UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BASIC MARINE, INC., Respondent.	DOCKET NOS. 12-0259 12-0260 (Consolidated)

Appearances:

Denise C. Hockley-Cann, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Terrie Peters, Controller, Basic Marine, Inc., Escanaba, Michigan
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On July 12, 2011, the Occupational Safety and Health Administration ("OSHA") inspected Basic Marine's ("Respondent") facility in Escanaba, Michigan. As a result of that inspection, OSHA issued two *Citations and Notifications of Penalty* ("Citations") to Respondent, which, after being contested, were designated Docket No. 12-0259 (OSHA Inspection No. 301604260) and Docket No. 12-0260 (OSHA Insp. No. 301604252). Docket No. 12-0259 contains five serious violations, four repeat violations, and one other-than-serious violation of the Act, with total proposed penalties of $44,660.00. Docket

No. 12-0260 contains twenty-six serious violations, one repeat violation, and one other-than-serious violation of the Act, with total proposed penalties of $103,180.00 Respondent timely contested the Citations. A trial was conducted in Milwaukee, Wisconsin on January 23 and 24, 2013. The parties submitted post-trial briefs for consideration.

Seven witnesses testified at trial: (1) Robert Bonack, OSHA Area Director for Michigan; (2) Ryan Wolschleger, OSHA Compliance Safety and Health Officer ("CSHO"); (3) Esley Chester, OSHA CSHO; (4) Eric Kampert, Occupational Safety and Health Specialist in OSHA's Directorate of Maritime Enforcement Programs; (5) Claude Kobasic, Supervisor, Basic Marine, Inc.; (6) Terrie Peters, Controller, Basic Marine, Inc.; (7) Daniel Kobasic, owner of Basic Marine, Inc.. (Tr. 61, 68, 106, 325, 414, 477, 505).

Jurisdiction

The parties stipulated that the Commission has jurisdiction in this case pursuant to Section 10(c) of the Act and that Respondent is 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. 34-35). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Stipulations

A few days before trial, Respondent filed a *Partial Notice of Withdrawal*, withdrawing its opposition to certain evidentiary elements for several citation items alleged in each docket.[1] Respondent's intentions with regard to its *Partial Notice of Withdrawal* were thoroughly discussed and clarified at the beginning of trial. (Tr. 44-54). Based on the *Partial Notice of Withdrawal* and the on-the-record discussion of the intent behind that document, the remaining

1. Respondent actually filed two *Partial Notices of Withdrawal*. The first version was filed on December 21, 2012. The second version was filed on January 18, 2013. (Ex. Resp. A-2). The second version clarifies the content of the December 21, 2012 version. Accordingly, when reference is made to the *Notice of Withdrawal*, the Court is referring to the January 18, 2013 version.

disputed issues for each citation item were clearly identified:

Docket No. 12-0259 (OSHA Insp. No. 301604260)

- Citation 1 Item 1: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 2: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 3a: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 3b: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 4: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 2 Item 1: All aspects of this proposed repeat violation remain in dispute;
- Citation 2 Item 2: Respondent's contest was withdrawn as to all elements *except* the "repeat" classification of the violation and the proposed penalty;
- Citation 2 Item 3: Respondent's contest was withdrawn as to all elements *except* the "repeat" classification of the violation and the proposed penalty;
- Citation 2 Item 4: Respondent's contest was withdrawn as to all elements *except* the "repeat" classification of the violation and the proposed penalty;
- Citation 3 Item 1: Respondent's contest of this proposed violation was entirely withdrawn;

Docket No. 12-0260 (OSHA Insp. No. 301604252)

- Citation 1 Item 1: Respondent's contest was withdrawn as to all elements *except*

the "serious" classification of the violation and the proposed penalty;

- Citation 1 Item 2: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 3: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 4a: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 4b: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 5: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 6: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 7: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 8: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 9: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 10: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 11: Respondent's contest was withdrawn as to all elements ***except*** the "serious" classification of the violation and the proposed penalty;

- Citation 1 Item 12: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 13: Respondent's contest was withdrawn as to all elements *except* the proposed penalty;
- Citation 1 Item 14: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 15: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 16: All aspects of this proposed serious violation remain in dispute;
- Citation 1 Item 17: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 18: All aspects of this proposed serious violation remain in dispute;
- Citation 1 Item 19: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 20: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 21a: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 21b: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 21c: Respondent's contest was withdrawn as to all elements

except the "serious" classification of the violation and the proposed penalty;

- Citation 1 Item 21d: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 1 Item 21e: Respondent's contest was withdrawn as to all elements *except* the "serious" classification of the violation and the proposed penalty;
- Citation 2 Item 1: All aspects of this proposed repeat violation remain in dispute;
- Citation 3 Item 1: Respondent's contest of this proposed violation was entirely withdrawn.

Additionally, on October 31, 2012, the Court entered an *Order* deeming admitted Complainant's *Requests for Admission* served on Respondent.[2] The *Requests for Admission* were admitted into the record as Exhibits C-3 and C-4. The admissions are specifically referenced in the discussion below to the extent they establish facts which are relevant to disputed issues in this case.

Applicable Law

To establish a violation of an OSHA standard, Complainant must prove that: (1) the cited standard applied to the condition; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

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).

2. Respondent failed to respond to *Complainant's Requests for Admissions*, then subsequently failed to respond to Complainant's *Motion for an Order Deeming Admitted Complainant's Request for Admissions.*

Complainant need not show that there was a substantial probability that an accident would actually occur; it need only show that if an accident occurred, serious physical harm could result. *Mosser Construction*, 23 BNA OSHC 1044 at *2 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). Many of the citation items that are characterized as serious allege violations of standards that protect against the same or similar hazards. Accordingly, to the extent that certain citation items allege a common hazard (i.e., asphyxiation), the discussion of these items is grouped together to analyze whether employee exposure to that common hazard could have resulted in serious physical harm or death.

"A violation is repeated if the employer was previously cited for a substantially similar violation and that citation became a final order before the occurrence of the alleged repeated violation." *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012); *Bunge Corp.*, 638 F.2d 831 (5th Cir. 1981); *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). "The Secretary establishes a *prima facie* case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard." *Id*. "[T]he principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards." *Stone Container Corp.*, 14 BNA OSHC 1757 (No. 88-310, 1990).

Discussion

Respondent performs shipbuilding and ship repair work at a facility in Escanaba, Michigan. (Tr. 34, 72). A large part of Respondent's business involves building custom vessels, conducting major retrofitting, and performing maintenance for U.S. Coast Guard and Army

Corps of Engineers ships. (Tr. 72–73). At the time of the inspection, Respondent employed 29 individuals. However, Respondent's workforce typically fluctuates between 18 and 28 employees. (Tr. 482; Ex. C-7, Resp. A-1).

