days, OSHA conducted fifteen additional direct read air sample tests[5] in several of the voids on the ship where hot work was being performed. (Tr. 80, 208-210, 220). None of OSHA's monitoring results indicated the presence of any hazardous substances, including carbon monoxide, above OSHA's permissible exposure limits. (Tr. 225, 375). Despite this fact, any detectible amounts of carbon monoxide inside the voids concerned OSHA because it is a colorless, odorless, tasteless, and toxic gas which asphyxiates people by displacing oxygen in the human bloodstream. (Tr. 96-97, 125, 242, 453, 575, 648, 779). It can only be detected through the use of air testing equipment. (Tr. 779). OSHA's concern with regard to Citation 2, Item 1 was that the actual presence of carbon monoxide inside some of the voids should have alerted Respondent's Shipyard Superintendent and Competent Person, Larry Williams, to conduct periodic testing throughout each shift, rather than just once each morning. (Tr. 124-125, 205, 208, 241).

The cited regulation at issue here is a performance standard, which differs from a specific standard in that employers are afforded broader discretion by OSHA to identify hazards which are peculiar to their own workplace, and to determine the steps necessary to abate them. *OSHRC v. Thomas Industrial Coatings, Inc*., 21 BNA OSHC 2283, 2008 CCH OSHD ¶32,937 (No. 97-1073, 2007). Since performance standards do not identify specific obligations, compliance is evaluated by courts on the basis of reasonableness. *Id*. Broadly worded standards, such as the one here requiring inspecting and testing "as often as necessary," typically require a showing that a reasonable person familiar with the situation would recognize a hazardous condition which should have been addressed. *Farrens Tree Surgeons, Inc*., 15 BNA OSHC 1793, 1992 CCH OSHD ¶29,770 (No. 90-998, 1992).

5 As opposed to 8-hour time-weighted averages. (Tr. 99, 766).

"If the language of the regulation is not specific enough, however, other sources may provide constructive notice: industry custom and practice; the injury rate for that particular type of [ ] work; the obviousness of the hazard; and the interpretations of the regulation by the Commission." *Corbesco, Inc.*, 926 F.2d 422 (5th Cir. 1991).[6]

The record clearly established that Mr. Williams conducted air monitoring in each void every morning, before welders entered the voids to begin work, to ensure that conditions were safe for them to enter. (Tr. 104, 119, 228, 346, 385-386, 653-655). He also maintained a daily log of his Shipyard Competent Person inspections, which referenced the requirements of the Marine Chemist Certificate. (Tr. 688; Ex. C-24). Furthermore, he implemented mechanical ventilation through the use of fans and blowers in each void to introduce fresh outside air, and to push out any air contaminants. (Tr. 232-233, 650). In sixteen years of working in the ship repair industry, a single pre-shift air test combined with the use of mechanical ventilation had always been sufficient to remove any hazardous substances from the confined space areas in which employees performed this type of work. (Tr. 585, 664-665). He never suspected that the employees performing hot work inside the voids on the *Paula Lee* were working in unsafe environments. (Tr. 588-589; Ex. R-30).

Marine Chemist Graham testified that, to comply with the terms of his Certificate, any hazardous substances detected during hot work on the *Paula Lee* did not have to be completely eliminated. They just needed to be maintained below PELs, which was normally achieved through mechanical ventilation for this type of work. (Tr. 481-483). Only if levels could not be maintained below PELs would it have been necessary to contact the Marine Chemist. (Tr. 481-482). The court also notes that Marine Chemist Graham had worked with Larry Williams for more than five years and had always found him to be a competent Shipyard Competent Person. (Tr. 474, 478).

6 As there were no published Commission cases interpreting this standard, and no evidence concerning injury rates, the court focused on the obviousness of the hazard and industry custom and practice.

Respondent's expert witness, Senior Marine Chemist Philip Dovinh,[7] explained that because the Marine Chemist Certificate did not specify any requirement to test for carbon monoxide, Larry Williams technically was not required to do so, even though he did perform such a test each morning with his air monitor. (Tr. 206-207, 751; Ex. C-3). He and Marine Chemist Graham both testified that Shipyard Competent Persons are afforded broad discretion under the plain language of OSHA Part 1915 regarding any need to periodically re-test atmospheric conditions and regarding which type of ventilation to use. (Tr. 232, 458-459, 478, 663, 752-753, 756). Mr. Dovinh pointed to the "as often as necessary" language in the cited standard to support his opinion. (Tr. 756, 762). He testified that the standard practice in the ship repair industry is to do exactly what Mr. Williams did: conduct air monitoring each morning before welders entered the voids. (Tr. 758). He further testified that, in his opinion, even the extreme smokiness of the crane turnstile void did not warrant re-testing because there is absolutely no correlation between smokiness and carbon monoxide levels. (Tr. 760, 780).

