UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. HCI INDUSTRIAL & MARINE COATINGS, INC., Respondent.	DOCKET NO. 17-1424

Appearances:

Jeannie Gorman, U.S. Department of Labor, Office of the Solicitor, Seattle, Washington
For Complainant

J. Randy Cornelius, Vice President, HCI Industrial & Marine Coatings, Brush Prairie, Washington
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On June 30, 2017, Complainant's Portland Area Office received a report from Oregon OSHA (OR-OSHA) that one of Respondent's employees fell while working on a barge in Portland, Oregon and sustained injuries requiring hospitalization.[1] (Tr. 62–63). That same day, Compliance Safety and Health Officer (CSHO) Michael Potter was dispatched to the pier where the barge was located and began a three-day inspection of the worksite. (Tr. 62, 119-121). CSHO Potter learned that Respondent's employee, [Redacted], was working inside the barge's No. 1 port storage tank

1. The referral was made to Federal OSHA because the barge was located on navigable waters, which is considered maritime jurisdiction. (Tr. 62).

when he fell. (Stip. No. 13 at Tr. 44). He was not wearing fall protection at the time. (Stip. No. 15 at Tr. 45).

After completing his investigation, CSHO Potter concluded that Respondent committed multiple violations of the Occupational Safety and Health Act of 1970 ("the Act"). CSHO Potter recommended, and OSHA issued, a six-item *Citation and Notification of Penalty*, with total proposed penalties of $12,752. Respondent filed a *Notice of Contest*, which brought this case before the Commission. On September 1, 2017, Complainant filed his *Complaint*, within which he amended Citation 1, Item 1 to allege a violation of 29 C.F.R. § 1915.152(a).[2] The matter was designated for Simplified Proceedings on September 15, 2017.

A trial was conducted on May 15, 2018, in Portland, Oregon. Prior to the presentation of evidence, Respondent withdrew its notice of contest to Citation 2, Item 1, which alleged an other-than-serious violation of the Act with no monetary penalty. (Tr. 10). The Court accepted Respondent's contest withdrawal. Accordingly, Citation 2, Item 1 will be affirmed as issued.

Four witnesses testified at the trial: (1) CSHO Michael Potter; (2) OSHA Area Director Cecil Tipton; (3) Joseph Bishop, Respondent's site superintendent and safety manager; and (4) Foo Beng Fong, a blaster/painter foreman for Respondent. The parties filed post-trial briefs for consideration.

Jurisdiction & Stipulations

The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 42–43). *See Slingluff v. OSHRC*, 425

2. The *Citation* initially alleged a violation of 29 C.F.R. § 1915.71(b)(7).

F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual matters, which were read into the record.[3] (Tr. 42–46).

Factual Background

Respondent was hired by Zidell to sandblast and paint interior storage tanks on Barge 686.[4] (Tr. 44). On June 30, 2017, Respondent's employees were working in the No. 1 port storage tank, which measured 40 feet long, 30 feet wide, and 22 feet high. (Stip. Nos. 13, 15 at Tr. 44). Due to the size of the tank, Respondent had to install marine staging (also known as "hanging staging"), which is similar to scaffolding but, instead of being built upward from the ground, it hangs from the top of a tank using wire ropes. (Tr. 108; Ex. C-3 at 41–43). During the installation of the staging, [Redacted] fell approximately 9 feet to the ground. (Stip No. 15 at Tr. 45; Ex. C-3 at 41–46). His harness was found on the bottom of the tank a few feet from where he landed; he was not wearing it at the time. (*Id.*). Although Superintendent Bishop testified that he saw [Redacted] wearing a fall protection harness earlier that morning, after the company safety meeting, he could not confirm that [Redacted] continued to wear it when he was working. (Tr. 158). Bishop testified he reminded everyone that morning, as he said he does every morning, of their 100% tie-off policy. (Tr. 152–53).

