United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR, Complainant, v. INGALLS SHIPBUILDING, INC., Respondent, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 773, and PASCAGOULA METAL TRADES COUNCIL, AFL-CIO, Authorized Employee Representatives.	OSHRC Docket Nos. 93-596, 93-597 & 93-614 (Consolidated)

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Edwin G. Foulke, Jr. on December 28, 1994. The parties have now filed a stipulation and settlement agreement.

The Commission has reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, the Commission concludes that this case raises no matters warranting further review. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, the Commission incorporates the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

BY DIRECTION OF THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

I certify that a copy of this order has been served on the following persons this 27th day of June 1995:

Daniel J. Mick
Orlando J. Pannocchia
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200 Constitution Ave., N.W.
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P. O. Box 149
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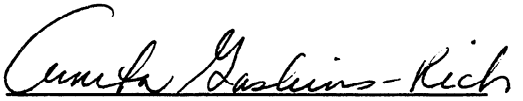

Arnita Gaskins-Rich
Legal Technician

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT REICH, SECRETARY OF LABOR, Complainant, v. INGALLS SHIPBUILDING, INC., Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 773, and PASCAGOULA METAL TRADES COUNCIL, AFL-CIO, Authorized Employee Representatives.	OSHRC Docket Nos. 93-596, 93-597 93-614 (Consolidated)

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which is currently pending before the Commission.

II

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor and the Respondent, Ingalls Shipbuilding, Inc., that:

1. Complainant hereby amends Items 15(j), 15(k), 15(n), 15(o), 15(p), 15(q), and 15(r) of Serious Citation 1, OSHRC Docket No. 93-614, to characterize the alleged violations

of 29 CFR § 1910.303(g)(2)(i) as other-than-serious violations of the Act. The total proposed penalties for items 15(j), (k), (n), (o), (p), (q), and (r) is amended to $600. Respondent represents that these alleged violations have been abated and shall remain abated by ensuring that the doors on its electrical panel cabinets shall be kept in a closed position at all times, except when the electrical panel is being serviced by its electrical maintenance personnel or when breakers are accessed by authorized employees. In the event that an authorized electrical servicing procedure involves the removal of blanks in the panel, Respondent shall ensure that the blanks are reinstalled in their original position. When breakers are removed from the panel to eliminate a circuit, a blank shall be installed.

2. Complainant hereby amends the proposed penalty for violation of Serious Citation 1, item 24 of OSHRC Docket No. 93-614 to $4,000. Respondent represents that it shall abate the alleged violation by instituting a procedure by which a diver in scuba gear shall be stationed either on the dive barge or proximate to the underwater point of entry, and be able to communicate with whomever is manning the air-supply hose at all times whenever it conducts surface-supplied air diving in physically confining spaces.

3. Complainant hereby withdraws items 45(a) of Serious Citation 1, OSHRC Docket No. 93-614, alleged violation of § 1910.181(b) issued to Respondent and the notification of proposed penalty for that item. Complainant amends the proposed

penalty for item 45(b) of Serious Citation 1 to $1,750 for the alleged violation of §1915.335(a)(1)(i). Respondent represents that employees working on energized circuits shall be required to use electrical protective equipment to prevent electrical shock and/or electrical burns. A safety rule requiring the mandatory use of electrical protective equipment shall be incorporated into the company's safety policy and disseminated to its employees through the issuance of the Supervisor's Weekly Safety Briefing within 60 days from execution of this agreement. The safety rule shall state that it will be enforced through means of progressive disciplinary procedures for those employees found not using the protective electrical equipment. The Employee Safety Manual shall be amended at its next publication to include this change.

4. Complainant hereby amends item 1 of Willful Citation No. 2, OSHRC Docket No. 93-596 (adjudicated by the ALJ as Serious) to characterize the alleged violation of §1915.36(a)(4) as a violation of Section 17 of the Act. The proposed penalty for this citation is amended to $2,500. Respondent represents that ventilation shall be provided in sufficient quantities to keep the concentrations of vapors below ten (10) percent of their lower explosive limit whenever it engages in painting operations where liquid solvents or paints are capable of producing a flammable atmosphere. Respondent shall also ensure that frequent air monitoring tests will be conducted by a competent person in order to ascertain the concentration of vapors present during paint operations.

5. Respondent hereby withdraws its notice of contest to the citations and penalties as referenced and amended herein.

6. Respondent hereby agrees to pay a penalty of $8,850 by submitting its check, made payable to U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) to the OSHA Area Office within 30 days from date of this Agreement.

7. Each party agrees to bear its own fees and other expenses incurred by each party in connection with any stage of their proceeding.

8. None of the foregoing agreements, statements, stipulations, or actions taken by Ingalls Shipbuilding, Inc. shall be deemed an admission by Respondent of the allegations contained in the citations or the complaint herein, nor of the applicability of any of the standards under the Act which formed the basis of the citations. The agreements, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and they shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and Health Act of 1970. Respondent reserves all applicable defenses in the event of future citations involving any of the underlying facts which formed the basis of any of the citations referenced herein.

9. The authorized employee representatives which elected party status in this case were contacted concerning the terms of

this Stipulation and Settlement Agreement, and have raised no objection to the reasonableness of any abatement period set forth herein.

10. The parties agree that this Stipulation and Settlement agreement is effective upon execution.

11. Respondent hereby certifies that on June 9TH, 1995, a copy of this Stipulation and Settlement Agreement was served on the authorized employee representatives by pre-paid first class mail in accordance with Commission Rule 7(c). Respondent further certifies that a copy of this Stipulation and Settlement Agreement was posted at its worksite in a conspicuous manner on the 12TH day of June 1995, pursuant to Commission Rule 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 9TH day of June 1995.

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
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P.O. Box 149
Pascagoula, MS 39568-0149

ORLANDO J. PANNOCCHIA
Attorney for the
Secretary of Labor
200 Constitution Avenue, NW
Room S-4004
Washington, D.C. 20210

CERTIFICATE OF SERVICE

I certify that a copy of the attached Stipulation and Settlement Agreement was mailed postage prepaid on this 7th day of June, 1995 to the following persons:

Mr. W.D. McGill
Business Manager, I.B.E.W.
Local 733
P.O. Box 1247
Pascagoula, MS 39568

Mr. H.E. Hinkel, Jr.
Safety Representative
Pascagoula Metal Trades Council
P.O. Box 1412
Pascagoula, MS 39568

ROBERT J. ARIATTI, JR.
Attorney for Ingalls Shipbuilding

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
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SECRETARY OF LABOR, Complainant, v. INGALLS SHIPBUILDING, INC., Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 733, and PASCAGOULA METAL TRADES COUNCIL, AFL-CIO, Authorized Employee Representatives.	OSHRC Docket Nos.: 93-596; 93-597; 93-614 (Consolidated)

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 28, 1994. The decision of the Judge will become a final order of the Commission on December 28, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 19, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

DOCKET NOS. 93-0596 & 93-0597 & 93-0614

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: November 28, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 93-0596 & 93-0597 & 93-0614

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. INGALLS SHIPBUILDING, INC., Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 733, and PASCAGOULA METAL TRADES COUNCIL, AFL-CIO, Authorized Employee Representatives.	OSHRC Docket Nos.: 93-596; 93-597; 93-614 (Consolidated)

Appearances:

Cynthia Welch-Brown, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Robert J. Ariatti, Jr., Esquire
Ingalls Shipbuilding, Inc.
Pascagoula, Mississippi
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On July 28, 1992, the Occupational Safety and Health Administration (OSHA) began a safety inspection of a shipyard owned and operated by Ingalls Shipbuilding, Inc. (Ingalls), in Pascagoula, Mississippi. The safety inspection resulted from the filing of a formal

complaint. It was expanded to a general inspection because Ingalls appeared on OSHA's high hazard list, which lists employers with high accident rates (Tr. 15-16). OSHA began a health inspection on August 5, 1992, which was limited in scope to complaint and referral items from the OSHA safety inspectors. On September 30, 1992, OSHA began a fatality inspection at Ingalls' shipyard.

On January 26, 1993, the Secretary issued to Ingalls citations for serious and "other" violations found in the safety inspection (Docket No. 93-614); for willful, serious, and "other" violations found in the health inspection (Docket No. 93-596); and for serious violations found in the fatality inspection (Docket No. 93-597). Ingalls contested various aspects of the citations and penalties. The Secretary filed a notice of dismissal on March 30, 1993, withdrawing one of the cited items.

A hearing was held in these matters from December 13 through 16, 1993. The undersigned consolidated the three cases for the purposes of holding one hearing and issuing one decision. Prior to the hearing, the Secretary and Ingalls reached agreements on several of the contested items. The parties entered into two stipulations and joint motions (Exhs. J-1, J-2), and the Secretary entered a notice of dismissal of one of the items (Exh. J-3).

Docket No. 93-614: The Safety Inspection

On July 28, 1992, OSHA Compliance Officers James Pinnix, Nate Williams, and Courtney Bohannon arrived at Ingalls' shipyard in response to a formal complaint (Tr. 15-16). They held an opening conference with Ingalls' director of industrial relations services, Don Massengale; its safety manager, Glenn Harris; and safety supervisor Harvey Bond. Two union representatives were also present, one from the metal trades union and one from the electrical workers' union (Tr. 17-18, 421).

After the opening conference, Pinnix began a walk-around inspection of the shipyard. The entire inspection lasted approximately one month. Pinnix was accompanied by Harris and Bond, and by another Ingalls safety supervisor, John Fleming. Compliance Officer Bohannon was assigned to review Ingalls' records. Compliance Officer Williams

accompanied Pinnix for the first week of the safety inspection and then proceeded on his own for the rest of the inspection (Tr. 18-20).