It is clear to the court that OSHA's initial concern over this issue arose when CSHO Pauli observed the smoke-filled crane turnstile void on the first day of the inspection. When OSHA subsequently discovered that two employees were working inside the crane turnstile void without active mechanical ventilation, and that carbon monoxide was present (although below permissible exposure limits), OSHA concluded that Mr. Williams was not re-testing the voids "as often as necessary."

The court credits Respondent's undisputed explanation that the majority of the repair work in the crane turnstile void had been completed earlier with active ventilation. Then, just before OSHA arrived, the *Paula Lee* owner's representative had found a few more spots that needed touch-up work and had directed Respondent's welders to go back into the crane turnstile void to address those issues even though the ventilation had been turned off. (Tr. 81, 217, 526-528, 532, 592). Larry Williams did

7 Complainant stipulated to Mr. Dovinh's status as a qualified expert witness in the field of shipyard work and shipyard safety. (Tr. 738).

not know that the *Paula Lee* owner's representative had sent the employees back into the void. (Tr. 526-528, 532, 592).

Although afforded broad discretion under the cited standard, the court concludes that there were several factors present at this jobsite which should have alerted a reasonable Shipyard Competent Person of the need to re-test the atmospheric conditions of the voids during the shift, and not just once each morning before work began,[8] to maintain the Marine Chemist Certificate conditions: (1) it was undisputed that welding activity changes the atmospheric conditions in the voids from those tested by the Marine Chemist when he issued the Certificate (Tr. 117-119, 654); (2) the welding rods being used by Respondent's welders on the *Paula Lee* were known to generate a small amount of carbon monoxide (Tr. 754; Ex. C-33); (3) carbon monoxide levels inside some of the voids were approaching the permissible exposure limits (Tr. 71-79; Ex. C-4); (4) the crane turnstile void was obviously and openly filled with smoke, and although smokiness may not have directly correlated to carbon monoxide levels, it certainly could indicate the presence of other harmful toxics at least justifying mid-shift air testing (Tr. 68-76; Ex. C-4); (5) Larry Williams and other supervisors had direct knowledge that the ship owner's representative was actively inspecting Respondent's work on the vessel and pointing out areas which needed further attention. A reasonable and diligent Shipyard Competent Person would have either prohibited employees from taking immediate direction from that person (especially when employees were directed to re-enter confined spaces to perform welding repairs without ventilation), or ensured that safety procedures were followed when employees addressed areas needing more work (Tr. 212-213, 526-528, 532, 592); (6) Welders had been complaining to Respondent's supervisors about inadequate ventilation, smoky conditions, and unusual smells inside

8 The court notes the testimony of Mr. Dovinh indicating that the standard practice in the ship repair industry was to test once each morning before welders enter voids, but even he acknowledged a duty by the competent person to determine whether additional tests during the shift should occur. (Tr. 758). The presence of hazardous and changing conditions in the voids created an obligation to go beyond the minimum industry standard. *Corbesco*, supra.

the voids[9] (Tr. 299, 301-311, 338, 617); and (7) Respondent was experiencing electrical problems in various work areas due to the wet conditions which resulted in, among other things, problems keeping the ventilation fans and blowers operational. As a result, Respondent had an electrician onboard attempting to fix electrical problems as they were identified. (Tr. 436, 443, 615-616).

Even Mr. Williams acknowledged that his own Shipyard Competent Person training provided that a "re-inspection frequency must be established and periodic survey of the work must be done to be sure that all requirements are being met." (Tr. 666-667, 670; Ex. R-28, p. DOL 998). He ultimately conceded that his standard practice of never re-testing the air inside voids during a shift was not an option identified in his Shipyard Competent Person training materials. (Tr. 670). The court finds that Mr. Williams' standard practice of never re-testing atmospheric conditions after welding began inside the voids, given the circumstances and conditions described above, was unreasonable and an abuse of the discretion afforded him under the standard. Accordingly, the court finds that Respondent violated the terms of the cited standard.