The inspections at issue in this case were follow-up inspections from OSHA's visit to Respondent's facility in March of 2008. (Tr. 70). Several of the 2008 violations serve as the basis for the repeat violations alleged in the current case. (Exs. C-2, C-4, C-6).

Docket No. 12-0259

Citation 1, Items 1, 2, 3a, 3b, and 4

As outlined above, only the serious classification of these five violations and their associated proposed penalties are contested.[3] All five of these items address work by Respondent's employees that was being performed on a particular barge called the *Memphis*. (Tr. 123, 131, 260). CSHO Wolschleger observed one employee spray painting and two other employees striping—using paint rollers—within confined spaces on the *Memphis*. (Tr. 123). During his investigation, CSHO Wolschleger identified the following violations relating to the confined space work being performed by those employees: (Item 1) Respondent failed to post confined space testing results outside the work areas, in violation of 29 C.F.R. § 1915.7(d)(2); (Item 2) Respondent failed to ensure that its shipyard rescue team had practiced rescue skills at least every twelve months, in violation of 29 C.F.R. § 1915.12(e)(1)(iii); (Item 3a) Respondent failed to ensure that its competent person conducted tests and visual inspections of the confined spaces aboard the barge to ensure that the required atmospheric conditions within the space were maintained, in violation of 29 C.F.R. § 1915.15(e); (Item 3b) Respondent failed to identify and evaluate respiratory hazards posed by the use of Amercoat 240 Off White Resin and Amercoat 240 Cure, which were being used to paint and stripe the confined spaces of the barge, in

3. Penalty assessments for each affirmed citation item in this case are discussed in the last section of this Decision.

violation of 29 C.F.R. § 1910.134(d)(1)(iii); and (Item 4) Respondent failed to provide its employees with air line respirators when employees were continuously exposed to spraying paints mixed with toxic vehicles or solvents in confined spaces, in violation of 29 C.F.R. § 1915.35(a)(1)(i).

First, posting confined space testing results informs employees that the confined spaces they enter have been tested and are, in fact, safe for work activities. (Tr. 126). Without such information, Respondent's employees were unaware as to whether the confined spaces on the barge *Memphis* were truly safe to enter. (Tr. 126). This exposed employees to potentially unsafe atmospheric conditions, including possible IDLH conditions (immediate danger to life and health) which can result in asphyxia, loss of consciousness, and death. (Tr. 125, 170). Second, shipyard employers are required to ensure that their rescue teams are prepared for emergencies, such as those that can arise when working with dangerous chemicals inside confined spaces. By failing to ensure that its rescue team had practiced rescue skills on an annual basis, as required by the regulations, employees working on the barge, and members of the rescue team, were exposed to inadequate, untimely, or unsuccessful emergency rescue methods. (Tr. 127). Third, Respondent's failure to continuously monitor the atmosphere in the confined spaces on the barge *Memphis*,[4] exposed employees to potential deterioration of confined space atmospheric conditions, including possible IDLH conditions, unbeknownst to the occupants. (Tr. 129). Fourth, Respondent's failure to identify and evaluate the respiratory hazards associated with the use of Amercoat 240 Off White Resin and Amercoat 240 Cure, exposed employees to unknown consequences of those hazardous chemicals and their impact on the confined space environments. (Tr. 131). Finally, Respondent's failure to use air line respirators when paints

4. On the first day of the inspection, CSHO Wolschleger was unable to verify that any confined space testing was conducted at all. (Tr. 168). However, he later learned that initial confined space testing was conducted, but never any subsequent monitoring for possible changes in conditions after the work began. (Tr. 170–171).

were mixed with toxic chemicals or solvents like those used by Respondent's employees, especially considering the lack of other protections and monitoring as discussed above, exposed employees to unknown chemical reactions and confined space condition deterioration. Respondent did provide the affected employee with air purifying respirators. However, CSHO Wolschleger testified, without contradiction, that air purifying respirators do not protect employees from low oxygen levels or excessive levels of toxic chemicals. (Tr. 172–173, 183).

Each of these violations, when viewed individually, and especially when viewed collectively, established the potential for accidents and injuries including asphyxia, chemical burns, respiratory damage, loss of consciousness, and death. Accordingly, the Court finds that Citation 1, Items 1, 2, 3a, 3b, and 4 were properly characterized as serious violations of the Act and will be AFFIRMED.

Citation 2, Item 1

Citation 2, Item 1 alleges a repeat violation of 29 C.F.R. § 1910.134(f)(2), and is contested in its entirety by Respondent. The cited regulation requires, in part, that employees who use tight-fitting face-piece respirators be fit tested annually. Respondent admitted, by operation of law, that one of its employees was wearing a half-mask air-purifying respirator while working in a confined space onboard the barge *Memphis*. (Ex. C-4, Admission No. 18). Respondent also admitted that it did not ensure that a fit-test had been performed at least annually with respect to that employee. (Ex. C-4, Admission No. 19). That individual was also one of the employees who was exposed to the hazards discussed above with regard to Citation 1, Items 1, 2, 3a, and 3b. (Ex. C-6 at 65, 91, 102, 107, 170). Thus, the Court finds that the cited standard applied, its terms were violated, and one of Respondent's employees was exposed to the hazardous condition.

CSHO Wolschleger learned of this violation by reviewing Respondent's own electronic fit-test records, which revealed that the affected employee had not been fit-tested since 2008. (Tr. 140-141, 145; Ex. C-47). Therefore, by reviewing its own online tracking system, Respondent knew, or at least should have known, that the affected employee had not been fit-tested in three years. (Tr. 139-141). Employer knowledge of the violative condition was established.

On June 16, 2008, Respondent was issued a *Citation and Notification of Penalty*, which included a serious violation of this same standard: 29 C.F.R. § 1910.134(f)(2). (Ex. C-1 at 8). Respondent did not contest that citation item, which, by operation of law, became a final order of the Commission. (Tr. 151–52; Ex. C-4 at 4). Therefore, Complainant established substantial similarity because both the prior and instant violations are for failure to comply with the same regulatory standard. In addition, the prior and instant violations resulted in Respondent's employees being exposed to the same hazards associated with the failure to conduct annual respirator fit-testing. (Tr. 154-156). Accordingly, Citation 2, Item 1 was properly characterized as a repeat violation of the Act and will be AFFIRMED.

Citation 2, Item 2

Only the repeat classification of this violation and its associated proposed penalty are contested. Citation 2, Item 2 describes a violation 29 C.F.R. § 1910.1200(e)(1), which requires an employer to "develop, implement, and maintain . . . a written hazard communication program." A hazard communication program describes how the criteria for warnings, material safety data sheets (MSDS), and employee training and information will be met. In addition to withdrawing its notice of contest to the violation, Respondent also admitted, by operation of law, that it had no hazard communication program in Building 2, where spray painting and striping

with hazardous chemicals was occurring on the barge *Memphis*. (Exs. Resp. A-2 and C-4, Admission Nos. 20–21).