Citation No. 1: Alleged Serious Violations

Item 3a: § 1910.23(d)(1)(i)

Item 3a alleged two instances aboard a ship under construction in which Ingalls violated § 1910.23(d)(1)(i), which provides:

> (d) *Stairway railings and guards.* (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(91)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:
>
> > (i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.

In instance (a), a metal structure in a location designed as 01-61-2-L in module No. 2 was not equipped with a handrail. The structure was enclosed on both sides. The steps were approximately 30 inches wide, and there were 9 inches between the risers. Pinnix measured the height of the structure at 9 feet 8 inches. The steps were accessible to the employees working in the area (Exh. C-1; Tr. 21-23).

Instance (b) involves a metal structure, less than 44 inches wide, located at 2-53-2-L in module No. 2 that was not equipped with a handrail. The structure was 8 feet 5 inches high and was accessible by Ingalls' employees (Tr. 23-24).

The hazard created by the failure to have at least one handrail is that an employee could fall while ascending or descending the steps (Tr. 22). The likely result of such a fall could include broken bones and serious cuts and bruises (Tr. 37).

In order to prove a violation of a § 5(a)(2) standard, the Secretary must establish four elements: "(1) the standard applies, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited condition, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition." *Wheeling-Pittsburgh Steel Corporation*, 16 BNA OSHC 1780, 1782, 1994 CCH OSHD ¶ __, (No. 91-2524, 1994).

Ingalls does not dispute the facts regarding the dimensions of the structures, nor does it dispute that handrails were not provided. That the Secretary established the last three elements of the violation is uncontested: Ingalls failed to equip the structures with handrails, its employees had access to the unrailed steps, and Ingalls knew that this condition existed since the structures were in plain view.

Ingalls argues, however, that the Secretary failed to establish the first element of the violation that the cited standard applies. Section 1910.23(d) is captioned "*Stairway railings and guards.*" Ingalls contends that the structures in question are ladders and not stairways. As such, these structures would be covered in the general industry standards by § 1910.27 (Fixed Ladders), or in the maritime standards by § 1925.72 (Ladders). Neither ladder standard requires that handrails be placed on ladders. Ingalls points out that Ingalls' plans and specifications for the ship at issue refer to the structures as "ladders" (Exhs. R-9, R-10, R-11; Tr. 318-320). The plans called for handrails to be installed on the structures.

Section 1910.23(d) appears in Subpart D (Walking-Working Surfaces). The definition section of that subpart, § 1910.21, provides little guidance in differentiating between stairways and ladders. Section 1910.21(b)(8) provides:

> (8) *Stairs or stairways.* A series of steps leading from one level or floor to another, or leading to platforms, crossovers, or around machinery, tanks, and other equipment that are used more or less continuously or routinely by employees, or other occasionally by specific individuals. A series of steps and landings having three or more risers constitutes stairs or stairway.

Sections 1910.21(c)(1) and (e)(1) provide:

> *Ladders.* A ladder is an appliance usually consisting of two side rails joined at regular intervals by crosspieces called steps, rungs, or cleats, on which a person may step in ascending or descending.

Both of these definitions apply to the structures at issue. The photograph identified as Exhibit C-1 could be used to illustrate either definition.

Under cross-examination, Pinnix was asked what criteria he used in determining whether the structures were stairways or ladders. Pinnix replied (Tr. 106):

> The area that I used to determine a stairway or a ladder is - - of course, it's got to have more than four steps on it. And, the ladder being more of a temporary use than the stairway.
>
> A stairway would be used or would be there for continuous use of employees where a ladder would be for a temporary use.

Pinnix's definition of a ladder as temporary is contradicted by § 1910.21(e)(2), which defines "fixed ladder": "A fixed ladder is a ladder permanently attached to a structure, building, or equipment." Temporary use is not, therefore, a defining characteristic of a ladder.

Pinnix advanced another distinction between ladders and stairways (Tr. 107): "A ladder, you ascend a ladder facing the ladder and you descend it facing the ladder. Stairways, you ascend a [stairway] facing it and descend it facing away from it." Pinnix's distinction is not found in the OSHA standards. Rather, it is Pinnix's "professional view" (Tr. 107). While Pinnix comported himself as an experienced, credible witness, his subjective interpretation of how stairways should be used as compared to ladders cannot be grafted on as a requirement of the OSHA standard.

The Secretary failed to provide any distinction found within OSHA law that would help to elucidate the difference between stairways and ladders. Ingalls, on the other hand, points out that § 1910.24(e), which governs "Fixed industrial stairs," provides in pertinent part:

> *Angle of stairway rise.* Fixed stairs shall be installed at angles to the horizontal of between 30° and 50°.

Pinnix did not measure the angles of the structures to the horizontal (Tr. 108). Keith Breland, an engineering supervisor for Ingalls, testified that the structures in question were required to be installed at angles of 50° to 60° to the deck (Tr. 313, 315).

The Secretary argues that the angle of installation is not determinative of what the structure is, but he fails to explain what is determinative. He states in his post-hearing brief that "one has only to look at the Secretary's Exhibits C-1 through C-10 to see that they are indeed stairs" (Secretary's Brief, p. 6). An examination of the referenced exhibits reveals that they consist of "two side rails joined at regular intervals by crosspieces called steps . . .

on which a person may step in ascending or descending," which is OSHA's definition of a ladder. The one distinguishing characteristic of stairways that appears in the regulations, the angle of the rise, does not apply to the structures at issue.

Accordingly, it is concluded that the Secretary failed to prove that § 1910.23(d)(1)(i), which applies to stairways, applies to the structures cited in item 3a. Those structures are determined to be ladders, which OSHA does not require to be equipped with handrails. Item 3a will be dismissed.

Item 3b: § 1910.23(d)(1)(ii)

The Secretary charges Ingalls with five instances of violating § 1910.23(d)(1)(ii), which provides that stairways with four or more risers be equipped as follows:

> (ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.

The width of the stairs in instances (a) through (e) were all less than 44 inches (Tr. 23). The fall distance in instances (a) and (b) was 7 feet 6 inches (Tr. 26). Pinnix did not measure or estimate the fall distance for instance (c) (Exh. C-2; Tr. 27-28). The fall distance in instance (d) was 10 feet 7 inches (Exh. C-3; Tr. 29). In instance (e), Pinnix estimated the fall distance to be 40 inches (Tr. 29-30).

As in item 3a, the structure cited as "stairways" are determined to be "ladders." Therefore, the cited standard does not apply. Item 3b will be dismissed.

Item 3c: § 1910.23(d)(1)(iii)

In seven instances (instance (b) was withdrawn by the Secretary prior to the hearing), the Secretary alleges that Ingalls violated § 1910.23(d)(1)(iii), requiring "[on] stairways less than 44 inches wide having both sides open, one stair railing on each side." Pinnix observed the following instances of structures less than 44 inches wide, having both sides open:

Instance	Fall Distance	Exhibit	Tr.
a	7 feet 4 inches	C-3	30
c	--	C-4	31
d	6 feet 9 inches	C-5	32

Instance	Fall Distance	Exhibit	Tr.
e	9 feet 9 inches	C-6	33
f	9 feet 9 inches	C-7	34
g	9 feet	C-8	34-35
h	9 feet	C-9	35

The structures that the Secretary cited as stairways were ladders. The cited standard does not apply. Item 3c will be dismissed.

Item 3d: § 1910.23(d)(1)(iv)

Ingalls contested the penalty and the serious classification of item 3d, which alleges a violation of § 1910.23(d)(1)(iv). The standard requires:

> (iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.

Pinnix observed a wooden stairway leading up to a restroom in a mobile trailer. The stairway had a handrail on the left side ascending, but not on the right side, which was open. The fall distance was 5 feet (Exh. C-10; Tr. 36). Likely injuries resulting from a fall the stairway could include broken bones and serious cuts and bruises (Tr. 37).

Ingalls argues that its violation of § 1910.23(d)(1)(iv) was not serious because the installation of a handrail on one side mitigated the possibility of injury. This argument is rejected. If an employee fell while ascending or descending near the unguarded side, the one existing handrail would be of little benefit to him or her. The possibility of injury remains. Item 3d is properly classified as serious.

In determining the penalty for a violation, § 17(j) of the Act requires the Commission to give "due consideration . . . to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

Ingalls employs approximately 20,000 employees (Tr. 40). The gravity of the violation was of moderate severity, the fall was only 5 feet and there was a railing on one side of the stairway. There was no evidence of lack of good faith on Ingalls' part. Ingalls had received

a citation for a serious violation of the Act during the relevant period (Tr. 41). Upon due consideration of these factors, it is determined that a penalty of $500.00 is appropriate.[1]

Item 15: § 1910.303(g)(2)(i)

The Secretary alleged that Ingalls violated § 1910.303(g)(2)(i) in eighteen instances. The cited standard provides:

> (2) *Guarding of live parts.* (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:
>
> > (A) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.
> >
> > (B) By suitable permanent, substantial partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts. Any openings in such partitions or screens shall be so sized and located that persons are not likely to come into accidental contact with the live parts or to bring conducting objects into contact with them.
> >
> > (C) By location on a suitable balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons.
> >
> > (D) By elevation of 8 feet or more above the floor or other working surface.

The Secretary cited the following instances:

(a) Exposed 110 V/AC from two broken light bulbs in temporary lighting at 01-77-2L on LHD No. 4.

(b) Exposed 110 V/AC from one missing bulb in temporary lighting at 02-81-0-C on LHD No. 4.