Two welders, Dan Ursery and Carlos Rodriguez, who were performing hot work inside the crane turnstile void on April 14, 2009 without mechanical ventilation, were exposed to this violative condition. (Tr. 126, 213, 532, 592). The testimony was unclear as to Instance (b), with regard to which employees, on which dates, and under what conditions, were performing hot work inside the starboard ballast tank. Therefore, Complainant failed to establish specific employee exposure for that void as alleged in Instance (b).

Respondent had direct knowledge, through its delegation of authority over the *Paula Lee* project to Larry Williams, of the practice of not re-testing atmospheric conditions inside the voids on the *Paula Lee* after employees entered and welding began. *A.P. O'Horo Co.*, 14 BNA OSHC 2004,

9 Mr. Williams did re-test two voids on April 14 and 15, 2009, but only after specific requests by two of Respondent's supervisors. Welding Supervisor Bernie Lewis asked him to re-test a void after employees complained about air quality, and on another occasion Respondent's Production Manager, Kenneth Willis, directed him to re-test because employees thought they smelled acetylene. (Tr. 313-315, 329, 339, 521).

1991 CCH OSHD ¶29,223 (No. 85-0369, 1991). Respondent's failure to re-test atmospheric conditions during shifts, when conditions had obviously changed from those identified in the Marine Chemist Certificate, especially considering the presence of carbon monoxide, exposed employees to serious, and possibly fatal, injuries.

Complainant alleged that Respondent's conduct in not re-testing the voids where carbon monoxide was present (although below permissible exposure limits) constituted willful conduct. To establish a willful violation, Complainant must prove heightened awareness of the violative condition which rose to the level of conscious disregard for the requirements of the Act, or plain indifference to employee safety. *General Motors Corp*., 14 BNA OSHC 2064, 1991 CCH OSHD ¶41,251 (No. 82-630 *et al*., 1991). An employer cannot be found to have willfully violated a standard where it believed in good faith that the standard did not apply, or made good faith efforts to comply with the standard to eliminate a hazard. *Id*. The court finds that Respondent had implemented several measures to ensure the safety of the employees performing hot work inside the *Paula Lee* voids, and therefore, demonstrated a good faith, reasonable belief that its conduct conformed to the requirements of the cited regulation. *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1999 CCH OSHD ¶31,933 (No. 96-0593, 1999). Respondent, through Mr. Williams, performed daily air testing before each shift, re-tested on at least two occasions when specifically requested to do so by other supervisors, and worked diligently to ensure that mechanical ventilation was working in each void (although the record revealed at least one failure in that task on April 14, 2009 in the crane turnstile void for about forty-five minutes). (Tr. 212-213). These facts, combined with the extremely broad discretion afforded Shipyard Competent Persons under the cited regulation, convince the court that Complainant failed to establish the willfulness of this violation. The record, considered in its totality, does not establish that Respondent committed this violation with either an intentional disregard for the requirements of the Act, or with plain indifference toward employee safety. *Kaspar Wireworks, Inc.*, 18 BNA OSHC

2178, 2000 CCH OSHD ¶32,134 (No. 90-2775, 2000); *Ensign-Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C. Cir. 1983). Accordingly, Citation 2, Item 1 will be AMENDED from a willful violation to a serious violation, Instance (b) will be VACATED, Instance (a) will be AFFIRMED as amended, and a $7,000.00 penalty will be ASSESSED.

Citation 3 Item 1

Complainant alleged a repeat violation of the Act in Citation 3, Item 1 as follows:

> *29 C.F.R. §1915.56(b)(2): Cables that were used were not free from repair or splices for a minimum distance of 10 feet from the cable end to which the electrode holder was connected: Paula Lee Barge, Port Crane Void: On or about April 14, 2009 and times prior thereto, the electrode holder (welding stinger) connected to a Miller XMT 304 series welder operating at 28.0 volts and 124 was repaired with black vinyl tape at five (5) feet from the electrode holder (welding stinger). This condition exposed employees to shock hazards from using defective cables repaired within 10 feet of the working lead. Seward Ship's Drydock, Inc. was previously cited for a violation of this occupational safety and health standard 29 CFR 1915.56(b)(2) which was contained in OSHA inspection number 307503631, Citation 03, Item 02, issued on September 18, 2008, with regard to a workplace located at Seward Ship's Drydock, Inc., Seward, Alaska.*