On June 16, 2008, Respondent was issued a *Citation and Notification of Penalty*, which included a serious violation of this same standard: 29 C.F.R. § 1910.1200(e)(1). (Ex. C-1 at 9). Respondent did not contest that citation item, which, by operation of law, became a final order of the Commission. (Tr. 151–52; Ex. C-4 at 4). Therefore, Complainant established substantial similarity because both the prior and instant violations are for failure to comply with the same regulatory standard. Further, both the prior and instant violations resulted in Respondent's employees being exposed to the same condition of working with hazardous chemicals without an established program for dissemination of information regarding those chemicals. (Tr. 154). Accordingly, Citation 2, Item 2 was properly characterized as a repeat violation of the Act and will be AFFIRMED.

Citation 2, Item 3

Only the repeat classification of this violation and its associated proposed penalty are contested. Citation 2, Item 3 describes a violation of 29 C.F.R. § 1910.1200(h)(1), which requires employers to provide employees "effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard . . . is introduced into their work area." In addition to withdrawing its notice of contest to the violation, Respondent admitted, by operation of law, that it did not provide effective information and training on hazardous chemicals in Building 2, where employees were exposed to hazardous chemicals. (Ex. Resp. A-2 and C-4, Admission Nos. 20-22).

On June 16, 2008, Respondent was issued a *Citation and Notification of Penalty*, which included a serious violation of this same standard: 29 C.F.R. § 1910.1200(h)(1). (Ex. C-1 at 10).

Respondent did not contest that citation item, which, by operation of law, became a final order of the Commission. (Tr. 151–152; Ex. C-4 at 5). Therefore, Complainant established substantial similarity because both the prior and instant violations are for failure to comply with the same regulatory standard. In addition, both the prior and instant violations resulted in Respondent's employees being exposed to the same condition of working with hazardous chemicals without proper training and information. (Tr. 149, 154). Accordingly, Citation 2, Item 3 was properly characterized as a repeat violation of the Act and will be AFFIRMED.

Citation 2, Item 4

Only the repeat classification of this violation and its associated proposed penalty are contested. Citation 2, Item 4 describes a violation of 29 C.F.R. § 1915.12(d)(2)(ii), which requires employers to "ensure that each employee who enters a confined space . . . with dangerous atmospheres is trained to . . . [a]nticipate and be aware of the hazards that may be faced during entry." In addition to withdrawing its notice of contest to the violation, Respondent admitted, by operation of law, that it did not train its employees to anticipate and be aware of all hazards associated with painting, striping, welding, and cleaning in the confined space aboard the barge *Memphis*. (Ex. Resp. A-2 and C-4, Admission No. 23).

On June 16, 2008, Respondent was issued a *Citation and Notification of Penalty*, which included a serious violation of this same standard: 29 C.F.R. § 1915.12(d)(2)(ii). (Ex. C-1 at 11). Respondent did not contest that citation item, which, by operation of law, became a final order of the Commission. (Tr. 151–52; Ex. C-4 at 5, 21–22). Therefore, Complainant established substantial similarity because both the prior and instant violations are for failure to comply with the same regulatory standard. Further, both the prior and instant violations resulted in Respondent's employees being exposed to the same potentially hazardous conditions of working

in confined spaces without proper training and information. (Tr. 149, 154). Accordingly, Citation 2, Item 4 was properly characterized as a repeat violation of the Act and will be AFFIRMED.

Citation 3, Item 1

Respondent completely withdrew its contest of Citation 3, Item 1. (Tr. 48). Accordingly, Citation 3, Item 1 will be AFFIRMED as issued.

Docket No. 12-0260

Citation 1, Items 1 and 2

As outlined above, only the serious classification of these two violations and their associated proposed penalties are contested.[5] These two citation items were issued pursuant to Section 5(a)(1) of the Act, which requires an employer to "furnish employment and a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm to its employees." 29 U.S.C. § 654(a)(1). Citation 1, Item 1 describes three instances in which Respondent exposed employees to crushing injuries due to inoperative safety latches on the hooks of hoists. (Exs. C-8, C-9, C-10, C-11). CSHO Chester testified that safety latches prevent slings or other material from sliding off of lifting hooks. (Tr. 204). The hooks at Respondent's facility were used to lift and move steel plates that were 6–10 feet long, and weighed between 3,000 to 6,000 pounds each. (Tr. 204, 426). These plates were typically suspended 2–6 feet above the ground in an area where at least five employees were working in close proximity to these suspended loads. (Tr. 205–206). Given the size and weight of the steel plates, CSHO Chester testified that employees would be crushed and/or killed if a steel plate slipped off of one of defective hoist hooks. (Tr. 204, 206).

5. As with Docket No. 12-0259, penalty assessments for each affirmed citation item in this case are discussed in the last section of this Decision.

Citation 1, Item 2 describes three instances in which Respondent failed to properly mark the rated load capacity on spreader bars and hoisting magnets that were used to lift these same steel plates. (Tr. 207; Exs. C-12, C-13, C-14). CSHO Chester testified that Respondent's employees were exposed to potential crushing injuries because the capacities of the spreader bars and hoist magnets were unknown. (Tr. 209). Without this readily available information, an employee could attempt to pick up an excessive load, which could cause the lifting mechanism to fail and seriously injure, or kill, an employee. (Tr. 209). This possibility was heightened by the fact that, in some instances, employees guided the steel plates by hand while they were being lifted and moved. (Tr. 210).

In both citation items, the hazard is the same - crushing injuries from falling steel plates. Respondent did not dispute CSHO Chester's testimony regarding the hazard or potential injuries. Any accident in which an employee is struck by a 3,000 to 6,000 pound steel plate could unquestionably result in serious injuries or death. Accordingly, Citation 1, Items 1 and 2 will be AFFIRMED as serious violations of the Act.

Citation 1, Item 3

Only the serious classification of this violation and its associated proposed penalty are contested. Citation 1, Item 3 describes a violation of 29 C.F.R. § 1910.67(c)(2)(v), which requires that "[a] body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift." CSHO Chester observed one of Respondent's employees driving an aerial lift, while occupying the basket, without using a body belt or lanyard. (Tr. 211; Ex. C-16, C-17). Body belts prevent employees from falling out of the basket if the aerial lift were to move or shift unexpectedly, such as hitting a bump or pothole during operation. (Tr. 213). CSHO Chester observed the aerial lift in operation, with the employee elevated approximately

four to five feet off of the ground, operating on uneven, gravel roads that actually contained potholes. (Tr. 212). CSHO testified, without contradiction, that falling out of the basket at that height could cause serious injuries, including a broken neck, and possibly death. (Tr. 214). Accordingly, Citation 1, Item 3 was properly characterized as a serious violation of the Act and will be AFFIRMED.