CSHO Potter arrived at the scene the same day, roughly six to eight hours after the accident. (Tr. 63). During the opening conference, CSHO Potter learned Respondent was the only employer on-site at the time of the accident. (Tr. 67). By the time CSHO Potter arrived, Respondent had sent its remaining employees home for the day. So, he inspected the work area where the accident occurred and took the opportunity to inspect Respondent's fall protection equipment, stored in a Conex box located on the pier. (Tr. 82–85).

3. When citing to the record, the Court will refer to individual stipulations as "Stip. No. __".
4. Ziddell was the shipbuilder.

CSHO Potter did not actually observe any employees working on staging, or at heights, during any part of his inspection. (Tr. 119–21). His conclusions were based on post-accident observations of the empty tank, and discussions with witnesses. According to CSHO Potter, one of Respondent's employees also provided him with a photograph of two unidentified workers, who appear to be working on elevated staging at some point, without wearing appropriate fall protection. (Tr. 76–78; Ex. C-23 at 74). CSHO Potter was told by the employee who supplied the photo that it was taken approximately one or two weeks before the accident involving [Redacted]. (Tr. 79). However, no one with personal knowledge of the scene depicted in the photograph testified at trial. Therefore, the conditions, time, date, location, names of individuals, or even the employer of the individuals in the photograph could not be properly authenticated. In addition to the photograph, CSHO Potter relied heavily on three unnamed employees who allegedly told him that Respondent required employees to keep a fall protection harness close by, but not necessarily wear it. (Tr. 72). However, a fourth employee, and several members of management, told CSHO Potter that Respondent does enforce the use of fall protection harnesses. CSHO Potter chose to believe the three employees who told him fall protection policies were not enforced. (Tr. 73-74). None of these unidentified employees were called by either party to testify at trial. Complainant's only witnesses were CSHO Potter and Area Director Tipton (who did not visit the jobsite).

Although Respondent stipulated that [Redacted] failed to wear his harness while he was installing marine staging above the threshold height for fall protection, Respondent maintained it had no knowledge, and could not have foreseen, his failure to wear it. In support, Respondent introduced documentation of safety policies, safety training sessions, and weekly safety meetings, to demonstrate that fall protection and their 100% tie-off policy were discussed on a regular basis. (Tr. 163; Ex. R-5, R-7). Further, as mentioned above, Supt. Bishop saw [Redacted] wearing his

harness earlier that day. The Court also notes that Bishop was sent to this worksite before the accident specifically to address and correct some safety concerns raised by Gunderson (the pier facility owner) (Tr. 64, 172–73).

During the OSHA inspection, CSHO Potter also identified what he perceived to be poorly maintained fall protection gear being stored in Respondent's Conex box. Specifically, CSHO Potter identified multiple harnesses and lanyards coated with paint, which he believed could diminish the ability of the equipment to function properly, as well as a harness in a that showed it had already been exposed to an impact load, *i.e.*, fall. (Tr. 83; Ex. C-2 at 56, 63, 64, 65). The harness's "impact indicator tag" was showing.

CSHO Potter concluded that Respondent did not have an adequate program to inspect fall protection gear and ensure it was safe for use. (Tr. 91–92). Although there was no evidence that the paint-splattered harnesses, or the "popped" harness, were actually being used, they were stored in the same location as new fall protection equipment and were readily accessible. (Tr. 84–85). Bishop testified that Respondent provided each employee with their own harness, but confirmed that the harnesses in the Conex box were available to employees for replacement purposes. (Tr. 158).

Finally, CSHO Potter concluded that the lighting inside the barge tank was deficient, which consisted of a combination of headlamps, ambient light from the access point, and string lights. (Stip No. 18; Tr. 103; Ex. C-3 at 39–43). Since CSHO Potter did not observed any employees performing specific work, under specific lighting conditions, his conclusions were based on conversations with unnamed employees telling him that most painting and sandblasting work occurred using headlamps only. (Tr. 103). Supt. Bishop, however, testified that the lighting being used at any given moment depended on what stage in the process employees were in. (Tr. 159–

61). For example, Respondent substantially relied on headlamps while installing staging because the staging was required to access the tank locations where string lights could be subsequently installed. (Tr. 161). Furthermore, depending on the activity, such as sandblasting or washing, some types of lights would be exposed to potential damage and create an electrical shock hazard if they got wet. (Tr. 159–160). Thus, different steps in the process required different sources/types of illumination at any given moment.