(c) Exposed 110 V/AC from two missing light bulbs in temporary lighting at 1-67-2-L area on LHD No. 4.

---

[1] The analysis of three of the relevant factors, *i.e.*, the size of Ingalls' business, its good faith, and its history of previous violations will, of course, remain constant with regard to the determination of penalties for other violations found in this case. The only variable factor will be the gravity of the violation.

(d) Exposed to 110 V/AC from one missing light bulb in temporary lighting at 02-49-4-L on Module 2.

(e) Exposed 110 V/AC from missing bulb in temporary lighting at 6-53-2-M AMO magazine in Module 1.

(f) Exposed to 110 V/AC from broken light bulb in temporary lighting at 2-167-2-L on LHD No. 4.

(g) Exposed 110 V/AC from broken light bulb in temporary lighting at AMR engine room No. 2 ship 4521.

(h) Light bulbs were broken out on walkway next to restrooms on walkway into Ship 4521, creating hazard of electrical shock to employees.

(i) Exposed 110 volt from broken bulb in temporary lighting at 01 Weather Deck, forward port Ship 4522.

(j) Locker Shop - Knock out blank was missing in the 220/120 volt electrical control panel box.

(k) Pump shop, 4A Warehouse - Knock out blank missing in the 220/208 volt electrical panel.

(l) Cover missing from start/stop controller box on 220 V/AC flushing pump motor at No. 2 Engine Room on Ship 7202 creating hazard of electrical shock to employees. * penalty only

(m) Rigging Shop, South Wall - Open and energized 480 V circuit breaker panel exposed employees to accidental contact with live parts. * penalty only

(n) Tire Shop, Northeast Wall, near Water Cooler - One single breaker/blank was missing from a 208V circuit breaker panel, exposing employees to accidental contact with live parts.

(o) Kevlar Shop - Five single breakers/blanks were missing from a 480v circuit breaker panel, exposing employees to accidental contact with live parts.

(p) Kevlar Shop North wall - 2 single breakers/blanks were missing from a 208V circuit breaker panel exposing employees to accidental contact with live parts.

(q) Shell Shop, PLA Middle Bay lights circuit breaker panel - Three single breakers/blanks were missing from a 480V circuit breaker panel.

(r) East bank, wetdock restroom (T-8 bathroom), supply room - Nine single 20A breakers/blanks were missing from 110V circuit breaker panel exposing employees to accidental contact with live parts.

Ingalls argues that the Secretary has again cited an inapplicable standard. Ingalls contends that because the alleged violations occurred in areas where the maritime standards applied, the Secretary was wrong to cite Ingalls under the general industry standards for instances 15(a) through 15(i), which existed on shipboard.

The relationship between the general industry standards and the maritime standards is explained in § 1910.5(c), which provides in pertinent part:

> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation or process . . . .
>
> (2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies.

The Secretary points to OSHA Instruction STD.2, which identifies those general industry standards that are applicable to shipyard work (Exh. C-31). Appendix A to the instruction identifies § 1910.303 as being applicable to shipyard employment (Exh. C-32, p. 8).

An OSHA instruction is only an internal memorandum that provides guidance to OSHA personnel. It has no binding affect on the Review Commission. The Commission is, however, bound by the OSHA standards themselves. Sections 1910.302 through 1910.308 address electric utilization systems. Section 1910.302(a)(2) provides in pertinent part:

> (2) *Not covered.* The provisions of §§ 1910.302 through 1910.308 of this subpart does not cover:
>
> (i) Installations in ships, watercraft . . .

Section 1910.302(a)(2)(i) clearly exempts electrical installations on ships from coverage by § 1910.303. Therefore, § 1910.303(g)(2)(i) is inapplicable to the cited conditions to the extent that they existed on ships. The Secretary has failed to establish an essential element of his case for items 15(a) through 15(i).

In contrast, instances 15(j), (k), (n), (o), (p), (q), and (r) pertain to openings in faceplates on junction boxes located throughout the shipyard. Only the proposed penalties were contested for instances 15(l) and (m). After considering the specific facts involved in each instance, and in spite of the fact that some openings were small, the violations are affirmed. The sizes of the openings were sufficient to allow accidental contact with fingers or tools. Also, even though the panel door might have been closed in some instances, electricians or others seeking to work in the panels would have been exposed. The fact that a panel door was closed affects the gravity of the violation. Ingalls has instituted a procedure which seeks to identify such violations. However, most of the instances were in plain sight. The quantity of such electrical violations establishes that its program could have been more effectively implemented. Ingalls had knowledge of the violations. Having evaluated the gravity of the specific instances, instances 15(j), (k), and (r) are assessed at $120.00 each; instances 15(n) (o), (p) and (q) are assessed at $100.00 each; and instances 15(l) and (m) are assessed at $200.00 each, for a total penalty of $1,160.00.

Item 23: § 1910.422(b)(3)

The Secretary charged Ingalls with a serious violation of § 1910.422(b)(3), which provides:

> (b) *Water entry and exit.* (3) A means shall be provided to assist an injured diver from the water or into a bell.[2]

During his inspection Pinnix observed Ingalls' divers in operation. Divers were required to check for leaks, inspect underneath the ships, and replace timbers and do any other work required below the surface of the water (Tr. 67, 223).

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[2] Section 1910.402 defines a bell as "[a]n enclosed compartment, pressurized (closed bell) or unpressurized (open bell), which allows the diver to be transported to and from the underwater work area and which may be used as a temporary refuge during diving operations.

Pinnix observed that the diving barge was equipped with a ladder, which he believed was the only means available to remove an injured diver from the water (Tr. 68). Pinnix suggested that Ingalls have a stokes basket (an emergency basket which can be lowered into the water for the purpose of putting the injured diver into it and lifting it from the water) installed on the diving barge and capable of being lifted mechanically (Tr. 68-69, 72). Ingalls had baskets at various locations throughout Ingalls' worksite, but none at the diving barge (Tr. 71-72).

Randy Sonnier is Ingalls' tender foreman and dive master for the dive crew. He has worked for Ingalls for over 19 years (Tr. 223). Sonnier testified that the diving barge is usually anchored or tied to a ship or structure and that the crew operates from the diving barge or the tender. The tender may be located away from the barge, at the side of the ship or structure, or in the waterway (Tr. 225). When the divers are working from the diving barge, there is no mechanical means to assist a diver from the water. If a diver is injured, the other divers help take him to the dock, where he is lifted from the water (Tr. 224). In an emergency, the divers could get an injured diver out of the water if the injured diver was near a gantry crane. Sonnier stated, "There's normally a gantry available somewhere in the yard. It's just depending on where we're diving at as to how we can get to it" (Tr. 243).

Sonnier estimated that the greatest amount of time needed to get an injured diver to the dock where an ambulance could pick him up would be four minutes (Tr. 265). Sonnier recalled only one instance in which an Ingalls' diver was ever injured. The diver was lifted into the diving boat and transported to the East Bank dock where an ambulance was waiting. From the time the diver lost air to the time he was placed in the ambulance was "probably two to three minutes" (Tr. 241-242).

The Secretary argues that Ingalls violated § 1910.422(b)(3) by failing to provide a mechanical means on the diving barge by which to remove an injured diver from the water. "The fact that Ingalls has baskets at the shipyard, gantry cranes at the docks, and a pair of hands in the skiff does not mean that it has complied with the standard" (Secretary's Brief, p. 15). The Secretary emphasizes the time factor as crucial to complying with the standard: "While there is no case law which interprets § 1910.422(b)(3), the Secretary

submits that the requirement for a means to assist an injured diver from the water must logically encompass a requirement for a readily available means" (Secretary's Brief, p. 15).

There are two flaws with the Secretary's argument. First, he is reading a requirement into the standard that does not appear in the clear language of the standard. The standard requires that "[a] means shall be provided to assist an injured diver from the water or into a bell." Obviously, the "means" should be effective. However, the Secretary is not free to impose a subjective interpretation of an inferred requirement upon employers.

Second, the Secretary has failed to prove his own additional requirement, that Ingalls' means of assistance was not readily available. Ingalls presented undisputed testimony that the greatest amount of time needed to retrieve an injured diver from the water and get him to emergency medical personnel is four minutes. The Secretary failed to adduce any evidence establishing what he believes to be an acceptable minimum amount of time for the means of assistance to comply with the standard. No testimony was given that proved that four minutes is outside the range of what the Secretary considers "readily available."

The Secretary has failed to establish that Ingalls was in violation of § 1910.422(b)(3). Item 23 is dismissed.

Item 24: § 1910.425(c)(2)

Section 1910.425(c)(2) provides:

> (c) *Procedures.* (2) A diver shall be stationed at the underwater point of entry when diving is conducted in enclosed or physically confining spaces.

From employee interviews, Pinnix learned that Ingalls' divers are required at times to work underneath the pontoon at the dry dock. The pontoon rests on a grid structure when it is at dockside. Ingalls' divers perform a variety of tasks underneath the pontoon: "replace parts of the grid structure itself, bottom surveys, video inspections, repair work, patch leaks" (Tr. 228).

Sonnier described the grid structure as thick concrete structures 16 feet square by 3 feet which were adjoined end-to-end for the length of the pontoon, which is 200 feet by 600 feet. The grid structure has 60 rows and each row has 11 sections. Each section has 4 pilings and 4 piling caps with 1 grid section and 2 grid timbers (Tr. 228-229). The grid

structure is fifteen feet below the surface of the water and directly under the pontoon (Tr. 231).

Pinnix testified that he considered the timbers of the grid structure to be a confined space (Tr. 76):

> Well, first of all it has limited egress and exit ways from it. It's definitely not an area where it's a continuous work area and it's -- of course, their vision is so limited under there, it's hard to see, you know, sometimes eight or twelve inches beyond their face. So, therefore, I considered it a confined space.