The cited standard provides:

> *29 C.F.R. §1915.56(b)(2): Only cable free from repair or splices for a minimum distance of ten (10) feet from the cable end to which the electrode holder is connected shall be used, except that cables with standard insulated connectors or with splices whose insulating quality is equal to that of the cable are permitted.*

On April 14, 2009, during OSHA's inspection, CSHO Casper observed one of Respondent's welders using a "stinger" cable with black electrical tape wrapped around a cable repair approximately five feet from the electrode holder. (Tr. 390, 394). A "stinger" cable is the electrical cable that runs between the welding machine and the welding tip where actual welding is performed. (Tr. 392). When CSHO Casper closely examined the cable underneath the tape, he observed a cut in the cable which exposed the metal conductor wires. (Tr. 392). The welder was using the repaired cable at a setting of

124 amps, which could have resulted in electrical shock. (Tr. 391, 396). The repaired stinger cable was in plain view to anyone walking by or working near that welder. (Tr. 395).

Henry Hogge, another of Respondent's welders testified that he observed other employees on the *Paula Lee* project using welding stinger cables which had been repaired and wrapped with electrical tape and duct tape while working on the *Paula Lee*. (Tr. 325). On one occasion, Mr. Hogge witnessed Welding Supervisor Bernie Lewis ask a welder who was using a repaired stinger cable, if it was "Time for a new stinger?" The welder replied to Mr. Lewis that he "can't afford it." (Tr. 326-327). Welder Bruce Whitmore testified that he also observed some of Respondent's welders using repaired and taped over stinger cables, that Respondent's own tool shop was issuing welding stingers with frayed cables, and that he was personally shocked several times because of the wet conditions in his work area and contact with the welding stinger. (Tr. 629, 633). It was unclear whether the other cable repairs observed by Respondent's welders were within ten feet of the cable end.

Respondent's Production Manager, Kenneth Willis, testified that he was not aware that welders were specifically experiencing shocks while working on the *Paula Lee*, but acknowledged that it was not uncommon and was "just part of the game," especially when welding in wet conditions. (Tr. 523-524). Respondent provided rubber gloves to address the issue. (Tr. 524, 555). Although the reports of shocks by welders were never directly attributed to repaired stinger cables, and were apparently more related to the wet conditions and incidental contact with the stinger end of the cable, the presence of repaired and taped-over welding cables increased the likelihood of a serious injury resulting from continued use of damaged welding cables. The court finds that the cited standard applied,[10] was violated, that the specific instance described in Citation 3, Item 1 was open, obvious, and could have resulted in serious injury or death through electric shock.

On September 18, 2008, Respondent was cited for an other-than-serious violation of the exact

10 There was no testimony indicating any purported application of the exception contained within the language of the standard.

same standard as a result of OSHA Inspection No. 307503631. (Ex. C-13). On October 10, 2008, that item was accepted through Respondent's execution of an *Informal Settlement Agreement* with the local OSHA Area Office. (Ex. C-13). Therefore, the violation became a *Final Order* of the Commission pursuant to Section 10(b) of the Act prior to the current inspection. Complainant made a *prima facie* showing of "substantial similarity" by establishing that the previous and present violations are for failure to comply with the same regulatory standard. Respondent failed to rebut that showing. *Potlatch Corp*., 7 BNA OSHC 1061 (No. 16183, 1979); *Monitor Construction Co*., 16 BNA OSHC 1589 (No. 91-1807, 1994). Accordingly, Citation 3, Item 1 will be AFFIRMED as a repeat violation. Considering the totality of the circumstances, including the fact that only one instance of a cable repair within ten feet of the cable end was actually documented, as well as Respondent's recent history of committing the same violation less than a year earlier, the court will reduce the penalty to $3,000.00.