Based on CSHO Potter's observations and conclusions, Complainant issued a *Citation and Notification of Penalty*, with a proposed total penalty of $12,752. The Court addresses each citation item below.

Discussion

To establish a violation of an OSHA standard pursuant to 5(a)(2), Complainant must prove that: (1) the standard applied to the work being performed; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Complainant has the burden of establishing each of the foregoing elements by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

This case illustrates the significance of the "preponderance of the evidence" standard, even under the relaxed requirements of Simplified Proceedings pursuant to Subpart M of the Commission Rules. *See* 29 C.F.R. Part 2200, Subpart M. Under Commission Rules for Simplified Proceedings, the Federal Rules of Evidence do not apply as they do in conventional cases. *See id.* § 2200.200(b)(6). Thus, otherwise inadmissible evidence, such as hearsay, can be introduced in a simplified case. However, though the rules may be more permissive, that does not mean that *any* evidence the parties offer on a particular point is automatically deemed persuasive or reliable.[5]

Citation 1, Item 1[6]

> Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:
>
> [29 CFR 1915.152(a): The employer shall provide and shall ensure that each affected employee uses the appropriate personal protective equipment (PPE) . . . , including . . . personal fall protection equipment . . . meeting the applicable provisions of this subpart, wherever employees are exposed to work activity hazards that require the use of PPE.]
>
> (a) HCI Industrial & Marine Coatings Inc. – 4350 NW Front Ave. Portland Or. 97210 – Barge 686 – On or about June 30th, 2017 and at times prior thereto, the employer did not provide adequate fall protection for employees installing marine hanging staging.

Citation and Notification of Penalty at 6.

The Standard Applies and Was Violated

According to the personal protective equipment standard for shipyard employment, "This subpart applies to *all work* in shipyard employment regardless of geographic location." 29 C.F.R. § 1915.151(a). There is no dispute that Respondent was performing surface preparation and tank

5. Judge John Gatto provides a concise discussion of the tension between admissibility and weight in Simplified Proceedings. *See U.S. Utility Contractor Co.*, 25 BNA OSHC 1292, 2014 WL 7644310 at *6–7 (No. 14-0744, 2014). In summary, live in-person testimony is generally more persuasive than hearsay or double-hearsay.

6. As noted above, Citation 1, Item 1 was amended by Complainant upon the filing of the *Complaint*. The narrative of Citation 1, Item 1 in the *Citation and Notification of Penalty* includes the language of the originally cited standard. For clarity, the Court has supplied the language from 1915.152(a).

lining services on a marine barge. (Stip. No. 10). The Court finds this qualifies as "work in shipyard employment". Thus, the standard applies.

The Court also finds that the terms of the standard were violated. According to its terms, the standard requires Respondent to both provide and ensure the use of fall protection equipment when its employees are exposed to hazards requiring the same. *Id.* § 1915.152(a).[7] At the time of his injury, [Redacted] was working on a platform located roughly 9 feet above the lower deck and was not wearing fall protection. (Stip. No. 15 at Tr. 45).

Respondent's Employee Was Exposed to the Hazard

To establish exposure under Commission precedent, the Secretary must show Respondent's employees were actually exposed to the violative condition or that it was "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). *See Oberdorfer Industries, Inc.*, 20 BNA OSHC 1321 ("The zone of danger is determined by the hazards presented by the violative condition that presents the danger to employees which the standard is designed to prevent."). [Redacted] was working on a platform 9 feet above the next lower level without wearing any fall protection. This exposed [Redacted] to a fall hazard that, unfortunately, came to fruition. Complainant established employee exposure.

Complainant Failed to Establish Employer Knowledge

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the

[7] 29 C.F.R. § 1915.159(b)(7) provides that personal fall arrest systems for shipyard employees must protect against free fall distances of 6 feet or more.

conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of a corporate employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

Complainant's theory of knowledge is premised, in large part, on two types of evidence: (1) testimony from CSHO Potter regarding what he says he was told by unnamed employees and managers, and (2) an unauthenticated photograph of two unidentified individuals who were working on hanging marine staging without any apparent form of fall protection at an unknown time and unknown location. The Court is not persuaded by this type of unreliable evidence.