Both the Secretary's counsel and Pinnix referred to the area underneath the dry dock as a "confined space" and spoke of the standard as applying to a "confined space." The standard, however, applies to "enclosed or physically confining spaces."

Indeed, the definitions of "confined space" found in the standards would appear to work against the Secretary's interpretation of the area at issue as a confined space. Subpart T, which contains the commercial diving operations standards and in which the cited standard is found, does not provide a definition of either "physically confining spaces" or "confined spaces." Section 1915.4 contains the definitions for the maritime standards. It provides:

> (p) The term "confined space" means a compartment of small size and limited access such as a double bottom tank, cofferdam, or other space which by its small size and confined nature can readily create or aggravate a hazardous exposure.
>
> (q) The term "enclosed space" means any space, other than a confined space, which is enclosed by bulkheads and overhead. It includes cargo holds, tanks, quarters, and machinery and boiler spaces.

Subpart Q (Welding, Cutting and Brazing) of the § 1910 standards provides at § 1910.252(b)(4) that "As used herein confined space is intended to mean a relatively small or restricted space such as a tank, boiler, pressure vessel, or small compartment of a ship." What all of these definitions have in common is the idea of a compartment, or a man-made restricted space. They clearly do not apply to the underwater area at issue here.

The crucial question is whether or not the area underneath the dry dock is a physically confining space. The Secretary does not argue that it is an enclosed space. Pinnix gives three reasons for recommending a citation for the violation of § 1910.425(c)(2):

(1) The area underneath the dry dock "has limited egress and exit ways from it";

(2) The area is "definitely not an area where it's a continuous work area"; and

(3) The diver's "vision is so limited under there, it's hard to see, you know, sometimes eight or twelve inches beyond their face."

(Tr. 76).

Pinnix's third reason is easily dismissed. The standard applies to "physically confining spaces," not visually confining spaces. The standard imposes no requirements for spaces where vision is limited.

Pinnix's second reason, that the area is not a continuous work area, does not appear to have any relevance to the cited standard. Not being the site of continuous work does not render an area as a physically confining space. This reason, too, can be dismissed.

This leaves Pinnix's first reason as his sole justification for recommending a citation for the violation of § 1910.425(c)(2). Pinnix stated that the area beneath the dry dock "has limited egress and exit ways from it." Sonnier testified that, while the divers could exit from underneath the grid structure by swimming out in any direction (north, south, east, or west), they did not have "free access to the surface" (Tr. 268, 272). Sonnier stated that within the diving industry, a physically confining space is "any space where the diver doesn't have a free access to the surface" (Tr. 268). Sonnier reiterated that the divers did not have access to the surface when the pontoon was on the grid structure (Tr. 268). In that case, the bottom of the pontoon would act as the "ceiling" to the divers' work area, cutting off their access to the surface (Tr. 269). Based upon Sonnier's testimony, it is determined that the area beneath the grid structure is a physically confining space within the meaning of § 1910.425(c)(2).

Sonnier admitted that Ingalls does not station a diver at the point of entry when a diver is required to work beneath the grid structure (Tr. 232). Walter Roberts, another diver for Ingalls, agreed that divers were not stationed at the point of entry when work is being done below the grid structure (Tr. 279). Ingalls points out that it always has divers work in pairs in case one of the divers encounters trouble (Tr. 249-250, 279). Ingalls contends that its divers prefer working in pairs and that the spirit of the standard is met by its use of the buddy system.

Unfortunately for Ingalls, it does no good to meet the spirit of the standard when the actual requirements of the standard are being violated. The preference of Ingalls' divers cannot be substituted for compliance with the language of § 1910.425(c)(2). Ingalls has conceded that it failed to station a diver at the point of entry for a physically confining space. The hazard created by Ingalls' failure to comply is that of drowning (Tr. 77). A serious violation of § 1910.425(c)(2) is found.

The gravity of the violation is severe. A penalty of $5,000.00 is appropriate.

Item 32: § 1915.72(a)(1)

The Secretary charges Ingalls with four instances of violating § 1915.72(a)(1), which provides:

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

All four instances involved 6-foot wooden ladders. The hazard created was a 6-foot fall onto the metal landing of the ship. In instance (b), the top rung of the ladder was broken (Exh. C-22; Tr. 80). Instance (c) involved a broken spreader. The spreader's function is to hold the legs of the ladder together (Exh. C-23; Tr. 81). Instance (d) also involved a broken spreader. Exhibit C-24 shows where Ingalls attempted to repair the spreader using tape (Tr. 82). In instance (e), the ladder had a broken top platform (Exh. C-25; Tr. 82-83).

Each of the four ladders in question was available for use by the employees on the ship. Employees indicated to Pinnix that the ladders were to be used. The ladders were not tagged or removed from service. The hazardous condition of the ladders could have been abated by removing them from the ship or by repairing them (Tr. 83). The most likely injuries that would result from a fall from one of the defective ladders were sprains and broken bones (Tr. 84).

Ingalls argues that Pinnix failed to observe an employee actually using any of the four ladders. Ingalls also contends that no employees told Pinnix that they were required to use the defective ladders or that they reported the condition of the ladders to their supervisor. All of this is irrelevant to the establishment of a violation of § 1915.72(a)(1). The Secretary has established that Ingalls' employees had access to the ladders, which is sufficient to prove a violation.

Joseph Krebs was director of Ingalls' electrical department at the time of OSHA's inspection (Tr. 354). Krebs testified that Ingalls' supervisors did not allow their employees to use broken wooden ladders. Krebs stated, "We supplied them with new ladders consistently. We bought new ladders all the time for them" (Tr. 356). Krebs stated that a broken ladder "is supposed to be taken out of service" (Tr. 358). Krebs described Ingalls' policy (Tr. 356-357):

> None of our workmen are allowed to work on ladders that had any defective rungs or defective legs.
>
> They were not allowed to stand at the last step of the top of the ladder. And, if the ladder becomes rickety, they should take it out of service, which in most cases, they always do. We destroy them.
>
> . . . .
>
> [Employees] can get a replacement ladder easily; they check them out. They are a check-out item out of the tool room.

Donald Massengale, Jr., is the director of industrial relations services at Ingalls (Tr. 421). Ingalls sends out documents to its supervisor entitled "Supervisors Weekly Safety Briefings" and "Job Safety Bulletins" (Exh. R-21; Tr. 423). Massengale referred to three separate briefings regarding inspection of broken or damaged ladders (Tr. 426-428).

The testimony of Krebs and Massengale does not negate, however, the observations made by Pinnix. Despite Ingalls' stated policy, Pinnix observed four defective ladders that were available for use and were not marked as defective. A company's safety policy does no good unless it is effectively enforced. The Secretary has established violations of § 1915.72(a)(1).

The possible injuries resulting from the hazard (sprains and broken bones) are serious. The violation is of medium gravity. A total penalty of $3,500.00 is appropriate for the four instances.

Item 35: § 1915.73(c)

Section 1915.73(c) provides:

> (c) When employees are working around open hatches not protected by coamings to a height of 24 inches or around other large openings, the edge of the opening shall be guarded in the working area to a height of 36 to 42 inches, except where the use of such guards is made impracticable by the work actually in progress.

The Secretary alleged two instances where employees were exposed to open hatchways with no attached railings. Instances (c) and (d) are depicted in the photographs admitted as Exhibits C-26, C-27, and C-28 (Tr. 87-88). The hazard presented was that of employees stepping or falling into the open hatches. The fall distance to the deck below was approximately 9 feet (Tr. 88). Possible injuries sustained in such a fall include lacerations, cuts, bruises, and broken bones (Tr. 89).

Ingalls did not contest the citation for the violation of § 1915.73(c), but did contest the penalty. The Secretary has established a serious violation of the standard, with medium gravity of the violation. A penalty of $3,500.00 is assessed.

Item 39: § 1915.91(c)

Section 1915.91(c) provides:

> Slippery conditions on walkways or working surfaces shall be eliminated as they occur.

Compliance Officer Nathaniel Williams observed three instances on the east bank where he believed Ingalls was in violation of § 1915.91(c). That standard, which is part of the maritime standards, is inapplicable to the two shops involved in instances (i) and (j). The violation for instance (k) was not contested, and only the penalty is at issue. Section 1915.91 specifies, "The provisions of this section shall apply to ship repairing, shipbuilding and shipbreaking except that paragraphs (c) and (e) of this section do not apply to shipbreaking." Because paragraph (c) is the section at issue, it applies only to ship repairing and shipbuilding. Section 1915.4 is the definition section of the maritime standards. Sections 1915.4(j) provides:

> The terms "ship repair" and "ship repairing" mean any repair of a vessel including, but not restricted to, alterations, conversions, installations, cleaning, painting, and maintenance work.

Section 1915.4(k) provides:

> The term "shipbuilding" means the construction of a vessel including, but not restricted to, alterations, conversions, installations, cleaning, painting, and maintenance work.

Ingalls argues that ship repairing and shipbuilding as defined by the maritime standards do not include work done in pipe and machine shops located on the banks of a waterway. Persuasive support for this view is found in *Dravo Corp. v. OSHRC,* 613 F.2d 1227 (3d Cir. 1980).

In *Dravo*, the Secretary cited Dravo for violations of the maritime standards following an OSHA inspection of the structural shop of Dravo's Engineering Works Division on Neville Island, Pittsburgh, Pennsylvania. Dravo contested the citations, which were affirmed by the administrative law judge. Dravo appealed to the Third Circuit Court of Appeals, which set aside that part of the administrative law judge's decision holding the OSHA maritime standards applicable to Dravo's structural shop.