Citation 3 Item 2

Complainant alleged a repeat violation of the Act in Citation 3, Item 2 as follows:

> *29 C.F.R. §1915.72(a)(1): The use of defective ladders was not prohibited: Paula Lee Barge: On or about April 14, 2009 and times prior thereto, a defective ladder with a broken rung and footpad was used to access the vessel after the vessel was put back in the water. This condition exposed employees to fall hazards to the steel deck of the barge or into the water. Seward Ship's Drydock was previously cited for a violation of this occupational safety and health standard 29 CFR 1915.72(a)(1) which was contained in OSHA inspection number 307503631, Citation 01, Item 4(a), issued on September 18, 2008, with regard to a workplace located at Seward Ship's Drydock, Inc., Seward, Alaska.*

The cited standard provides:

> *29 C.F.R. §1915.72(a)(1): The use of ladders with broken or missing rungs or steps, broken or split side rails, or other faulty or defective construction is prohibited. When ladders with such defects are discovered, they shall be immediately withdrawn from service. Inspection of metal ladders shall include checking for corrosion of interiors of open end, hollow rungs.*

After the *Paula Lee* was refloated and secured to the pier on April 11, 2009, an extension

ladder was stretched across the gap between the pier and the ship. (Tr. 134-135, 315). Walking back and forth on the ladder rungs was the only means of access for employees on and off the boat for two days, until it was replaced with a gangway plank. (Tr. 315-316, 708-710). The angle of the ladder also fluctuated with the tide, becoming nearly horizontal at times. (Tr. 315, 625-626, 713). The ladder was defective in that it had a broken lower rung, and one of the bases, or feet, was missing. (Tr. 132-134, 317, 693-694; Ex. C-10). Although the precise number was unclear, at least four of Respondent's employees, and possibly as many as fifteen, used the ladder to access the *Paula Lee* on April 11-12, 2009. (Tr. 137, 298, 318, 627-629).

Bernie Lewis, Respondent's Welding Supervisor, had instructed the employees to use the ladder to access the *Paula Lee*. (Tr. 317). Both he and Production Supervisor Kenneth Willis knew that employees had been using the ladder to access the barge and that some had been complaining about it. (Tr. 563-564, 579, 627, 710). By the time CSHO Pauli observed the ladder, it had already been replaced by a gangway plank and was lying on a pile of tires on the deck of the *Paula Lee*. It still had not been tagged or otherwise labeled as defective and unusable. (Tr. 367; Ex. C-1, pp. 2, 4; C-10).

The cited standard applied, was violated, and at least four of Respondent's employees were exposed to the violative condition. Complainant established knowledge of the condition by at least two of Respondent's supervisors, which is imputed to Respondent. The court also finds that falling from the defective ladder, which in this instance would have occurred through the gap over the water between the ship and the pier, could have resulted in serious injury or death.

On September 18, 2008, Respondent was cited for a serious violation of the exact same standard as a result of OSHA Inspection No. 307503631. (Ex. C-13). On October 10, 2008, that item was accepted through Respondent's execution of an *Informal Settlement Agreement* with the local OSHA Area Office. (Ex. C-13). Therefore, the violation became a *Final Order* of the Commission pursuant to Section 10(b) of the Act prior to the current inspection. Complainant made a *prima facie*

showing of "substantial similarity" by establishing that the past and present violations are for failure to comply with the same regulatory standard. Respondent failed to rebut that showing. *Potlatch Corp*., supra; *Monitor Construction Co*., supra. Accordingly, Citation 3, Item 2 will be AFFIRMED as a repeat violation. Considering the totality of the circumstances, including the fact that Respondent violated this same standard less than a year earlier, and that there was a high likelihood of an actual accident due to employees having to walk across a defective, horizontal, extension ladder stretched between a barge and a pier, in icy, wet, springtime Alaska conditions, the proposed penalty of $8,400.00 will remain unchanged.

Citation 3 Item 3

Complainant alleged a repeat violation of the Act in Citation 3, Item 3 as follows:

> *29 C.F.R. §1915.73(b): Flush manholes or other comparable small openings in the deck and other working surfaces were not suitably covered or guarded while employees were working in the vicinity:*
>
> *(a) Paula Lee Barge, Weatherdeck, Port Ballast Tank: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.*
>
> *(b) Paula Lee Barge, Weatherdeck, Starboard Ballast Tank: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.*
>
> *(c) Paula Lee Barge, Weatherdeck, Port Crane Void: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.*
>
> *(d) Paula Lee Barge, Weatherdeck, Starboard Crane Void: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.*
>
> *(e) Paula Lee Barge, Weatherdeck, Starboard P5 Void: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.*

(f) Paula Lee Barge, Weatherdeck, Starboard S5 Void: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.