The Court finds that CSHO Potter's testimony about Respondent's practices regarding fall protection were based on selective acceptance of unnamed, non-testifying employees' hearsay statements who told him fall protection was not enforced; rejection of an unnamed, non-testifying employee and supervisor hearsay statements who told him fall protection was enforced; and an unreliable photograph provided to him by an unnamed, non-testifying employee of unidentified workers at an unidentified location, on an unknown date. Although hearsay, and in this case double-hearsay, may be admissible in *Simplified Proceedings*, it is not automatically persuasive or reliable. Not one of these employees, whose out-of-court statements were offered as affirmative evidence that Respondent failed to enforce fall protection rules, and therefore, should have known [Redacted] was working without wearing his harness, testified at trial or was otherwise available for cross-examination by Respondent.

Conversely, Respondent presented actual in-person, live testimony from Fong (one of Respondent's supervisors present on this job) and Bishop (superintendent and safety manager present on this job). They testified about their actual and direct knowledge of worksite conditions, employee activities, Respondent's safety policies, and fall protection training and enforcement. Bishop testified, without contradiction, that he personally observed [Redacted] wearing his harness as he left the morning safety meeting, during which Bishop specifically discussed fall protection requirements. (Tr. 155–156). According to Bishop, employees were provided with daily instructions to wear their harness inside the tanks at all times and to tie-off when exposed to a fall hazard on the upper portions of the staging. (Tr. 156). Records and testimony illustrate that these instructions were also given on a weekly basis and as the needs of a particular project called for it. (Tr. 199; Ex. R-7). Providing further evidence of attempts to prevent falls, Bishop pointed out that the barge's storage tanks themselves were equipped with signs specifically requiring the use of fall protection upon entry. (Tr. 168; Ex. R-12). Bishop acknowledged that some employees occasionally attempt to skirt the rules when no one was watching. This is less an indictment of the quality of Respondent's program, and more a lamentation about the inability to be everywhere at one time on a worksite, with multiple projects occurring simultaneously, and using employees that were chosen for them by the local union. (Tr. 165, 173–74). The Court finds that Respondent's records and the testimony of Bishop and Fong, establish that Respondent regularly discussed fall protection at its safety meetings and conducted inspections of the worksite to ensure fall protection was being used. This evidence weighs more heavily than Complainant's hearsay and double-hearsay unidentified employee comments, which by CSHO Potter's own admission, sometimes contradicted one another.

As for the photograph that was given to CSHO Potter by one of Respondent's unidentified employees, the Court has grave concerns about its reliability. First, Complainant asserts in a post-trial brief footnote, without any support in the record, that the individuals in the photograph are [Redacted] and Dustin Colby, an employee and foreman, respectively. *Sec'y Post-Trial Br.* at 8 n.2. This identification never occurred on the record. Indeed, Colby's name was mentioned very sparingly. First, Cornelius referred to Dustin Colby as "an HCI employee" when identifying him as a potential witness. (Tr. 8). Colby is referred to in Stipulation No. 12 as one of "HCI's employees on the jobsite". (Tr. 44). Third, Colby was identified as an individual with whom CSHO Potter discussed lighting. (Tr. 113). Contrary to Complainant's representation, Mr. Colby was not listed as a competent person in Stipulation No. 11. Further, while Mr. Fong identified a "Dustin" as a foreman, Stipulation No. 12 identifies two different Dustins that were on the jobsite during the course of CSHO Potter's inspection. (Tr. 44, 192–93). Put simply, the Court does not have adequate, competent evidence to conclude that the individuals in the picture in Exhibit C-2 at 74 were [Redacted] and Colby, nor was there any foundation as to where or when the photograph was taken by the unnamed employee who purportedly gave it to CSHO Potter. Simply too much is unknown about this photograph to make it a reliable indicator that Respondent knew or could have known of a violation of 1915.152(a) on June 30, 2017.