The Third Circuit focused on the definitions given in the maritime standards for "employer" and "employee." Section 1915.4(c) provides:

> The term "employer" means an employer, any of whose employees are employed, in whole or in part, in ship repairing, shipbuilding, shipbreaking or

related employments as defined in this section on the navigable waters of the United States, including dry docks, graving docks and marine railways.

Section 1915.4(d) provides:

The term "employee" means any person engaged in ship repairing, shipbuilding, shipbreaking or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to repair any vessel under 18 net tons.

Looking at what the maritime standards include, the Third Circuit reasoned as follows:

Because the Secretary has failed in his regulations to state that a structural shop is included with docks and marine railways as a place of maritime employment to which shipbuilding regulations apply, we believe that the structural shop at issue here is not to be held to shipbuilding safety standards. The Act grants the Secretary, and not OSHRC or the courts, the means and the responsibility to amend the regulation if he so desires . . . . Which areas besides waters, docks, and marine railways are covered is unclear.

Dravo, 613 F.2d at 1232-1233. Thus, the Third Circuit declined to expand the coverage of the maritime standards to the structural shop because it was not an area specified in the standards. "[A]n employer should not be subject to penal sanctions for nonadherence to safety standards without adequate notice in the regulations of the exact contours of his responsibility." *Ibid* at 1234.

The court's reasoning in *Dravo* is applicable here. The pipe shop and machine shop on the east bank of the waterway are not the types of areas specified in the maritime standards as coming under their jurisdiction. Therefore, it is concluded that § 1915.91(c) is inapplicable to the cited conditions. Items 39(i) and (j) are dismissed. Instance 39(k) involved leaking hydraulic oil where employees could possibly slip into lathes or other operating equipment. Maintenance had been previously alerted to the condition, which was abated after the OSHA inspection. A penalty of $325.00 is assessed.

Item 40: § 1915.92(a)

Section 1915.92(a) provides:

> (a) All means of access and walkways leading to working areas as well as the working areas themselves shall be adequately illuminated.

Compliance Officer Nathaniel Williams observed four instances where employees were working with inadequate illumination:

Instance (a) -- An employee was working in an area where the temporary lights were out. Ingalls' supervisor Lulu Farmer told Williams that she had problems getting lights in that area. Williams stated that the inadequate illumination created a tripping hazard due to all of the debris and materials on the floor (Exh. C-41; Tr. 291-293).

Instance (b) -- Employees were required to perform deckwork in an area where light bulbs had burned out (Exh. C-42; Tr. 293-295).

Instance (c) -- Employees were working in an area where light bulbs were missing from temporary lights (Tr. 295-296).

Instance (d) -- Employees in the locker shop were grinding hatchway doors. Six of the room's eight fluorescent lights were burned out (Tr. 297-298).

Ingalls raises the weak defense that Williams' determination that the lighting was inadequate was his subjective opinion. This defense is without merit. Williams documented employees working in areas where light bulbs were burned out or missing. It is well within his capabilities to determine whether or not the lighting was adequate. The standard by its language contemplates that some level of personal judgment must be exercised when it requires that working areas be "adequately illuminated."

The Secretary has established a violation of § 1915.92(a). Injuries resulting from tripping over materials and debris due to inadequate illumination could be serious. A penalty of $1,500.00 is appropriate.

Item 41: § 1915.92(d)

Section 1915.92(d) provides:

> (d) Where temporary lighting from sources outside the vessel is the only means of illumination, portable emergency lighting equipment shall be available to provide illumination for safe movement of employees.

The ships at Ingalls' shipyard are illuminated by temporary lighting from outside the vessels. From time to time, the lights go out, leaving the employees in darkness. Later in the construction process, battle lanterns were to be installed, but they were either not installed or were not equipped with batteries at the time of Williams' inspection (Tr. 98-99). Williams believed that there was no other portable emergency lighting equipment.

Ingalls had flashlights available to its employees in its tool rooms on the ships (Tr. 364-365). The Secretary does not consider flashlights to be "portable emergency lighting equipment." The standards do not define "portable emergency lighting equipment," and the Secretary offers no definition. Looking at the plain language of § 1915.92(d), it would appear that flashlights meet the requirements of the standard. Flashlights are portable, they are lighting equipment, and they are frequently used in emergencies. The Secretary argues that having the flashlights in the tool rooms takes them out of compliance with the standard. Section 1915.92(d), however, requires only that the lighting equipment be "available," not that it be issued to each individual employee. The flashlights were available to the employees within the meaning of the standard.

The Secretary has failed to established a violation of § 1915.92(d). Item 41 will be dismissed.

Items 45a and 45b: §§ 1915.181(b) and 1915.335(a)(1)(i)

Section 1915.181(b) provides:

> (b) Before an employee is permitted to work on an electrical circuit, except when the circuit must remain energized for testing and adjusting, the circuit shall be deenergized and checked at the point at which the work is to be done to insure that it is actually deenergized. When testing or adjusting an energized circuit a rubber mat, duck board, or other suitable insulation shall be used underfoot where an insulated deck does not exist.

Section 1915.335(a)(1)(i) provides:

> (a) *Use of protective equipment.* (1) *Personal protective equipment.* (i) Employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed.

Williams conducted employee interviews in which he learned that the employees were working on energized circuits without using personal protective equipment (Tr. 175-176). Williams spoke with employees in the tool room who told him that protective equipment was available if employees wanted to use it (Tr. 193). Joseph Krebs testified that protective equipment is readily available to employees performing electrical work and that they could check out any protective equipment they wanted from either the electrical tool room or the main tool room (Tr. 359-360).

Unlike the standard cited in the previous item, the standards at issue here require that the equipment in question actually be used; availability is not sufficient to meet the requirements of the standard. Ingalls does not contend that its employees were provided with and were required to use protective equipment.

The Secretary has established violations of §§ 1915.181(b) and 1915.335(a)(1)(i). The hazard created by the violations was electrical shock which could result in hospitalization (Tr. 174, 178). The violations were serious. A total penalty of $3,500.00 is appropriate.

Docket No. 93-596: The Health Inspection

On August 5, 1992, OSHA Industrial Hygienist (now assistant area director for health) Jesse Baynes began a health inspection of Ingalls' worksite (Tr. 465-466). The inspection was in response to a formal employee complaint filed with OSHA (Tr. 467). Baynes was accompanied by OSHA Industrial Hygienist Denise Thomas. Baynes and Thomas held an opening conference attended by several Ingalls' representatives. Following the opening conference, Baynes and Thomas commenced a walk-around inspection of the site (Tr. 468-469).

Citation No. 1: Alleged Serious Violations

Item 2: § 1910.132(a)

The Secretary cited Ingalls for three instances of violating § 1910.132(a), which provides:

> (a) *Application.* Protective equipment, including personal protective equipment for eyes, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Instance (a) of item 2 alleges:

> (a) Employees working with the transducers using a detergent as a lubricant, were not given adequate personal protective equipment (PPE). Appropriate PPE would prevent prolonged or repeated contact which MSDS indicates may cause skin irritations.

Ingalls' employees used Wisk detergent as a lubricant in installing transducers (Tr. 472). Transducers, which weigh approximately 50 pounds, are underwater hydrophones that are part of a ship's sonar apparatus (Tr. 471, 812). The U. S. Navy specifies that soap be used as a lubricant in installing the transducers. The employees dip their hands into the detergent, wipe it on the transducer, and then pick it up to slide it into the grommets (Tr. 812-814).

Baynes testified as to the result of this procedure (Tr. 472):

> And in doing so, what they were doing was coating their whole body, their upper body with the Wisk detergent.
>
> And this would be saturating their clothing, and it would be against their skin for [a] prolonged period of time, up to and including perhaps all day long, depending on the length of time that they were working with the product.

Exhibit C-43 is a copy of the material safety data sheet (MSDS) for Wisk detergent. Under "Symptoms of Overexposure," the MSDS states:

EYE: Irritation from contact resulting in pain and possible corneal injury.

SKIN: Possible irritation from prolonged or repeated contact.

Section 8 of the MSDS provides information on special protection when using Wisk. It states:

> Protective Gloves:
> Clean cotton gloves, if needed.

Baynes testified (Tr. 475-476):

> At least a significant part of the time, they were wearing their normal street clothes. At other times, they would be wearing clothing that would be provided in the way of disposable clothing by Ingalls, but it would not be impervious clothing that would prevent the skin contact with the Wisk product.

Sometime in 1991 or 1992, before the OSHA inspection that gave rise to this case, Ingalls' management learned that several of its employees had developed rashes (Tr. 813, 825). Some employees filed grievances with their union because of the rashes they developed (Tr. 591).

Krebs testified that Ingalls had used Wisk for over 30 years with no reported rashes (Tr. 822). When employees developed rashes in 1991 or 1992, Ingalls was not sure what was causing the rashes. It decided to wait until the next ship came up to see if those employees working with Wisk also developed rashes (Tr. 823). (Transducer installation only takes place during one and a half days per ship. In 1993, when Ingalls installed two ship sets, transducer installation required a total of three days (Tr. 814).) When employees working with Wisk on the next ship developed rashes, Ingalls required its employees to use gloves, boots and raincoats when installing transducers (Tr. 824).

An employer is required to have available an MSDS for any hazardous substance to which its employees are exposed. Ingalls had available the MSDS for Wisk, upon which it could be expected to rely. All the MSDS recommended in the way of protective clothing was cotton gloves. The Secretary makes it clear that he would have found the use of cotton

gloves inadequate to meet the requirements of § 1910.132(a). Baynes was adamant that what was required was impervious clothing (Tr. 476).