(g) Paula Lee Barge, Weatherdeck, P/CL Void: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.

(h) Paula Lee Barge, Weatherdeck, Port Midship Void: On or about April 15, 2009 and times prior thereto, employees were exposed to an open and unguarded flush manhole. This condition exposed employees to fall hazards of up to 15 feet.

Seward Ship's Drydock was previously cited for a violation of a substantially similar hazard under 29 CFR 1915.73(d) which was contained in OSHA inspection number 307503631, Citation 01, Item 4(c), issued on September 18, 2008, with regard to a workplace located at Seward Ship's Drydock, Inc., Seward, Alaska.

The cited standard provides:

29 C.F.R. §1915.73(b): When employees are working in the vicinity of flush manholes and other small openings of comparable size in the deck and other working surfaces, such openings shall be suitably covered or guarded to a height of not less than 30 inches, except where the use of such guards is made impracticable by the work actually in progress.

During the inspection, CSHO Pauli observed eight flush manholes on the deck of the Paula Lee that were open, with no guarding around them which would prevent employees from falling or stepping into the holes. (Tr. 140-147, 412; Ex. C-12, C-28). Each manhole was approximately 19 inches wide. (Tr. 143). Some of the tanks/voids had employees performing work inside them. Some did not. (Tr. 272). All of Respondent's employees were working and traveling near the eight unguarded manholes, and were exposed to the hazard of falling fifteen feet to the bottom of the voids. (Tr. 147-149, 414-415). Falls through the openings could have resulted in serious injuries, including cuts and broken bones. (Tr. 150). The cited standard applied, was violated, and fifteen of Respondent's employees were exposed to the serious condition.

Respondent's Production Manager, Kenneth Willis, acknowledged the existence of the open, unguarded manholes. (Tr. 534). In addition, their condition was in plain view to each of Respondent's three supervisors walking and working on the *Paula Lee*. In direct contradiction of the plain language of the cited standard, Mr. Willis did not think it was reasonable to have to put guards around them. (Tr. 535-536). He was aware, however, that there were various methods of guarding open manholes. (Tr. 557). The manhole openings could have been guarded using a raised U-bar type protection, or by placing standard railing around the opening. (Tr. 141-142, 414). Knowledge of the violative conditions by Respondent's supervisors, and specific means of abating the conditions, were established.

The court rejects Respondent's assertion that the abatement methods were impracticable because employees were working inside the voids, and therefore, the exception language in the standard applied. First, employees were not working inside all of the eight unguarded voids. Second, the railing and U-bar protection methods described by witnesses could have easily been installed so that they would not have impeded prompt entry or exit from the voids.

On September 18, 2008, Respondent was cited for a serious violation of a different fall hazard regulation as a result of OSHA Inspection No. 307503631, in Citation 1, Item 4c, which Complainant argues involved a substantially similar hazard. (Tr. 151; Ex. C-13, p. 12). Where the citations involve different standards, Complainant must introduce evidence to show the substantial similarity of the hazards in each violation. *Monitor Construction Co.*, supra. The cited standard in the 2008 case, 29 C.F.R. §1915.73(d), requires guardrails for "unguarded edges of decks, platforms, flats, and similar flat surfaces more than 5 feet above a solid surface…" The 2008 violation was based on an unguarded "leading edge of the hatch to the freezer hold" which was ten feet above the next lower level. (Ex. C-13, p.12). On October 10, 2008, that citation item was accepted through Respondent's execution of an *Informal Settlement Agreement* with the local OSHA Area Office. (Ex. C-13). Therefore, the violation became a *Final Order* of the Commission pursuant to Section 10(b) of the Act prior to the

current inspection.

The court finds that Complainant made a *prima facie* showing of substantial similarity by establishing that both the previous and present violations were for fall hazards related to unguarded openings on the deck of a ship. Respondent failed to rebut that showing of substantial similarity. *Potlatch Corp*., supra; *Monitor Construction Co*., supra. Accordingly, Citation 3, Item 3 will be AFFIRMED as a repeat violation. Considering the totality of the circumstances, including the fact that Respondent exposed employees to a similar hazard less than a year earlier, and that there were eight different unguarded openings throughout an already cluttered, icy, and wet deck, creating a high likelihood of an actual accident, the proposed penalty of $8,400.00 will remain unchanged.