Citation 1, Items 4a, 4b, 5, and 6

Only the serious classification of these violations and their associated proposed penalties are contested. Each of these citation items relates to forklifts in use at Respondent's facility during the inspection. (Tr. 214–222). CSHO Chester discovered that the manufacturer's specifications plate on the Baker Model B-50-PD forklift did not identify lifting capacities, which meant that operators could not readily determine the rated capacity of the forklift. (Tr. 215; Ex. C-18). This was especially problematic because the forklifts were operated by multiple individuals on an intermittent basis. (Tr. 220). CSHO Chester was also unable to obtain any evidence from Respondent that its forklift operators had ever been properly trained or evaluated. (Tr. 223). Further, several other defects were discovered on the Baker forklift: a missing seatbelt assembly, cracked and broken boots on the gear mechanisms; and rusted control sticks. (Tr. 217; Exs. C-19, C-20, C-21, and C-22). CSHO Chester was most concerned about the missing seatbelt assembly, but he pointed out that the other defects can cause water damage to the gears and vehicle malfunction. (Tr. 217). Even when seatbelts were provided on other forklifts, such as the Hyster Model HI55XL, employees (including supervisor Claude Kobasic) were not using them. (Tr. 227, 232).

Based on these observations, CSHO Chester identified the following uncontested forklift violations: (Item 4a) Respondent failed to maintain the manufacturer specification plates in

legible condition, in violation of 29 C.F.R. § 1910.178(a)(6);[6] (Item 4b) Respondent failed to conduct an examination of industrial trucks before placing them in service, in violation of 29 C.F.R. § 1910.178(q)(7); (Item 5) Respondent failed to ensure that each forklift operator was properly trained and evaluated, in violation of 29 C.F.R. § 1910.178(l); and (Item 6) Respondent failed to ensure that each forklift operator followed the manufacturer's operating instructions, warnings, and precautions, in violation of 29 C.F.R. § 1910.178(l)(3)(i)(A).

The forklifts at issue were driven throughout Respondent's facility, including areas where other employees were working. (Tr. 224–227). These conditions, when viewed individually, and especially when viewed collectively, exposed employees to accidents caused from forklift tipping due to overloading, forklift malfunction, ejection from the forklift cab, and inappropriate forklift operation, any of which could result in serious injuries, such as crushing, decapitation, or death. (Tr. 215, 219, 227-228). Accordingly, Citation 1, Items 4a, 4b, 5, and 6 were properly characterized as serious violations of the Act and will be AFFIRMED.

Citation 1, Item 7

Only the serious classification of this violation and its associated proposed penalty are contested. Citation 1, Item 7 describes a violation (with two instances) of 29 C.F.R. § 1910.179(g)(1)(v), which requires pendant control boxes to be constructed to prevent electrical shock, and to be clearly marked for identification of functions. During the inspection, CSHO Chester observed a pendant control box (which controlled a crane) with a broken face plate and exposed electrical wiring underneath. (Tr. 235; Ex. C-24). CSHO Chester was concerned that an employee picking up the pendant box could inadvertently touch the exposed wiring, resulting in shock or electrocution. (Tr. 235–236). Claude Kobasic testified that the electrical power to the

6. CSHO Chester testified that Citation 1, Item 4(a) contains a typographical error. It should read, "Nameplates or markings for powered industrial trucks were ***not*** maintained in a legible condition." (Tr. 218).

pendant box was 240 volts. (Tr. 437). CSHO Chester also observed a second pendant control box (also used to operate a crane) which did not have the function of each button labeled. (Tr. 235; Ex. C-25). An operator could inadvertently maneuver the crane in the opposite manner intended by pressing the wrong button. (Tr. 239). These defective pendant control box conditions exposed employees to the possibility of electric shock, electrocution, crushing injuries, struck-by injuries, and death. Accordingly, Citation 1, Item 7 was properly characterized as a serious violation of the Act and will be AFFIRMED.

Citation 1, Item 8

Only the serious classification of this violation and its associated proposed penalty are contested. Citation 1, Item 8 describes three instances wherein Respondent failed to correct unsafe crane conditions disclosed during periodic inspections, in violation of 29 C.F.R. § 1910.179(l)(3). CSHO Chester reviewed a crane audit report which was performed at Respondent's facility by a third party in March 2011. (Tr. 237, 510). The report identified inoperative brakes on two separate P&H cranes, which were still being operated in the same condition at the time of the inspection. (Tr. 246–247). CSHO Chester also observed that a wire rope being used to hoist loads was missing a "lay," or layer of wire strands. (Tr. 242). This missing lay ran the entire length of the wire rope. (Tr. 242–245; Ex. C-27). This compromised the wire rope's lifting capacity and presented an increased possibility of a load falling on or near an employee. (Tr. 244). Similarly, the inoperative crane brakes prevented the crane operator from stopping a load from falling on, or swinging toward, employees. (Tr. 248). In each instance, if such an accident occurred, it would undoubtedly cause serious injury or death. Accordingly, Citation 1, Item 8 was properly characterized as a serious violation and will be AFFIRMED.

Citation 1, Item 9

Only the serious classification of this violation and its associated proposed penalty are contested. Citation 1, Item 9 describes the continued use of a defective web sling, in violation of 29 C.F.R. § 1910.184(i)(9)(iv). The sling at issue was being used to carry a hoisting magnet and steel plates, yet clearly displayed torn stitching and an exposed red warning line. (Tr. 250-251; Ex. C-28). The red warning line is integrated by the manufacturer into the inner part of the sling to alert users that the sling is no longer capable of lifting its rated load. (Tr. 250). By not taking this sling out of service, employees were exposed to sling failure, falling loads, crushing injuries and death. (Tr. 251–253). Accordingly, Citation 1, Item 9 was properly characterized as a serious violation and will be AFFIRMED.

Citation 1, Item 10

Only the serious classification of this violation and its associated proposed penalty are contested. Citation 1, Item 10 describes a violation of 29 C.F.R. § 1910.242(b), which states that compressed air shall not be used for cleaning purposes except where reduced to less than 30 psi and then only with effective chip guarding and personal protective equipment (PPE). CSHO Chester observed an employee cleaning dust and debris off of himself using a compressed air line. (Tr. 253; Ex. C-29). Although it was undisputed that the compressed air hose did not contain chip guarding, Respondent presented undisputed evidence that the air pressure at the nozzle was 25 psi. (Tr. 440, 464). CSHO Chester asserted that using the air hose for that purpose could cause an "embolism…pierce the skin…infection", or could result in damage to the eye from flying debris. (Tr. 253–257). However, there was no discussion of whether the employee was wearing or using appropriate PPE at the time. In addition, CSHO Chester conceded that the likelihood of an injury from this situation was "pretty low" and that "there was no possibility of

death or – anything like that or – or possible long term hospitalization." (Tr. 258). Accordingly, Citation 1, Item 10 will be MODIFIED to an other-than-serious violation of the Act and AFFIRMED.