In order to require an employer to go beyond the recommendation of the MSDS, the Secretary must establish that the employer had reason to know that more stringent means of protection was required. The Secretary has failed to do that here. He did not dispute Ingalls' contention that it had been using Wisk since 1960, with no reports of rashes occurring until 1991 or 1992. While rashes were reported then, the Secretary failed to adduce any evidence that should have alerted Ingalls to a cause and effect relationship between the use of the Wisk and the rashes. When Ingalls determined that a causal relationship did exist, it established a requirement for the use of protective clothing in compliance with § 1910.132(a). The Secretary has failed to prove that Ingalls had knowledge of the hazardous condition to which the use of Wisk exposed its employees at the time of the inspection. Instance (a) of item 2 will be dismissed.

Instance (b) of item 2 alleged:

> (b) Employees working with a fire cloth (Ami-Sil) were not given personal protective equipment to protect them from the dermatitis caused by the Ami-Sil.

Ami-Sil is a fiberglass-like material used as a fire cloth for wrapping various pieces of equipment to protect the equipment from damage during installation in a ship. Without the protective wrapping, slag burns, welding burns, and bumps would damage the equipment (Tr. 477).

The MSDS for Ami-Sil describes the effects of overexposure: "Some AMI-SIL characteristics are similar to fiber-glass which has been identified as a nuisance particulate by ACGIH." Under the section addressing special precautions, the MSDS states: "Any person exhibiting sensitivity to glass fibers should avoid excessive contact w/skin" (Exh. C-44).

Employees in the Land Based Test Facility (LBTF) rolled off pieces of Ami-Sil and wrapped them around equipment which was then shipped to various locations around the shipyard (Tr. 478). Baynes testified that he believed that Ingalls should have required its employees to wear impervious gloves and clothing (Tr. 483).

Charles Fayard was an electrician-welder for Ingalls at the time of the OSHA inspection (Tr. 713). He was assigned to work in the LBTF, wrapping Ami-Sil around computer units (Tr. 714). Fayard was the only employee in LBTF who worked with Ami-Sil a full 7 or 8 hours a day (Tr. 732). About the third week after he started working with Ami-Sil, Fayard noticed blistering on his hands (Tr. 715). He reported the condition to his supervisor who told him to go to the company hospital (Tr. 717). Fayard was then advised to see his personal physician, who diagnosed Fayard as being allergic to Ami-Sil (Tr. 719, 722).

Fayard knew that gloves were available in his department's tool room upon request (Tr. 733). He never requested any gloves and continued to work with the Ami-Sil for approximately a month after he was diagnosed as being allergic to it (Tr. 734).

Ned Nonis was a combination electrician for Ingalls (Tr. 693). His first exposure to Ami-Sil was in July 1992 when he lay down on top of computer banks wrapped in Ami-Sil in order to install wave guides (Tr. 694). After about two hours, Nonis experienced a sensation in his back like he was lying on top of metal shavings (Tr. 696). Nonis told his supervisor, Tyrese Malone, about the irritation caused by the lying on the Ami-Sil. About three days later, Nonis went to the company hospital and was told to see his personal physician (Tr. 699-700). The rash persisted for six months after Nonis's initial contact with the Ami-Sil (Tr. 702). Nonis never asked for any type of protective equipment or clothing when working around the Ami-Sil (Tr. 705, 710).

Harold Ward is Ingalls' electronics supervisor in the LBTF area (Tr. 826). Ward testified that protective clothing (coveralls and rubber gloves) was available in the tool room (Tr. 828). Protective clothing for use with the Ami-Sil was optional, at the discretion of the employees (Tr. 829). Ward stated that he received complaints from employees about rashes during a two-week period. Charles Fayard was the first employee to complain (Tr. 830).

The Secretary contends that Ingalls had actual knowledge that exposure to Ami-Sil was causing its employees to develop rashes. The MSDS for Ami-Sil warns only against excessive contact with it for people "exhibiting sensitivity to glass fibers." Under section VII, "SPILL OR LEAK PROCEDURES," the MSDS lists the following instructions (Exh. C-44):

Respiratory Protection (specify type): No special requirements. Mouth and nose mask may be worn when cutting large quantities.

Protective Gloves: Not required unless sensitive to fiber.

Eye Protection: Safety glasses may be worn but not required.

Other Protective Equipment: Normal wash-up after handling is recommended.

The MSDS suggests to an employer that protective clothing must be worn by employees sensitive to the fibers in Ami-Sil. Employee complaints of rashes put Ingalls on notice that certain of its employees should be required to wear protective clothing. It was feasible to provide this clothing, which Ingalls, in fact, provided. Under the circumstances where Ami-Sil was suspected of being the irritant, it was insufficient merely to refer employees to their personal physicians without follow-up. Under these circumstances, there was enough causal evidence to establish Ingalls' constructive knowledge that Ami-Sil caused the rashes. Fayard and Nonis testified that their personal physicians told them that they were allergic to Ami-Sil and to avoid it. Yet neither one of them made use of the protective clothing that they knew was readily available in the tool room. The employees should have been more active in their own protection. However, the standard makes use of protective equipment mandatory. It is the employer's responsibility to require employees to wear appropriate protective clothing. The conditions caused by the hazard included prolonged irritation and rashes requiring a doctor's treatment. The violation was serious. A penalty of $600.00 is assessed.

As in instance (a), the Secretary has failed to establish that Ingalls had knowledge of the hazardous condition. Based on the MSDS, Ingalls could assume that it was taking adequate precautions.

Instance (c) of item 2 alleges:

(c) Employees working with nofoul rubber were not given adequate personal protective equipment to protect them from the dermatitis caused by dust generated when grinding the rubber.

Nofoul rubber is used by Ingalls to coat the sonar domes of its ships. Baynes explained that "[t]he process consists of gluing the rubber to the surface of this sonar dome,

and then the employees take hand grinders and grind the surface down to where it presents a smooth, even, uninterrupted, if you will, surface across the sonar dome" (Tr. 485). The grinding generates dust from the Nofoul rubber (Tr. 486).

Section V of the MSDS for Nofoul rubber lists the following acute health effects (Exh. C-45):

> Excessive exposure to dust and/or fumes containing TBTO [tributyltin oxide, an ingredient of Nofoul rubber] will irritate the skin, eyes, upper and lower respiratory tract. Symptoms may include headache, nausea, vomiting, severe coughing, delayed (after shift) coughing spasms and shortness of breath may occur. Effects diminish or disappear within 12-36 hours after removal from exposure.

Under section VI, "Worker Protection," the MSDS states that employees exposed to Nofoul rubber should wear respirators. Baynes acknowledged that Ingalls' employees were wearing respirators (Tr. 487). Under "SKIN," section VI of the MSDS states: "Disposable vinyl gauntlet gloves" (Exh. C-45).

Baynes testified that when he first observed Ingalls' employees grinding the Nofoul rubber, the employees were wearing "a cotton or a cotton-like jumpsuit" (Tr. 494). When Baynes took air samples of the employees approximately 20 days later, the employees "were being put into a disposable suit that covered the body, and they were taking gloves to their hands and wearing the airline respirator" (Tr. 494).

When asked what protective clothing he believed Ingalls should have provided to its employees working with Nofoul rubber, Baynes replied (Tr. 495):

> To protect them from the dermal source of entry, they should have something similar to the clothing that they ultimately went to, which would prevent the dust and the particles that they were grinding off and getting into their clothing and getting next to the skin and having the contact with the skin; a tieback type suit, something along that line.

Baynes claimed that the department supervisor, Rayford Tanner, showed Baynes a rash that had developed on his chest and abdomen (Tr. 488). The Secretary introduced a copy of a photograph into evidence that purported to be of Tanner's rash (Exh. C-46).

Tanner subsequently took the stand and denied having had a rash and denied that the photograph was of him (Tr. 861-862).

The Secretary faces the same problem faced in instance (a). He is attempting to require Ingalls to comply with a general standard by going beyond what the MSDS for a substance requires. While some employees working with the Nofoul rubber did develop rashes, the Secretary offered no proof as to a causal relationship between the Nofoul rubber and the rashes. The MSDS lists numerous symptoms of overexposure to the rubber, but development of a rash is not one of them. The MSDS recommends that gloves be worn when working with the rubber, but is silent as to protective clothing.

The Secretary has failed to prove that Ingalls knew of a hazardous condition caused by the Nofoul rubber. Instance 2 (c) will be dismissed.

Item 3: § 1910.134(b)(6)

Section 1910.134(b)(6) provides:

> (b) *Requirements for a minimal acceptable program.* (6) Respirators shall be stored in a convenient, clean, and sanitary location.

Baynes testified that the respirators used by the employees working with the Nofoul rubber were stored in tool bags and lockers (Tr. 503). Exhibits C-47 and C-48 show a cloth tool bag that was kept on the pontoon. The employees stored their respirators in the bag. Baynes stated that storing the respirators with the tools would expose the respirators to contamination (Tr. 504-505). Baynes also believed that storing the respirators in the tool bags with other equipment exposed the face pieces to the possibility of becoming distorted or misshapen, thus reducing the effectiveness of their fit (Tr. 506). Baynes testified that, (Tr. 508-509):

> [T]he best way to store respirators is in individual compartments where the only thing you put in that compartment is the respirator. It would need to be of rigid shape to keep anything heavy from causing a distortion of the shape of the respirator face piece so it would give you a proper face piece to face seal.

Baynes also observed respirators stored in lockers in a trailer used by the rubber crew (Tr. 624). Baynes believed that the lockers were not clean and sanitary because the employees' clothes and boots were also stored in the lockers with the respirators (Tr. 625).