Affirmative Defenses

Respondent did not specifically or separately address the elements of any affirmative defenses in its *Post-Trial Brief*. Typically, this results in a waiver of any affirmative defenses pled in a party's *Answer*. *Georgia-Pacific Corp*., 15 BNA OSHC 1127, 1991 CCH OSHD ¶29,395 (No. 89-2713, 1991). However, Respondent did briefly refer to an employee failing to comply with company policy with regard to Citation 2, Item 1; used the terms "unfeasible" and "impracticable" with regard to Citation 3, Item 3; and "not feasible" with regard to Citation 1, Item 7. (*Resp. Brief*, pp. 14-15, 21, 24, 44). Therefore, the court will briefly address those assertions.

To establish the affirmative defense of "unpreventable employee misconduct", Respondent must show that: (1) it established work rules designed to prevent the violation, (2) it adequately communicated those rules to its employees, (3) it took steps to discover violations, and (4) it effectively enforced the rules when violations were discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1995-97 CCH OSHD ¶31,451 (No. 91-2494, 1997). When the alleged misconduct is that of a supervisor, the proof of "unpreventable employee misconduct" is more rigorous and more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision.

Archer-Western Contractors Ltd., 15 BNA OSHC 1013, 1991 CCH OSHD ¶29,317 (No. 87-1067, 1991). Respondent's reference to a violation of company policy pointed to the conduct of welders working inside the crane turnstile void without proper ventilation. However, the conduct addressed in Citation 2 Item 1 was that of Respondent's Shipyard Competent Person, not the welders, for failing to test the void atmospheres as often as necessary to maintain the conditions of the Marine Chemist Certificate. There were six other factors identified above, besides the two welders working inside an unventilated void, which should have alerted Mr. Williams of the need to periodically re-test the void atmospheres *after* welding began. The court also notes that Shipyard Superintendent and Competent Person Larry Williams never issued any documented discipline for any employee who worked on the *Paula Lee* project. (Tr. 644, 698). Accordingly, Respondent failed to establish the defense of unpreventable employee misconduct.

The defense of infeasibility requires an employer to prove that: (1) the means of compliance prescribed by the standard were technologically or economically infeasible, or necessary work operations were technologically infeasible after implementation; and (2) there were no feasible alternative means of protection available. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1993-95 CCH OSHD ¶ 30,485 (No. 91-1167, 1994). Although it may not have been convenient to implement good housekeeping measures on the deck (Citation 1, Item 7), including raising electrical lines and air hoses above the walking surface of the deck, it certainly was technically and economically possible. Similarly, several witnesses testified that there were at least two recognized and available methods which could have been implemented to guard the eight manholes identified in Citation 3, Item 3. Accordingly, Respondent failed to establish the affirmative defense of infeasibility with regard to Citation 1, Item 7 or Citation 3, Item 3.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is hereby AFFIRMED and a penalty of $500.00 is ASSESSED;

2. Citation 1, Item 3 is hereby VACATED;

3. Citation 1, Item 4a is hereby VACATED;

4. Citation 1, Item 4b is hereby AFFIRMED and a penalty of $1,000.00 is ASSESSED;

5. Citation 1, Item 6 is hereby AFFIRMED and a penalty of $1,500.00 is ASSESSED;

6. Citation 1, Item 7 is hereby AFFIRMED and a penalty of $2,500.00 is ASSESSED;

7. Citation 1, Item 8 is hereby AFFIRMED and a penalty of $500.00 is ASSESSED;

8. Citation 1, Item 9 is hereby AFFIRMED and a penalty of $1,200.00 is ASSESSED;

9. Citation 2, Item 1 is hereby MODIFIED to a serious violation, Instance (b) is VACATED, Instance (a) is AFFIRMED as modified, and a penalty of $7,000.00 is ASSESSED;

10. Citation 3, Item 1 is hereby AFFIRMED and a penalty of $3,000.00 is ASSESSED;

11. Citation 3, Item 2 is hereby AFFIRMED and a penalty of $8,400.00 is ASSESSED;

12. Citation 3, Item 3 is hereby AFFIRMED and a penalty of $8,400.00 is ASSESSED.

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: October 6, 2011
Denver, Colorado