Complainant's presentation of evidence failed to show Respondent knew or could have known of the fall protection violation alleged in Citation 1, Item 1. Nearly all of Complainant's substantive evidence on the issue of knowledge is vague hearsay or double hearsay from unnamed sources. Respondent, on the other hand, introduced direct, uncontradicted testimony from two supervisors who actually worked at this jobsite, which the Court found much more persuasive and reliable. Accordingly, Citation 1, Item 1 will be VACATED.

Citation 1, Item 2a

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

> 29 CFR 1915.159(c)(4): Lifelines and lanyards were not protected against cuts, abrasions, burns from hot work operations and deterioration by acids, solvents, and other chemicals.
>
> (a) HCI Industrial & Marine Coatings Inc. – 4350 NW Front Ave. Portland Or. 97210 – Barge 686 – On or about June 30th, 2017 and at times prior thereto, the CSHO observed several components of personal fall arrest systems that were covered in paint.

Citation and Notification of Penalty at 7.

Complainant Failed to Prove a Violation of the Standard

The standard cited in Citation 1, Item 2a applied per 29 C.F.R. § 1915.151(a).[8] Complainant failed to prove, however, that the terms of the standard were violated. The standard requires that fall protection equipment be protected from cuts, abrasions, burns, and deterioration. 29 C.F.R. § 1915.159(c)(4). Complainant does not assert in this case that the harnesses CSHO Potter found in the Conex box were exposed to cuts, abrasions, or burns; instead, he claims Respondent failed to protect the fall protection equipment from deterioration due to chemical exposure. Specifically, CSHO Potter testified that some harnesses and lanyards were covered with paint and, therefore, would not arrest a fall properly when exposed to an impact load.

The Court does not question CSHO Potter's conclusion that some of the harnesses had paint on them and, indeed, looked more used than other newer harnesses that were available in the Conex box . (Tr. 83; Ex. C-3 at 56). However, the Court is not convinced the presence of paint on a harness, alone, constitutes a violation of the 29 C.F.R. § 1915.159(c)(4). CSHO Potter did not testify as to how the paint on the harnesses resulted in deterioration, per the terms of the standard. His non-expert opinion that "when they're covered in paint and stiff and hard like this, the

8. The standard applies for the same reasons supplied in the Court's discussion of Citation 1, Item 1, *supra*.

likelihood that it's going to arrest the fall in less than 1800 pounds is – is low" was not otherwise supported by the record. Other than the presence of paint, there was nothing to suggest the harnesses in question were deficient, and no evidence was introduced to illustrate the effect of paint, as a "chemical", on the structural integrity of the harness components. Surprisingly, CSHO Potter testified that the harness found on the bottom of the tank next to [Redacted], in C-3 at 57, although covered in some paint, oil, and dirt, was otherwise compliant with 29 C.F.R. § 1915.159(c)(4), whereas the harness found in the Conex was not. (Tr. 87; Exs. C-3 at 56 & 57). One simply appears to have more paint and dirt on it than the other. There was no reliable explanation as to why or how one harness was acceptable to use, and the other was not.

Without evidence that the harness/PFAS in question had actually deteriorated or were otherwise damaged per the terms of the standard, the Court cannot conclude the cited standard was violated. Accordingly, Citation 1, Item 2a will be VACATED.

Citation 1, Item 2b

> Complainant alleged a serious violation of the Act in Citation 1, Item 2b as follows:
>
> 29 CFR 1915.159(c)(5): Personal fall arrest systems were not inspected prior to each use for mildew, wear, damage, and other deterioration. Defective components were not removed from service.
>
> (a) HCI Industrial & Marine Coatings Inc. – 4350 NW Front Ave. Portland Or. 97210 – Barge 686 – On or about June 30th, 2017 and at times prior thereto, the CSHO observed several harnesses, lanyards, and anchorage connectors that were coated with paint and had many other indicators of wear and damage, including frayed stitching.

Citation and Notification of Penalty at 8.