Walter Williams, a shipfitter working in the sonar dome at the time of the OSHA inspection, testified that he stored his respirator in a box in a cloth tool bag with his tools (Tr. 799). Rayford Tanner, the supervisor of the rubber crew, testified that the respirators were stored in lockers in work trailers along with tools used in the Nofoul operation (Tr. 856).

Section 1910.134(b)(6) does not address the possibility of the respirator's face piece becoming distorted or misshapen. Therefore, Baynes' concerns regarding distortion are irrelevant. The standard does, however, require that respirators be stored in a "clean and sanitary location." Storage of respirators with tools used to work with Nofoul violates the requirements of § 1910.134(b)(6). As noted in the previous section, excessive exposure to dust or fumes containing TBO, an ingredient of Nofoul rubber, will irritate the skin, eyes, and upper and lower respiratory tract. The possibility of contamination of the respirators is high when they are stored in tool bags and lockers along with tools used with Nofoul rubber.

The Secretary has established that Ingalls violated § 1910.134(b)(6). The gravity of the violation is moderate. A penalty of $2,000.00 is appropriate.

Item 4: § 1910.134(d)(2)(ii)

Section 1910.134(d)(2)(ii) provides:

> (d) *Air quality.* (2) Breathing air may be supplied to respirators from cylinders or air compressors.
>
> > (ii) The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type compressor shall be used. Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape from a contaminated atmosphere in event of compressor failure,

> and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (d)(1) of this section.

Ingalls was using an oil-lubricated compressor in the sonar dome area to supply breathing air to the rubber crew (Tr. 511). The compressor was not equipped with either a high-temperature alarm or a carbon monoxide alarm (Tr. 512, 870-871, 875).

The purpose of a high-temperature alarm is to alert employees that the compressor is operating in a condition that could produce carbon monoxide in their breathing air. The purpose of a carbon monoxide alarm is to alert employees that carbon monoxide is being produced and that they need to remove themselves from that environment (Tr. 513-514).

Frank Spires is a facilities engineering specialist for Ingalls. He testified that the type of air compressor Ingalls used is equipped with an automatic shutoff. The automatic shutoff consists of two separate temperature cutoffs (Tr. 868). The technical manual for the compressor states that "[a] temperature switch will shut down the compressor if the discharge temperature reaches 240°F (115°C)" (Exh. R-31, p. 10). The temperature is in relation to the lubricant that is used in the machine to maintain it below vapor points of all the components of the compressor. The compressor shuts off before carbon monoxide develops (Tr. 870). Spires claimed that in speaking with the manufacturers' sales representative and field people, he was unable to locate any compressor manufacturer that makes a unit equipped with the alarms required by the standard (Tr. 877).

Ingalls contends that having an automatic shutdown device on a compressor is safer than having an alarm on a compressor. The alarm is triggered after a problem with carbon monoxide has already developed. The automatic shutdown device is activated before the carbon monoxide problem reachs a critical stage (Tr. 872).

The Secretary has established a violation of § 1910.134(d)(2)(ii). Ingalls is not free to disregard the requirements of the standard because it believes that it implements a superior method. Ingalls did not obtain a variance from the standard (Tr. 875). Ingalls has,

however, established that its employees were exposed to minimal danger from its failure to comply with the standard. The Secretary does not dispute Ingalls' contention that the compressor automatically shuts off before any carbon monoxide problem can develop. Because the gravity of the violation is slight, the violation will be classified as "other" and no penalty is assessed.

Item 5: § 1910.134(e)(5)

Section 1910.134(e)(5) provides:

> (5) For safe use of any respirator it is essential that the user be properly instructed in its selection, use and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

Baynes conducted interviews with employees in the sonar dome area and found that several of the employees required to wear respirators had not been fit tested (Tr. 516). Walter Williams, a shipfitter, testified that he was required to wear a respirator while working in the sonar dome, but that he was not fit tested prior to its use (Tr. 797-798). Herbert Lee, a chipper and grinder, also testified that he was not fit tested for a respirator, although he was required to wear one while working in the sonar dome (Tr. 802-803). Mark Cochran, a painter, testified that he was required to wear a respirator while painting, but that he was not fit tested prior to its use (Tr. 790-791).

Ingalls argues that because of its large number of employees "some employees inadvertently may be missed" (Ingalls' brief, p. 44). This is not a viable defense. The safety and health standard applies to each employee working for the employer.

The Secretary has established a violation of § 1910.134(e)(5). The hazard created by the violation is that of possibly exposing employees to toxic materials. Williams and Lee were working with Nofoul rubber, Cochran was working around paint and solvent fumes. The gravity of the violation is moderate. A penalty of $2,000.00 is assessed.

Item 6: § 1915.36(a)(2) and
Item 1 of Citation No. 2: § 1915.36(a)(4)

Item 6 and item 1 of Citation No. 2 (an alleged willful violation) arose out of the same fact situation. Therefore, they will be treated together. Sections 1915.36(a)(2) and (4) provide:

> (a) In all cases when liquid solvents, paint and preservative removers, paints or vehicles, other than those covered by § 1915.35(b), are capable of producing a flammable atmosphere under the conditions of use, the following precautions shall be taken:
>
> > (2) Ventilation shall be provided in sufficient quantities to keep the concentration of vapors below ten (10) percent of their lower explosive limit. Frequent tests shall be made by a competent person to ascertain the concentration.
> > . . . .
> > (4) Only explosion proof lights, approved by the Underwriters' Laboratories for use in Class I, Group D atmospheres, or approved as permissible by the Mine Safety and Health Administration or the U.S. Coast Guard, shall be used.

During Baynes' inspection, an employee was spray painting in compartment J-73-A on LHD-3 (Tr. 524). The paint that the employee was using was White F-124, which has a flash point of 100° F. (Exh. C-52; Tr. 532). The compartment was ventilated with a "sucker," a 6-inch stainless steel piece of tubing with a fan on one side (Tr. 906-907). The only source of illumination in the compartment was an Erickson light, which was not explosion-proof (Tr. 558-559).

The painter was summoned to the deck above the compartment he was spray painting, where Baynes and Ingalls' industrial hygienist, Mark Frederic, and several others were waiting. Baynes and Frederic spoke with the painter for 5 to 10 minutes (Tr. 539).

Baynes and Frederic disagree on the next sequence of events, but the discrepancy in their testimony does not affect the outcome of this issue. According to Baynes, he and Frederic descended the ladder to the compartment and stood at the foot of the ladder. He took a reading of the atmosphere with an MSA Microguard Vapor Tester, which he had calibrated that morning. The tester continuously displayed the lower explosive limit of the

atmosphere. Baynes did not move more than a step or two from the ladder. The LCD display on the tester read 11%, 1% above the percentage allowed by § 1915.36(a)(2). Upon receiving that reading, Baynes showed it to Frederic and then they both exited the compartment (Tr. 528-530, 652-656).

Frederic testified that he and Baynes went into the compartment twice. He stated that he and Baynes moved around the compartment, away from the ladder, and took various readings on the tester. Frederic recalled the first time they entered the compartment (Tr. 914-915):

> When we went down the ladder, it was two to three percent at the ladder. We went about six or eight feet starboard again -- well, of course it was the first time -- and it was I think, six.
>
> And, then we came back to the ladder and it was eight. As we were going back up the ladder, it was eight.

Frederic drew a diagram of the compartment (Exh. R-37) and commented on the readings Baynes took the second time they entered the compartment (Tr. 905):

> At the bottom of the ladder, it was two percent, six or eight feet, give or take a few, to the starboard was seven percent. Maybe about ten feet forward of the ladder, it was nine percent . . . And, in this extreme corner here [diagonally across from the ladder], it was eleven percent.

Ingalls considers that Frederic's version of events is significant because it believes that the atmospheric reading for the compartment should be based on an average of the various readings taken, which would produce a reading below 10% of the LEL. It is mistaken. There is nothing in the standard that indicates that an average of readings should be taken, or even that multiple readings need be taken. Both parties agree that a reading of 11% was taken in some part of the compartment.

Ingalls argues that the cited standards are inapplicable because the White F-124 paint being used is classified as a combustible, and not a flammable liquid (liquids whose flash points are less than 100° F are classified as flammable; liquids whose flash points are 100° F or more are classified as combustible) (Tr. 929). Ingalls argues that because the White F-1244 paint is a combustible liquid, it is not covered by §§ 1915.36(a)(2) and (4), which

refer to paint "capable of producing a flammable atmosphere." There is nothing in the standard that requires that the paint be a flammable liquid, only that it may produce a flammable atmosphere. Ingalls' argument is undermined by its own witness, Louis Janus, whom Ingalls offered as an expert in chemistry (Tr. 926). During cross-examination this exchange occurred (Tr. 936):

> Q.: And, if a liquid had a flash point which did not render it a flammable liquid, *per se*, could such a liquid be capable of producing a flammable atmosphere under the conditions of use?
>
> A.: Yes, they very well could.

The Secretary has established that Ingalls failed to provide ventilation in sufficient quantities to keep the LEL below 10%. It is undisputed that the painter was using an Erickson light, which was not explosion-proof as required by the § 1915.36(a)(4).

Ingalls' only defense against this charge is that in January, 1988, one of its representatives wrote a letter to OSHA to explain its position that the paint was not a flammable liquid (Exh. R-42). Ingalls never received a response to this letter (Tr. 981). Nevertheless, Ingalls claims that "[a]s a result of the correspondence, a citation was never received." (Ingalls' Brief, p. 49). Therefore, Ingalls asserts it had reason to believe that explosion-proof lights were not necessary. This argument is wholly rejected. Since OSHA never responded to Ingalls' letter, Ingalls had no basis whatsoever for asserting that a citation was not issued "as a result" of the letter. The fact that a citation was not issued in that case does not justify ignoring OSHA standards. The Secretary has established violations of both §§ 1915.36(a)(2) and (4). The hazard presented by the violations is that of fire or explosion or both.