Citation 1, Items 11 and 12

Only the serious classification of these violations and their associated proposed penalties are contested. Citation 1, Item 11 describes a violation of 29 C.F.R. § 1915.73(b), which requires an employer to ensure that flush manholes and other small openings of comparable size in the deck are suitably covered or guarded when employees are working in the vicinity, except when the use of such guards is made impracticable by work in progress. Citation 1, Item 12 describes a violation of 29 C.F.R. § 1915.73(d), which requires an employer to use guardrails to protect employees who are exposed to the edges of decks, platforms and similar flat surfaces more than five feet above a solid surface. Respondent's employees were exposed to fall hazards in each situation due to: (Item 11) inadequate guarding of a mantle opening on the barge *Memphis*; and (Item 12) the unguarded side of a barge where employees were exposed to a 10-foot fall onto packed gravel, dirt, and concrete. (Tr. 259, 261, 343; Exs. C-30, C-31, C-32). Either type of fall could result in serious injuries either by striking the edge of the steel opening during the fall, falling all the way through the hole to the level below, or falling off the edge of the barge. Accordingly, Citation 1, Items 11 and 12 were properly characterized as serious violations of the Act and will be AFFIRMED.

Citation 1, Item 13

Only the proposed penalty for this item is contested. (Tr. 50). Therefore, it is addressed in the penalty assessment section below.

Citation 1, Items 14 and 15

Only the serious classification of these violations and their associated proposed penalties are contested. Citation 1, Item 14 describes a violation of 29 C.F.R. § 1915.112(c)(2), which requires that sling chains be given a thorough inspection every three months for wear, defective welds, deformation, and increase in length or stretch. The chain must also bear an indication of the month in which it was inspected. CSHO Chester observed chains being used to lift steel plates with no evidence of inspection. (Tr. 276, 281; Exs. C-34, C-35, C-36). According to one Commission ALJ, "If a chain which should have been discovered as defective was not removed from service or repaired, even failure of one link could cause large objects to fall onto employees." *Trinity Marine Prods., Inc.*, 21 BNA OSHC 1819 (No. 05-0302, 2006) (ALJ Spies).

Citation 1, Item 15 describes a violation of 29 C.F.R. § 1915.113(b)(2), which requires that "[l]oads shall be applied to the throat of the hook since loading the point overstresses and bends or springs the hook." CSHO Chester observed hooks used by Respondent that were stretched open, which meant that the load was placing stress at the point of the hook as opposed to the throat. (Tr. 285; Exs. C-34, C-35, C-36). These hooks were being used to lift the steel plates referenced numerous times in the citations discussed above, which given their stretched condition, increased the possibility of failure. (Tr. 287-289). If a 3,000 pound steel plate were to fall onto an employee, due to an undiscovered defect in a chain or the failure of a stretched hook, serious crushing injuries or death could result. Accordingly, Citation 1, Items 14 and 15 were properly characterized as serious violations and will be AFFIRMED.

Citation 1, Item 16

All aspects of Citation 1, Item 16 remain in dispute. This item alleges a violation of 29 C.F.R. § 1915.116(f), which requires the use of anti-chafing material or blocks when slings pass

over sharp edges. Respondent admitted, by operation of law, that at the time of the inspection "slings were not always padded by means of wood blocks or other suitable material where they passed over sharp edges or corners of loads." (Ex. C-3, Admission No. 21). In this instance however, the language of the admission is extremely general and does not, in and of itself, establish facts sufficient to prove the specific violation described at trial.

Complainant explained that the factual basis for this alleged violation was actually CSHO Kampert's observation of a sling stretched over the top of a roof beam that was in the shape of an upside-down "T". (Tr. 357–358; Ex. C-37). The sling was being used to raise and lower an air conditioning unit, a hydraulic unit, and generators into the hold of the barge *Memphis*. (Tr. 351–352). CSHO Kampert testified that the narrow portion of the T-beam placed significant stress on the sling, which exposed the employees working below to sling failure and the potential for being struck by falling material. (Tr. 360–361). However, CSHO Kampert was not certain of the configuration or dimensions of the T-beam since he only observed it from the floor of the facility – which he conceded was far away, in the upper, dark portion of building. (Tr. 394-396).

Respondent contended that the T-beam was not a sharp edge within the meaning of the standard. Claude Kobasic testified, without contradiction, that he personally installed the sling over the T-beam, and that it had rounded edges. (Tr. 447). Having installed the sling and examined the configuration closely, Claude Kobasic was in a better position to assess the need for blocks or padding than CSHO Kampert, who only took distant photos of the sling and beam from the ground.

Based on the foregoing, the Court finds that Complainant failed to establish, by a preponderance of the evidence, that the cited standard was violated. Accordingly, Citation 1, Item 16 will be VACATED.

Citation 1, Item 17

Only the serious classification of this violation and the associated proposed penalty are contested. Citation 1, Item 17 describes a violation of 29 C.F.R. § 1915.155(a)(1), which requires an employer to provide protective head protection to its employees when there is a potential for head injuries from falling objects. None of Respondent's employees, including owner Daniel Kobasic, were wearing hard hats while working in and around the barge *Memphis*. (Tr. 278, 362–364; Ex. C-39). In addition to various suspended loads on hoists and cranes, CSHO Kampert observed a lot of equipment and materials "haphazardly" stacked along the unprotected edge of the barge. (Tr. 364). Failure to wear proper head protection subjected Respondent's employees to the potential for serious head injuries, or even death. (Tr. 365). Accordingly, Citation 1, Item 17 was properly characterized as a serious violation and will be AFFIRMED.

Citation 1, Item 18

All aspects of Citation 1, Item 18 remain in dispute. This item alleges a serious violation of 29 C.F.R. § 1915.158(b)(4), which requires life buoys (rings) to have 90 feet of line attached to them. Respondent admitted, by operation of law, that at the time of the inspection its employees worked on, over, or near water during the repair of the U.S. Coast Guard vessel *Katmai Bay*, and that life buoys in the area were not all attached to at least 90 feet of line. (Ex. C-3, Admission No. 23). In addition, CSHO Kampert observed a life buoy along the waterfront of Respondent's pier that did not have any line attached to it. (Tr. 366). Nick Kobasic, Respondent's project manager for the *Katmai Bay*, as well as other employees, worked and traveled along the pier. (Tr. 367-369). At trial, Claude Kobasic revealed that none of the three life buoys on the pier had the requisite 90 feet of line attached to them; rather, one had no line

and the other two had 65–70 feet of line. (Tr. 450–451). The Court finds that the cited standard applied, its terms were violated, Respondent's employees were exposed to the condition, and Respondent had knowledge of the violative condition.

The Court also finds that Citation 1, Item 18 was properly characterized as a serious violation of the Act. Falling off a pier into the northern waters of Lake Michigan, without prompt rescue, could result in hypothermia or drowning. (Tr. 370). When a life buoy has no attached line, a potential rescuing party has only one chance to get the life buoy to the drowning employee. If the throw is unsuccessful, precious seconds, possibly even minutes, would be lost in trying to procure another life buoy. This problem is compounded by the fact that the two remaining buoys on Respondent's pier only had 65–70 feet of line, and were located 80 feet away from the life buoy that had no line at all. (Tr. 450). Based on the foregoing, Citation 1, Item 18 was properly characterized as a serious violation and will be AFFIRMED.

Citation 1, Item 19

Only the serious classification of this violation and the associated proposed penalty are contested. Citation 1, Item 19 describes a violation of 29 C.F.R. 1915.173(e), which requires 55-gallon (or larger) containers of flammable or toxic liquid to be surrounded by dikes or pans which enclose a volume equal to at least 35 percent of the total volume of all containers. CSHO Kampert observed two 55-gallon drums of xylene, a flammable liquid, without proper containment. (Tr. 371–374; Exs. C-40, C-41). In addition to being flammable, xylene can cause cause eye damage and respiratory problems. (Tr. 374; Ex. C-41). The failure to provide proper containment for these large quantities of hazardous chemicals exposed nearby employees to these potential hazards. Accordingly, Citation 1, Item 19 was properly characterized as a serious violation and will be AFFIRMED.

Citation 1, Items 20, 21a, 21b, 21c, 21d, and 21e

Only the serious classification of these violations and their associated proposed penalties are contested. Citation 1, Item 20 describes a violation of 29 C.F.R. § 1915.173(f), which requires an employer to provide fire extinguishers "adequate in number and suitable for the hazard." Citation 1, Item 21 alleges five related violations of 29 C.F.R. § 1915.502, which requires an employer to implement various elements of a Fire Safety Plan and to document that it was communicated to employees. More specifically, Respondent failed to: (Item 20) provide fire extinguishers in an area where flammable chemicals were stored; (Item 21a) institute fire alarm procedures; (Item 21b) institute procedures for notifying employees of a fire emergency; (Item 21c) institute procedures for employee evacuation; (Item 21d) institute procedures to account for all employees after evacuation; and (Item 21e) inform employees of the Fire Safety Plan. The failure to establish and implement the requirements of a Fire Safety Plan, and the failure to have fire extinguishers in areas where flammable liquids were stored, exposed Respondent's employees to the potential for serious burn injuries and death. Accordingly, Citation 1, Items 20, 21a, 21b, 21c, 21d, and 21e were properly characterized as serious violations of the Act and will be AFFIRMED.

Citation 2, Item 1

All aspects of Citation 2, Item 1 remain in dispute. This item alleges a repeat violation of 29 C.F.R. § 1910.212(a)(3)(ii), which provides: "[t]he points of operation of machines whose operation exposes an employee to injury, shall be guarded…" Respondent admitted, by operation of law, that at the time of the inspection its "employees' duties included use of a band saw which lacked proper guarding to protect users from making inadvertent contact with the unused portion of the moving blade during operating cycles." (Ex. C-3, Admission No. 32).

Further, Respondent's foreman, Claude Kobasic, admitted that he has used the specific band saw at issue for at least thirty years. (Tr. 442–443).

Despite these admissions, Respondent contends that the blade was guarded by rollers and a vice which were part of the band saw station. (Tr. 444; Exs. C-44, C-45). Claude Kobasic explained that the band saw could be fed automatically or manually. (Tr. 445, 471). Once the material was fed into place for a cut, the employee tightened the vice using a rotating handle. (Tr. 444; Ex. C-45). To operate the saw manually, as Claude Kobasic testified he does, the operator turns an eight-inch wheel to moves the saw blade toward the material held in the vice. (Tr. 470; Ex. C-44).

The evidence showed that the exposed blade was unguarded, and was in close proximity to numerous handles and wheels that were used when operating the saw. This placed the operator in the zone of danger. The Commission has long-recognized that OSHA's machine guarding standards were designed to protect employees from common human errors such as neglect, distraction, inadvertence, carelessness, or simple fatigue. *Slyter Chair, Inc*., 4 BNA OSHC 1110 (No. 1263, 1976); *B.C. Crocker*, 4 BNA OSHC 1775 (No. 4387, 1976); *Signode Corp.*, 4 BNA OSHC 1078 (No. 3527, 1976); *Dover Elevator Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993). In addition to Claude Kobasic's admitted use, there were fresh metal shavings on the table, indicating recent use. (Tr. 295). The Court finds that the cited standard applied, was violated, employees were exposed, and the employer had knowledge of the condition.

On April 29, 2008, Respondent was issued a *Citation and Notification of Penalty*, which included a serious violation of this same standard: 29 C.F.R. § 1910.212(a)(3)(ii). (Tr. 290; Ex. C-3 at 6, 16). Respondent initially contested that citation item, and later negotiated a settlement with Complainant whereby the 2008 citation item was accepted with a reduced penalty and

became a final order of the Commission. (Tr. 290; Ex. C-3 at p. 25). Therefore, Complainant established substantial similarity because both the prior and instant violations are for failure to comply with the same regulatory standard. Further, both the prior and instant violations resulted in Respondent's employee exposure to the same potentially hazardous condition of unguarded machinery. Accordingly, Citation 2, Item 1 was properly characterized as a repeat violation of the Act and will be AFFIRMED.

Citation 3, Item 1

Respondent completely withdrew its contest of Citation 3, Item 1. (Tr. 53). Accordingly, Citation 3, Item 1 will be AFFIRMED as issued.

Penalties

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).

In calculating the original proposed penalties, Complainant credited Respondent with a 30% reduction for its status as a "medium" sized employer, but increased the penalties by 10% based on Respondent's 2008 violation history. (Tr. 85–88; Ex. C-7). Complainant did not

provide any penalty reduction to Respondent based on good faith. (Tr. 89).

The Court finds that Respondent is actually a small employer that typically employs anywhere from 18 to 28 employees. (Tr. 483-485; Ex. Resp. A-1). As the size of the employer is an important statutory factor in assessing penalties, this determination will be applied to virtually every assessment below, in addition to the other relevant statutory criteria.

Docket No. 12-0259

Citation 1, Item 1

According to CSHO Wolschleger, three employees were exposed to work in confined spaces on the barge *Memphis* for approximately six hours a day, ranging from a week to a month at a time. (Tr. 123, 127, 129, 132, 134). Complainant proposed a penalty of $3,850.00 for this item based on the CSHO's conclusion that the likelihood of an accident stemming from the failure to post confined space records was low, and that the severity of the injury that could result was high. (Tr. 125). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 2

As with the previous item, three employees were exposed to the violative condition approximately six hours a day, ranging from a week to a month at a time. (Tr. 123, 127, 129, 132, 134). Complainant proposed a penalty of $3,850.00 for this item based on the CSHO's conclusion that the likelihood of an accident stemming from the failure to have shipyard crews practice rescue skills once every twelve months was low, and that the severity of the potential injury was high. (Tr. 128). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00

is appropriate.

Citation 1, Items 3a and 3b

The same employees were exposed for the same periods of time as in the previous two violations. Complainant proposed a penalty of $3,850.00 for this grouped citation item based on the CSHO's conclusion that the likelihood of an accident stemming from the failure to conduct regular inspections of confined spaces and evaluate respiratory hazards was low, and that the severity of the potential injury was high. (Tr. 130-132). Although it is incumbent upon Respondent to perform proper confined space evaluations, there was no evidence to indicate that the atmospheric conditions in the confined spaces at issue ever deteriorated. Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 4

One employee was exposed for the same periods of time as in the three previous violations. Complainant proposed a penalty of $3,850.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from the failure to provide the employee with an airline respirator was low, and that the severity of the potential injury was high. (Tr. 134). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 2, Item 1

One employee was exposed to this condition, but there was no evidence that his respirator did not fit him properly; just that the fit had not been tested since 2008. If tight-fitting face-piece respirators do not fit employees' faces properly, their effectiveness in protecting them

from airborne hazards and atmospheric conditions could be eliminated. Complainant proposed a penalty of $6,160.00 for this repeat citation item based on the CSHO's conclusion that the likelihood of an accident stemming from the failure to ensure the employee had an annual fit test was low, and that the severity of potential injury was medium. (Tr. 144). Based on the totality of the circumstances introduced in the record for this repeated violation, as well as Respondent's small size, the Court finds that a penalty of $4,000.00 is appropriate.

Citation 2, Item 2

Complainant proposed a penalty of $6,160.00 for this repeat citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to develop and implement a hazard communication program was low, and that the severity of the potential injury was medium. (Tr. 147). Although Respondent's employees used various hazardous chemicals, with no comprehensive hazard communication program in place, Respondent did maintain material safety data sheets (MSDS). (Tr. 176, 182). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $4,000.00 is appropriate.

Citation 2, Item 3

This violation is directly related to Citation 2, Item 2 above, in that the inevitable result of failing to have a hazard communication program, is that Respondent did not train employees pursuant to the (non-existent) program. Complainant proposed a penalty of $6,160.00 for this repeat citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to provide hazardous chemical information and training was low, and that the severity of the potential injury was medium. (Tr.150-151). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the

Court finds that a penalty of $4,000.00 is appropriate.

Citation 2, Item 4

The number of employees exposed, and the approximate periods of exposure, for this violation are the same as in Citation 1, Items 1 through 4 above. Complainant proposed a penalty of $10,780.00 for this repeat citation item based on the CSHO's conclusion that the likelihood of an accident stemming from failure to provide training regarding confined space hazards was high, and that the severity of potential injury was also high. Complainant's assessment of probability was based, in large part, on the presence of the previously discussed violations in this inspection. (Tr. 154). According to CSHO Wolschleger's narrative report, though deficient in some respects, it appears that Respondent did provide some measure of confined space training. (Ex. C-6 at 220). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $5,000.00 is appropriate.

Citation 3, Item 1

Complainant did not propose a penalty for this citation item.

Docket No. 12-0260

Citation 1, Item 1

Five employees were exposed to the condition of defective lifting hook latches on a daily basis. (Tr. 205-206). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from the condition was high, and that the severity of potential injury was also high. Although the potential injury resulting from such an accident could be severe, the Court finds that the likelihood of such an accident occurring was relatively low. Based on the totality of the circumstances introduced in

the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 2

Five employees were exposed to this condition daily. (Tr. 209). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to mark the rated load capacity on its lifting equipment was high, and that the severity of the potential injury was also high. (Tr. 210). Claude Kobasic testified that the crane had a lifting capacity of 10,000 pounds and that the plates being lifted weighed 3,000 to 6,000 pounds, which made it unlikely that any accident would actually occur as a result of this condition. (Tr. 426). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 3

One employee was exposed to the condition of using an aerial lift without a body belt and lanyard. (Tr. 212). Complainant proposed a penalty of $3,850.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from this condition was low, and that the severity of the potential injury was high. (Tr. 213-214). The Court notes the low rate of speed at which the aerial lift traveled, as well as the brief (2-3 minutes) exposure of one employee. (Tr. 213). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $1,500.00 is appropriate.

Citation 1, Items 4(a) & 4(b)

Four employees were exposed "intermittently" throughout each day to these forklift

deficiencies. (Tr. 219). Complainant proposed a grouped penalty of $5,390.00 for these citation items based on the CSHO's conclusion that the likelihood of an accident was high, and that the severity of the potential injury was also high. (Tr. 219-221). Complainant did not provide details regarding the loads that these forklifts carried, nor was there evidence introduced as to their lifting capacities, making a determination regarding likelihood of an actual accident difficult. Nor was their evidence that the other noted deficiencies actually affected the forklifts' performance. Without more information, the Court is not persuaded that there was a high likelihood of an accident actually occurring from these conditions. Based on the totality of the circumstances introduced in the record for these violations, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 5

The same employees were exposed for the same duration as in Citation 1, Item 4 above. (Tr. 223). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to train and evaluate its forklift operators was high, and that the severity of the potential injury was also high. (Tr. 224). However, CSHO Chester testified that Respondent's employees had training in previous jobs and had operated similar equipment before. (Tr. 314). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,500.00 is appropriate.

Citation 1, Item 6

Complainant proposed a penalty of $3,080.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to ensure that its forklift operators were wearing seatbelts was low, and that the severity of the potential injury

was medium. (Tr. 232-233). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 7

Five employees were exposed to these conditions on a daily basis. (Tr. 239). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from damaged and unmarked pendant control boxes was high, and that the severity of the potential injury was also high. (Tr. 239-240). With respect to the partially broken pendant control box, Dan Kobasic testified that there was plastic insulation under the cover which prevented employee contact with the wiring. (Tr. 511). With respect to the unmarked pendant box, there were only two buttons, and there was no evidence that Respondent's employees were unaware of how they functioned. (Ex. C-25). Although the severity of the injuries which could result from these conditions was high, the Court is not convinced that such accidents were likely to occur. Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 8

Five employees were exposed daily to these defective crane conditions. (Tr. 249). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to correct unsafe crane conditions after an inspection was high, and that the severity of the potential injury was also high. (Tr. 249-250). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $3,500.00

is appropriate.

Citation 1, Item 9

Five employees were exposed on a daily basis to the continued use of a defective web sling. (Tr. 251–253). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident was high, and that the severity of the potential injury was also high. (Tr. 253). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $4,000.00 is appropriate.

Citation 1, Item 10

Complainant proposed a penalty of $3,080.00 for this citation item. The Court modified this violation to other-than-serious. Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $500.00 is appropriate.

Citation 1, Item 11

Seven employees were exposed to the insufficiently protected manhole opening on a daily basis. (Tr. 263). Complainant proposed a penalty of $3,850.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident was low, and that the severity of the potential injury was high. (Tr. 264). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 12

Seven employees working onboard the barge *Memphis* were exposed to a 10-foot fall off the side of a barge onto packed gravel, dirt, and concrete. (Tr. 343; Ex. C-31, C-32).

Complainant proposed a penalty of $5,390.00 for this violation based on the CSHO's conclusion that the likelihood of an accident stemming from this condition was high, and that the severity of the potential injury was also high. (Tr. 345-346). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,500.00 is appropriate.

Citation 1, Item 13

Complainant proposed a penalty of $5,390.00 for this violation based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to keep walkways clear of hoses and cables was high, and that the severity of the potential injury was also high. (Tr. 350-351). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 14

Five employees were exposed to this condition on a daily basis. (Tr. 277). Complainant proposed a penalty of $4,620.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to conduct a visual inspection of its sling chains every three months was high, and that the severity of the potential injury was medium. (Tr. 279). Although the chains bore no indication that an inspection had been conducted in the previous three months, CSHO Chester's examination of the chains did not disclose defects or other problems that would warrant a finding that there was a high likelihood of an accident. (Tr. 276). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $1,500.00 is appropriate.

Citation 1, Item 15

Complainant proposed a penalty of $3,080.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to ensure that loads were being applied to the throat of its hooks was low, and that the severity of the potential injury was medium. (Tr. 289). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $1,500.00 is appropriate.

Citation 1, Item 16

This citation item will be VACATED. Accordingly, there is no assessed penalty.

Citation1, Item 17

Nine employees were exposed to this condition on a daily basis. (Tr. 364-365). Complainant proposed a penalty of $5,390.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to ensure that affected employees wear hard hats was high, and that the severity of the potential injury was also high. (Tr. 365). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $3,500.00 is appropriate.

Citation 1, Item 18

One employee's exposure to this condition was observed, but there was evidence of other employees periodically traveling along the pier to work on the *Katmai Bay*. (Tr. 367-369). Complainant proposed a penalty of $3,850.00 for this violation based on the CSHO's conclusion that the likelihood of an accident from failure to have adequate line attached to life buoys was low, and that the severity of the potential injury was high. (Tr. 370). Based on the totality of the

circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 1, Item 19

Six employees were exposed to this violative condition on a weekly basis. (Tr. 372). Complainant proposed a penalty of $2,310.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to provide containment for 55-gallon containers of flammable liquid was low, and that the severity of the potential injury was high. (Tr. 374). There was no evidence in the record of leakage or any ignition source in the area of the containers. Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $1,000.00 is appropriate.

Citation 1, Item 20

Ten employees were exposed to this condition on a weekly basis. (Tr. 377). Complainant proposed a penalty of $2,310.00 for this citation item based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to provide an adequate number of fire extinguishers near a flammable chemical storage area was low, and that the severity of potential injury was high. (Tr. 378). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $1,500.00 is appropriate.

Citation 1, Items 21a, 21b, 21c, 21d, and 21e

Ten employees were exposed to this violative condition. (Tr. 382). Complainant proposed a grouped penalty of $5,390.00 for these citation items based on the CSHO's conclusion that the likelihood of an accident stemming from Respondent's failure to develop and

implement the components of a Fire Safety Plan was high, and that the severity of the potential injury was also high. (Tr. 382). Respondent did, however, enter into an emergency response agreement with the local fire department. (Tr. 381-382). Based on the totality of the circumstances introduced in the record for this violation, as well as Respondent's small size, the Court finds that a penalty of $2,000.00 is appropriate.

Citation 2, Item 1

Five employees and a supervisor used the unguarded band saw intermittently throughout the day. (Tr. 295-296). Complainant proposed a penalty of $10,780.00 for this violation based on the CSHO's conclusion that the likelihood of an accident was high, and that the severity of potential injury was also high. (Tr. 303-304). A significant portion of the moving saw blade was exposed, within inches of wheels and handles adjusted by operators. Based on the totality of the circumstances introduced in the record for this repeated violation, as well as Respondent's small size, the Court finds that a penalty of $7,000.00 is appropriate.

Citation 3, Item 1

Complainant did not propose a penalty for this citation item.

ORDER

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

Docket No. 12-0259

- Citation 1, Item 1 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 2 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Items 3a and 3b are AFFIRMED and a grouped penalty of $2,000.00 is ASSESSED;

- Citation 1, Item 4 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 2, Item 1 is AFFIRMED and a penalty of $4,000.00 is ASSESSED;
- Citation 2, Item 2 is AFFIRMED and a penalty of $4,000.00 is ASSESSED;
- Citation 2, Item 3 is AFFIRMED and a penalty of $4,000.00 is ASSESSED;
- Citation 2, Item 4 is AFFIRMED and a penalty of $5,000.00 is ASSESSED;
- Citation 3, Item 1 is AFFIRMED with no penalty;

Docket No. 12-0260

- Citation 1, Item 1 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 2 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 3 is AFFIRMED and a penalty of $1,500.00 is ASSESSED;
- Citation 1, Items 4a and 4b are AFFIRMED and a grouped penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 5 is AFFIRMED and a penalty of $2,500.00 is ASSESSED;
- Citation 1, Item 6 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 7 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 8 is AFFIRMED and a penalty of $3,500.00 is ASSESSED;
- Citation 1, Item 9 is AFFIRMED and a penalty of $4,000.00 is ASSESSED;
- Citation 1, Item 10 is MODIFIED to an other-than-serious violation, AFFIRMED as modified, and a penalty of $500.00 is ASSESSED;
- Citation 1, Item 11 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 12 is AFFIRMED and a penalty of $2,500.00 is ASSESSED;
- Citation 1, Item 13 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 14 is AFFIRMED and a penalty of $1,500.00 is ASSESSED;

- Citation 1, Item 15 is AFFIRMED and a penalty of $1,500.00 is ASSESSED;
- Citation 1, Item 16 is VACATED;
- Citation 1, Item 17 is AFFIRMED and a penalty of $3,500.00 is ASSESSED;
- Citation 1, Item 18 is AFFIRMED and a penalty of $2,000.00 is ASSESSED;
- Citation 1, Item 19 is AFFIRMED and a penalty of $1,000.00 is ASSESSED;
- Citation 1, Item 20 is AFFIRMED and a penalty of $1,500.00 is ASSESSED;
- Citation 1, Items 20a through 20e are AFFIRMED and a grouped penalty of $2,000.00 is ASSESSED;
- Citation 2, Item 1 is AFFIRMED and a penalty of $7,000.00 is ASSESSED; and
- Citation 3, Item 1 is AFFIRMED with no penalty.

SO ORDERED.

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

Date: July 8, 2013
Denver, Colorado