Citation 1, Item 2c

> Complainant alleged a serious violation of the Act in Citation 1, Item 2c as follows:
>
> 29 CFR 1915.159(c)(6): Personal fall arrest systems and components subjected to impact loading were not immediately removed from service.

> (a) HCI Industrial & Marine Coatings Inc. – 4350 NW Front Ave. Portland Or. 97210 – Barge 686 – On or about June 30th, 2017 and at times prior thereto, the CSHO observed a personal fall arrest harness with a load impact indicator that had been activated.

Citation and Notification of Penalty at 9.

The Standards Apply and Were Violated

There is a fair amount of overlap between Citation 1, Items 2b and 2c, which is why Complainant grouped them together (along with 2a) for penalty purposes. For the same reasons, and to avoid unnecessary repetition, the Court shall address both violations simultaneously.

As expressed above with respect to the previous two citation items, the Court finds the cited standards in Citation 1, Items 2b and 2c apply. Further, the Court also finds the terms of the respective standards were violated. During cross-examination, Bishop stated, "Well, if I'd seen those in the Conex box, of course I could look at them and take care of them. But my – my specific thing was to make sure that the guys were being safe out on the job." (Tr. 178). Subsequently, Bishop rather forthrightly admitted, "I didn't inspect them." (Tr. 179). This admission is sufficiently clear to establish, at the very least, that Respondent did not perform inspections of the fall protection equipment prior to each use. Accordingly, the Court finds Respondent violated the terms of 29 C.F.R. § 1915.159(c)(5).

For similar reasons, the Court also finds Respondent violated 29 C.F.R. § 1915.159(c)(6). The standard requires fall arrest systems and equipment subject to impact loading to be removed from service. During his inspection of the Conex, CSHO Potter found a harness with an exposed tag indicating that the fall arrest system had been subject to an impact load and needed to be removed from service. (Stip. No. 16 at 45–46; Ex. C-3 at 65–66). It was stored in the Conex box, along with other employee-accessible harnesses and equipment. Accordingly, the Court finds the terms of 1915.159(c)(6) were violated.

Respondent's Employees Were Exposed to a Hazard

As noted above, to prove exposure the Secretary must show Respondent's employees were actually exposed to the violative condition or that it was "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., supra*. In the case of defective equipment, access to a hazard is considered reasonably predictable where such equipment is "available for use." *Dover Elevator Co., supra*.

According to Bishop, Respondent's employees met at the Conex box every morning before work started. (Tr. 180). They would have morning briefings, conduct safety talks, and collect gear/equipment from the Conex. (Tr. 180). Although Respondent argues only management had access to the Conex box, the testimony and evidence presented at trial suggests otherwise. *Resp't Post-Trial Br.* at 4. For example, in response to questions about why the harness/PFAS with a "popped" impact load tag was not removed from service or destroyed, Bishop testified, "[S]omeone probably went in there and got a new harness, threw that one on the floor, or he maybe even hung it up, and didn't tell anybody." (Tr. 169). Bishop also acknowledged employee access, "I suppose somebody could go in there and grab them." (Tr. 179). CSHO Potter also testified that employees told him they had to get to work early to get the best equipment out of the Conex. (Tr. 75). At the very least, this suggests that access to the Conex was not as restricted as Respondent argues.

Respondent's failure to conduct inspections and remove defective/unusable equipment subjected its employees to the possibility of being exposed to a fall hazard. *See, e.g., R.B. Thomas Electric, Inc.*, 19 BNA OSHC 1785 (No. 00-2333, 2001) (ALJ) (holding employer's failure to

inspect worksites and provide training exposed an employee to a 15- to 20-foot fall). Complainant established employee exposure to a hazard in both Items 2b and 2c.