The violation of § 1915.36(a)(4) was alleged as a willful violation.

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. . . . It is differentiated from other types of violations by a "heightened awareness of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference."

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶ 29,531 (No. 85-319, 1990) (citation omitted).

Baynes explained why he believed Ingalls' violation of § 1915.36(a)(4) was willful (Tr. 568):

> [Ingalls was] aware of the condition and had opted for or were aware that an option had been exercised to go to other than explosion-proof lights. That, to me, represented knowledge on their part of the hazardous condition and knowledge that it was a violation.

What Baynes described, knowledge on the part of the employer that a standard is being violated, is what is required to establish a serious violation of a standard. The Secretary has failed to show a "heightened awareness" that would constitute a willful violation. Item 1 of Citation No. 2 will be classified as serious. A penalty of $5,000.00 each will be assessed for the violations of § 1915.36(a)(2) and (4).

Item 9a: § 1915.99(g)(8)

Section 1915.99(g)(8) provides:

> (g) *Material safety data sheets.* (8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

While at the Land Based Test Facility (LBTF), Baynes asked the foreman for a copy of the MSDS for Ami-Sil. He was told that Earl Sanders, the tool room clerk, would get it for him. Sanders gave Baynes an MSDS for lagging roll, not Ami-Sil. Sanders was unable to find an MSDS for Ami-Sil and told Baynes that he would have to get one from the safety department about half a mile away (Tr. 547).

The LBTF is a shop where employees wrap equipment with a protective covering (Tr. 556, 828). As previously noted, the court in *Dravo* declined to expand the coverage of the § 1915 maritime standards to land based structural shops. Section 1915.99(g)((8) is inapplicable to the LBTF.

Item 9b: § 1915.99(h)

Section 1915.99(h) provides:

> (h) *Employee information and training.* Employers shall provided employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

Item 9b cites two instances in which § 1915.99(h) was allegedly violated. Instance (b) occurred at the LBTF where Ingalls failed to provide Charles Fayard with information and training regarding the use of Ami-Sil (Tr. 551). Because it occurred at the LBTF, it is not covered by the § 1915 maritime standards.

Instance (a) occurred in the sonar dome. Supervisor Rayford Tanner admitted that he did not provide his employees with information and training regarding dermatitis, which may be caused by exposure to Nofoul rubber (Tr. 845).

The Secretary has established a violation with regard to instance (a) of item 9b. The hazard presented by this violation is the development of dermatitis. The gravity is moderate. A penalty of $500.00 is appropriate.

Citation No. 3: Alleged "Other" Violation

Item 1: § 1910.1000(e)

Section 1910.1000(e) provides:

> (e) To achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with 1910.134.

Baynes sampled employees in the sonar dome for exposure to organic tin. One of the employees, Ed Patterson, was found to be exposed over the permissible exposure limit (PEL) (Tr. 573). "Tin, organic compounds" is listed in Table Z-1-A of § 1910.1000. The PEL for tin is .1mg/m^3. The personal sample on Patterson was .428 mg/m^3 (Exhs. C-55, C-56; Tr. 579-580). Patterson was wearing protective clothing and an airline respirator, which reduced his exposure to the tin (Tr. 576, 582).

Ingalls questions the accuracy of Patterson's sample result. Another employee who was sampled at the same time, John Love, had a sample result of only .099 mg/m^3 (Tr. 639-640). However, a difference in the results of personal samples is not enough to discredit their accuracy.

The Secretary has established a violation of § 1910.1000(e). Because Patterson was wearing protective clothing and a respirator, his exposure was minimal. No penalty is assessed.

Docket No. 93-597: The Fatality Inspection

On September 30, 1992, OSHA Compliance Officer, Carmen Bunch began an investigation of a fatality that occurred at Ingalls on September 28, 1992 (Tr. 998-999). Bunch held an opening conference with representatives of Ingalls and then commenced his investigation (Tr. 999). As a result of Bunch's investigation, the Secretary issued a citation to Ingalls on January 26, 1993, alleging serious violations of four of the § 1910 standards (Tr. 1000). At the time of the hearing, three items were still at issue.

The Fatality

On September 28, 1992, employee Patricia Dickerson was electrocuted while using an electric drill motor while on board a ship under construction. The fatality occurred when the hot wire inside the drill motor's handle came loose from its connection and contacted the metal casing on the drill motor (Tr. 1096, 1098). The green grounding wire had separated or broken within the cord itself, resulting in Dickerson becoming the ground conduit at the time the hot wire contacted the metal casing (Tr. 1098).

Item 2: § 1910.305(g)(92)(iii)

Section 1910.305(g)(2)(iii) provides:

> (iii) Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

As noted earlier in this decision (Docket No. 93-614, item 15), § 1910.302(a)(2) specifically excludes "installations in ships" from the coverage of §§ 1910.302 through 1910.308. There is no dispute that the alleged violation took place aboard a ship under construction. Therefore, § 1910.305(g)(2)(iii) is inapplicable to the cited condition. Item 2 will be dismissed.

Items 3a and 3b: §§ 1910.334(a)(2)(i) and (ii)

Sections 1910.334(a)(2)(i) and (ii) provide:

> (2) *Visual inspection.* (i) Portable cord- and plug-connected equipment and flexible cord sets (extension cords) shall be visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage to outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket). Cord- and plug-connected equipment and flexible cord sets (extension cords) which remain connected once they are put in place and are not exposed to damage need not be visually inspected until they are relocated.
> (ii) If there is a defect or evidence of damage that might expose an employee to injury, the defective or damaged item shall be removed from service, and no employee may use it until repairs and tests necessary to render the equipment safe have been made.

Section 1910.331 defines the scope of § 1910.334(a)(2)(i) and (ii). Section 1910.331(c) provides:

> The provisions of §§ 1910.331 through 1910.335 do not apply to work performed by qualified persons on or directly associated with the following installations:
> . . . .
> (3) *Installations in vehicles.* Installations in ships, watercraft . . . .

"Qualified person" is defined in § 1910.399 as "[o]ne familiar with the construction and operation of the equipment and hazards involved. Dickerson was a first class electrician (Tr. 1029). An electrician can be presumed to be familiar with the operation of an electric drill motor and the hazards involved. Dickerson was a qualified person working on an installation aboard a ship. Therefore, § 1910.334 is inapplicable to the cited circumstances as provided by § 1910.331(c)(3).

Items 3a and 3b are dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

It is hereby ORDERED that the parties' stipulations and joint motions and notice of dismissal embodied in Exhibits J-1, J-2, and J-3 are incorporated by reference herein in disposition of the relevant items. Based on the foregoing decision, the items of the citations remaining in contest from Docket Nos. 93-614, 93-596, and 93-597 are disposed of as follows:

Docket No. 93-614

Citation No. 1

Item	Standard	Disposition		Penalty
3a	§ 1910.23(d)(1)(i)	Dismissed		$ -0-
3b	§ 1910.23(d)(1)(ii)	Dismissed		-0-
3c	§ 1910.23(d)(1)(iii)	Dismissed		-0-
3d	§ 1910.23(d)(1)(iv)	Affirmed		500.00
15(a) - (i)	§ 1910.303(g)(2)(i)	Dismissed		-0-
15(j) - (r)	$ 1910.303(g)(2)(i)	Affirmed		1,160.00
23	§ 1910.425(c)(2)	Affirmed		5,000.00
32	§ 1915.72(a)(1)	Affirmed		3,500.00
35(c) & (d)	§ 1915.73(c)	Penalty only		3,500.00
39(i) & (j)	§ 1915.91(c)	Dismissed		-0-
39(k)	§ 1915.91(c)	Penalty only		325.00
40	§ 1915.92(a)	Affirmed		1,500.00
41	§ 1915.92(d)	Dismissed		-0-
45a	§ 1915.181(b)	Affirmed	}	
45b	§ 1915.335(a)(1)(i)	Affirmed	}	3,500.00
		Total		$18,985.00

Docket No. 93-596

Citation No. 1

Item	Standard	Disposition	Penalty
2(a), 2(c)	§ 1910.132(a)	Dismissed	$ -0-
2(b)	§ 1910.132(a)	Affirmed	600.00
3	$ 1910.134(b)(6)	Affirmed	2,000.00
4	§ 1910.134(d)(2)(ii)	Affirmed as "Other"	-0-
5	§ 1910.134(e)(5)	Affirmed	2,000.00
6	§ 1915.36(a)(2)	Affirmed	5,000.00
9a	§ 1915.99(g)(8)	Dismissed	-0-
9b	§ 1915.99(h)	Affirmed	500.00

Citation No. 2

Item	Standard	Disposition	Penalty
1	§ 1915.36(a)(4)	Affirmed as Serious	$ 5,000.00

Citation No. 3

Item	Standard	Disposition	Penalty
1	§ 1910.1000(e)	Affirmed	$ -0-
		Total	$15,100.00

Docket No. 93-597

Citation No. 1

Item	Standard	Disposition	Penalty
2	§ 1910.305(g)(2)(iii)	Dismissed	$ -0-
3a	§ 1910.334(a)(2)(i)	Dismissed	-0-
3b	§ 1910.334(a)(2)(i)	Dismissed	-0-

NANCY J. SPIES
Judge

Date: November 16, 1994