Respondent Had Knowledge of the Violations

Typically, the failure to conduct required inspections, of itself, is sufficient to find an employer has constructive knowledge of a violation. *See Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (reasonable diligence includes, amongst other things, an obligation to inspect the work area). Bishop, Respondent's site superintendent, readily admitted he did not perform inspections of the fall protection equipment, and Respondent did not put forth evidence that any other employees performed such inspections. As noted by Bishop, daily meetings were held at the Conex box, and the equipment inside of it was accessed every day. (Tr. 152, 158, 178). Thus, not only did Respondent have a regular opportunity to perform such inspections, but it also had a compelling reason to perform them. Second, not only does the cited standard require regular, pre-work inspections of fall protection equipment, but Respondent's own safety checklist for marine hanging staging requires the same. The checklist inquires,[9] "Is each person equipped with and wearing a safety harness and an independently hung safety line that is in good condition and free of defects?" (Ex. R-14 at 15).

Along similar lines, the Commission found constructive knowledge when a construction site superintendent failed to "take steps to verify the safe condition of equipment" prior to allowing its use. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010). Because reasonable diligence requires an employer to "inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations", the Commission found the superintendent's failure to inspect newly purchased equipment for GFCI

9. The checklist is an appended attachment to the section on Marine Hanging Staging within Respondent's Safety Manual. (Ex. R-14).

did not meet that standard. *Id.* Accordingly, the Court found the superintendent had constructive knowledge of the violation, which was imputable to the employer based on his position as a supervisor. *Id.* (citing *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000)). Similarly, this Court finds Bishop's failure to conduct any inspections of the fall protection equipment constitutes constructive knowledge of both Items 2b and 2c. Bishop was aware that he was not performing (or delegating the performance of) required inspections of fall protection equipment under 1915.159(c)(5), and his failure to do so allowed defective and questionable equipment (at least one harness previously exposed to an impact load) to be available for use in violation of 1915.159(c)(6). Given Bishop's position as site superintendent, the Court finds his knowledge is properly imputable to Respondent.

The Violations Were Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction,* 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

According to the parties' stipulations, Respondent's employees worked on suspended platforms that were between 9 and 15 feet above the ground during the Barge 686 project. (Stip. No. 14 at Tr. 45). A fall from such heights could result in contusions, broken bones, or, as occurred in this case, a disabling injury. (Tr. 45, 146). Respondent's failure to ensure that fall protection

equipment was being regularly inspected, and defective equipment/unusable equipment was not immediately removed from service, exposed its employees to a real possibility of serious injury or death. An employee, or even a manager, could conceivably grab the harness that had already been exposed to a fall and proceed to get onto suspended marine staging not knowing that his equipment was defective/unusable. These are not a mere paperwork errors, but rather failures which exposed employees to a substantial fall hazard that could result in serious bodily injury or death. The violations were serious.

Accordingly, Citation 1, Items 2b and 2c will be AFFIRMED.

Citation 2, Item 2

Complainant alleged an other-than-serious violation of the Act in Citation 2, Item 2 as follows:

> 29 CFR 1915.82(a)(1): The employer did not ensure that each work area and walkway was adequately lighted whenever an employee is present.
>
> (a) HCI Industrial & Marine Coatings Inc. – 4350 NW Front Ave. Portland Or. 97210 – Barge 686 – On or about June 30th, 2017 and at times prior thereto, the employer provided headlamps to employees as their only means of illumination in the #1 port storage tank.
>
> *note: OSHA FactSheet: Emergency or portable lights do not fall within the temporary lighting category and are not required to meet similar lighting levels. However, such lights are only intended for short-term use, such as evacuating a space, and must not be used to perform work tasks unless it is in addition to the already existing lighting.

Citation and Notification of Penalty at 11.

Complainant Failed to Prove a Violation of the Standard

There was a fair amount of conflicting and confusing evidence introduced on the issue of whether adequate lighting existed within the storage tank during the installation of the marine hanging staging. As with Citation 1, Item 1, though, Complainant overstated the parties'

stipulations, placed substantial emphasis on hearsay and double-hearsay evidence, and failed to present sufficient evidence to sustain a violation of the standard.

First, Complainant submits that the parties stipulated that the only light available to employees was from their headlamps and the ambient light from the manhole/access point. *Sec'y Post-Trial Br.* at 16. The stipulation actually states, "HCI begins the staging under the manhole/access point and uses the ambient light from the manhole/access point." (Stip. No. 18 at Tr. 46). In other words, while this might be how the process begins, there was ample testimony from individuals who actually worked at this jobsite to establish that headlamps were not the sole source of illumination during the tank re-lining process.

Second, CSHO Potter testified he was told by several unnamed employees that they work using headlamp light only. (Tr. 101–103, 114). Depending on the stage of the process, this may have been the case for some periods of time. However, Bishop testified, without contradiction, that headlamps and ambient light from the access point were typically the only sources of illumination at early stages of work in a tank, until the hanging staging could be built to allow access to the points where string lights were installed. (Tr. 160–61). Otherwise, Bishop testified, the amount and type of lighting used for particular employees at particular locations was dependent upon the activity. When power washing a tank, for example, string lights are unplugged because of electrical shock hazards. When sandblasting, string lights are removed because they would be damaged; instead, lights were attached at the end of the sandblasting hoses to provide adequate illumination. Finally, when painting, explosion-proof lights were installed. (Tr. 159–60). The Court credits Bishop's uncontroverted testimony on this issue over CSHO Potter's hearsay and double-hearsay testimony from unknown sources. Additionally, the Court notes again that CSHO

Potter did not observe employees performing any work in the tank, under any particular lighting conditions.

According to the cited standard, an employer is required to ensure a work area is "adequately lighted". 29 C.F.R. § 1915.82(a)(1). The question of whether a particular work area had adequate light is not relegated to the opinion of the CSHO; rather, it is a two-part question: (1) where was the work taking place? and (2) did the lighting provided meet the requirements of that particular location? *See id.* § 1915.82, Tbl. F-1. The reference table provided for the cited standard indicates that, depending on the area where work is being performed, a certain minimum light intensity is required. *Id.* In that respect, Complainant's failure to present persuasive evidence is two-fold: (1) he generally alleged that lighting used in the #1 port storage tank was insufficient, without regard to the specific type of work being performed, or the location within the tank, at any given time; and (2) he never presented evidence of any measurement of light intensity (in lumens) for any particular employees, performing any particular work, at any particular location in the tank.

The cited standard has specific thresholds for the amount of light required in a given work location. *See id.* Complainant's only non-hearsay evidence on this point was that CSHO Potter, when he entered the tank after the accident while no employees were present, believed it was too dark within the work space. (Tr. 104). Complainant failed to present sufficient evidence to prove a violation of the cited standard. Accordingly, Citation 2, Item 2 will be VACATED.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission 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. 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 (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. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Citation 1, Items 2b and 2c were calculated as part of a grouped item penalty. (Tr. 145–46; Ex. C-2 at 27-a). Complainant applied multiple reductions in penalty, including 30% for Respondent's small size, 15% for demonstrated good faith, and 10% for no violation history, which resulted in an overall proposed grouped penalty of $3,879. (*Id.*) Given Respondent's size, safety program, and lack of violation history, the Court finds the reductions were appropriate as applied. In addition, however, Respondent demonstrated that it performed regular safety meetings, during which fall protection was regularly discussed. Further, while Respondent makes had replacement harnesses/PFAS available in the Conex box for its crew members, the weight of the evidence suggests that employees were issued their own individual harnesses, which they were responsible for bringing to work and maintaining. Thus, it is unclear how often employees needed to access the extras in the Conex box. In addition, the fall-impacted harness was among several brand new harnesses, making it unlikely that the spent harness would have actually been selected by an employee. (Tr. 177). Considering the totality of the circumstances discussed above, and given that one of the three grouped items is being vacated, the Court finds that a grouped penalty of $2,000 for Citation 1, Items 2b and 2c is appropriate.

Order

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

that:

1. Citation 1, Item 1 is VACATED;
2. Citation 1, Item 2a is VACATED;
3. Citation 1, Items 2b and 2c are AFFIRMED as serious violations of the Act, and a grouped penalty of $2,000 is ASSESSED;
4. Citation 2, Item 1 is AFFIRMED as an other-than-serious violation of the Act, and no penalty is assessed; and
5. Citation 2, Item 2 is VACATED.

/s/ Brian A. Duncan

Date: February 14, 2019
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission