UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. LONGHORN SERVICE COMPANY, Respondent.	OSHRC DOCKET NO. 13-1458

Appearances:

Alicia Truman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado
For Complainant

George R. Carlton, Jr., Esq., Godwin Lewis, PC, Dallas, Texas
For Respondent

Before: Administrative Law Judge John H. Schumacher

DECISION AND ORDER

I. Procedural history

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Longhorn Servicing Company ("Respondent") worksite, located at the Laroque 34-12H well in Alexander, North Dakota on April 12, 2013. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging seven serious violations and one repeat violation of the Act with a proposed total penalty of $29,400.00. Respondent filed a timely notice of contest, bringing this matter before the Commission. A trial was held on November 13, 2014, in Denver, Colorado. At the beginning of the trial, Complainant withdrew Citation 1, Item 1, which alleged a violation of

section 5(a)(1) of the Act and proposed a penalty of $4,500.00. (Tr. 11–12). Both parties have filed post-trial briefs.

II. Stipulations

The parties submitted a set of Joint Proposed Stipulations to the Court. The Stipulations are as follows:

1. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.

2. Longhorn is, and was at all pertinent times, an Oklahoma corporation engaged in well servicing operations and Longhorn's activities affect interstate commerce.

3. The Secretary employs Robert Klostermann as a Compliance Safety and Health Officer for the Occupational Safety and Health Administration ("OSHA"), assigned to OSHA's Denver, Colorado, Area Office. He served in that position and was an authorized representative of the Secretary at all pertinent times.

4. On April 12, 2013, Mr. Kolstermann inspected a worksite located at the Laroque 34-12H well in Alexander, North Dakota ("Worksite") where Longhorn's Rig 33 was located (OSHA Inspection No. 900410).

5. Respondent's management employees were present for and involved in the setup of the rig operations at the worksite.

6. The rig floor on Longhorn's Rig 33, as set up at the worksite on the day of the inspection, was approximately seven feet, eight inches above the ground.

7. There was no fixed stairs or ladder provided for Respondent's employees at the worksite to use when climbing to and from the rig floor on Rig 33.

8. The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

III. Jurisdiction

As stipulated to by the parties, the Court finds that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 651 *et seq.* Further, Respondent has also stipulated that it is an employer engaged in a business and industry affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *See Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

IV. Factual Background

Three witnesses testified at trial: (1) Compliance Safety and Health Officer ("CSHO") Robert Klostermann; (2) David de los Angles, a tool hand and on-site supervisor for Respondent; and (3) Richard Bittle, General Manager of Respondent.[1]

Respondent is a well-servicing company that has operations in North Dakota but has its principal office in Oklahoma. As part of its well-servicing operations, Respondent is contracted by the well owner (in this case, Whiting Oil and Gas) to prep wells for both hydraulic fracturing and production. (Tr. 28). In order to accomplish this, Respondent uses a well-servicing rig, which is mounted to a truck. The rig is backed up to the well, and an expanded metal platform is lowered over the well bore. (Tr. 143).

Two days prior to the inspection at issue, Respondent set up the servicing rig and inserted pipe into the Laroque 34-12H well in order to flush it out. (Tr. 29). This process is also known as "tripping in". (Tr. 29, 34). The next day, Respondent flushed out the well by pumping water into the pipe system, cleaning out contaminants and preparing it for production. (*Id.*). On the day

1. At the close of Respondent's case, counsel for Respondent proffered, and the Court admitted, the deposition of Mr. Kenneth Jordan. Upon further review, the Court finds that the deposition submitted by Respondent is hearsay. Former testimony, such as a deposition, is only an exception to the hearsay rule when the declarant is unavailable as a witness. *See* F.R.E. 804(b)(1). The criteria for whether a declarant is considered "unavailable" is found at F.R.E. 804(a). Respondent put forth no evidence to suggest Mr. Jordan was unavailable, thus the deposition is hearsay and was not considered by the Court in rendering this *Decision*. Further, the Court's ruling in this regard will have little impact, as Respondent did not rely upon nor did it cite Mr. Jordan's deposition in its brief.

of the inspection, Respondent was in the process of removing the pipe string from the well, also known as "tripping out". (Tr. 29).

CSHO Klostermann arrived at the worksite in the afternoon of April 12, 2013, and met with David de los Angles and David McNabb, the area manager from Oklahoma, as well as a couple of representatives from Whiting Oil and Gas. (Tr. 27). According to Klostermann, his inspection of Respondent's worksite was conducted pursuant to OSHA Region VIII's oil and gas industry problem-solving initiative. (Tr. 24). The purpose of this initiative is to focus inspection efforts on the four leading causes of accidents and injuries in the oil and gas industry; namely, falls, fires, struck-by hazards, and electrical hazards. (Tr. 25). Klostermann testified, however, that based on his observation of a number of different unsafe behaviors, he decided that it was appropriate to expand the scope of the inspection to a comprehensive inspection. (Tr. 25).

During his inspection, Klostermann observed five of Respondent's employees working on the rig: two floor hands; a derrick hand; David de los Angles, the tool hand; and Sergio Medrano, the rig operator. (Tr. 26, 29). A tool pusher, typically the on-site manager, was not present on the day of the inspection. (Tr. 187–88). Angles and Sergio Medrano were the worksite supervisors in the absence of a tool pusher. (Tr. 29, 188).

As a result of his inspection, Klostermann recommended, and Complainant issued, several citations involving tripping and fall-related hazards, personal protective equipment, and fire hazards. Each of those citations, along with their respective characterizations and penalties, will be discussed further below.

V. Applicable Law

To establish a *prima facie* violation of Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the 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. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

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

VI. Discussion

A. Citation 1, Item 2A

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.23(a)(8): Every floor hole in which employees could accidentally walk was not guarded or covered:
>
> (a) On or about April 12, 2013, for employees tripping out of the well with the area around the drill pipe having an opening of approximately 12 inches x 24 inches and exposed to a potential fall hazard of approximately 7 feet, 8 inches, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.

The cited standard provides:

> Every floor hole into which persons can accidentally walk shall be guarded by either:
>
> (i) A standard railing with standard toeboard on all exposed sides, or
>
> (ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

29 C.F.R. § 1910.23(a)(8).

This Citation Item addresses a hole in the rig floor that Klostermann observed during the course of his investigation. (Ex. C-4). The rig floor was equipped with a hole so that pipe could be inserted into and taken out of the well bore. (Tr. 32; Ex. C-4). Klostermann, however, was concerned with the hole that was adjacent to the pipe-setting equipment. This hole was created by shifting an adjustable piece of the rig floor so that a piece of equipment known as a "V-door" would rest properly against the rig floor. (Tr. 36, 178, 201). The V-door allowed Respondent's employees to transfer pieces of pipe away from the servicing rig. (Tr. 178, 201; Ex. C-4). By shifting the piece of the rig floor outward, Respondent created, in Klostermann's estimation, a hole that measured approximately 12 inches by 24 inches. (Tr. 40–41). As they were removing pipe from the well bore, Klostermann observed two employees working around, and in close proximity to, the floor hole. (Tr. 44–45).

1. The Standard Applies

According to Subpart C of the regulations, a "floor hole" is "[a]n opening measuring less than 12 inches but more than 1 inch in its least dimension, in any floor, platform, pavement, or yard, through which materials but not persons may fall; such as a belt hole, pipe opening, or slot opening." 29 C.F.R. § 1910.21(a)(1). Respondent contends that the hole at issue does not meet the definition of a "floor hole" because it is too large and because "it specifically states that to be a 'floor hole' people may not fall through it." *Resp't Br.* at 3. Complainant contends that the dimensions of the hole accord with the definition of a "floor hole". Alternatively, however, Complainant notes that the preface to section 1910.21(a)(1) explains that the terms shall have the meanings ascribed to them in this paragraph "unless the context requires otherwise." *Compl't Br.* at 10 (citing 29 C.F.R. § 1910.21(a)). Thus, Complainant argues, even if the hole were slightly larger than 12 inches in its least dimension (which Complainant does not concede), but

was not such that a person was likely to fall through it, context requires a finding that the hole in question was, in fact, a "floor hole".[2]

The Court finds that the standard applies. Klostermann estimated the dimensions of the hole to be approximately one foot by two feet. Though Angles testified that the hole was two feet wide, he did not indicate what the other dimension of the hole was. (Tr. 203). The Court accepts Klostermann's measurements and further finds that, given the location of the equipment surrounding the hole, it was a hole "into which persons may accidentally walk" but not one "through which persons may fall." *See* 29 C.F.R. § 1910.21(a)(1) & (2). In this context, the Court finds that the cited standard applies.

2. The Terms of the Standard Were Violated

The Court also finds that the terms of the standard were violated. First, the Court finds that this is a hole into which persons can accidentally walk. Klostermann testified that he observed Respondent's employees working in the immediate area surrounding the floor hole and determined that employees could step into the hole while loading pipe onto the V-door.[3] (Tr. 36–37, 44). There were no standard railings or covers over the hole; in fact, the cover, as it were, had been slid out away from the floor. Further, contrary to Respondent's assertion, there was nobody attending the hole while it was uncovered. To be sure, both floor hands worked in close proximity to the hole, and likely were aware of its existence; however, while on the rig floor, the floor hands were occupied with removing pipe from the well bore and transporting it to the slide. It is one thing to generally know that a floor hole is present in your workspace, it is yet another to actually attend to that hole to ensure that others do not step into it. The plain language of the standard contemplates a situation whereby the cover for a floor hole is removed and an employee

2. A "floor hole" is distinguished from a "floor opening", which measures 12 inches or more in its least dimension, through which persons may fall. *See* 29 C.F.R. § 1910.21(a)(2).

3. In this respect, the Court accords little weight to Rick Bittle's testimony as to where employees stand while working. As noted by Complainant, Bittle had not been to this particular worksite, or any other worksite in North Dakota for that matter, and has little involvement with the field crews in general.

"*constantly* attend[s]" it. 29 C.F.R. § 1910.23(a)(8) (emphasis added). CSHO Klostermann testified that the employees were focused on the job at hand, which would take their attention away from the floor hole. (Tr. 42–43). *See also Stearns-Roger, Inc.*, 7 BNA OSHC 1919 (No. 76-2326, 1979) (holding that identical construction standard regarding floor holes "is directed toward accidental situations when employees are not looking precisely where they are walking"). The Court finds that an employee who is otherwise engaged in a work activity cannot constantly attend to the hole under the meaning of the standard. Accordingly, the standard was violated.

3. Respondent's Employees Were Exposed to the Hazard

Respondent contends that Complainant failed to prove that the two floor hands were exposed to the hazard presented by the floor hole. The Commission, however, does not require definitive proof of actual exposure to the hazard; rather, the question is whether employees have access to the hazard. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Access to a hazardous condition exists "if there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)). The zone of danger is "that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). It is sufficient for the Secretary to prove access to the zone of danger, rather than actual exposure to the immediate risk of injury or death. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 811–12 (3rd Cir. 1985); *Phoenix Roofing, Inc*. 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.)

Angles and Medrano set up the servicing rig two days before Klostermann conducted his inspection. (Tr. 89, 189). Over the course of those two days, Respondent's employees inserted

pipe into and removed pipe from the well bore. By way of example, during the "tripping out" process the rig operator operates a system of pulleys and slips to pull the pipe string out of the well bore and hold it in place while the topmost pipe section is removed from the string. (Tr. 34). The pulley system, also known as the traveling block, is connected to the top part of the pipe that is sticking out of the well bore. (Tr. 35). The floor hands will remove the slips holding the topmost pipe section in place, which allows the traveling block to raise the pipe out of the well bore until the bottom portion of the pipe section is exposed. (*Id.*). Once the entire pipe section is exposed, the slips are placed back in the pipe stem to prevent the remainder of the string from falling back into the well bore. (*Id.*). The floor hands then use a set of hydraulic tongs, which are placed on the fully exposed pipe section, as well as the one below it, to unscrew the pipe. (*Id.*). After the pipe is separated from the string, the floor hands guide the bottom portion of the pipe to the V-door, and the rig operator lowers the pipe onto the slide. (Tr. 36). Once on the slide, the floor hands disconnect the elevators from the top of the pipe, which allows it to travel down the slide. According to Klostermann, this process takes approximately 3 hours, both for tripping in and tripping out pipe. (Tr. 71).

The Court finds that the foregoing process exposed the floor hands to the floor hole on the rig. Over the course of two days, the floor hands were working around the floor hole, guiding pipe into or out of the well bore. As the pictures show, the well bore, where the pipe is removed from, is directly adjacent to the floor hole. (Ex. C-4, C-10). The lion's share of the work was centered around that hole. Based on the observations of Klostermann, his description of the work process, and Respondent's admission that the floor hole had been present on the rig during the entire operation, the Court finds that "there is a 'reasonable predictability' that employees 'will be, are, or have been in' the 'zone of danger.'" *Kokosing*, 17 BNA OSHC 1869 (citing *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-1613, 1994)).

4. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

Respondent also knew or, with the exercise of reasonable diligence, could have known of the violative condition. "The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82–928, 1986). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381–82 (No. 76–4271, 1981).

Angles testified that he and Medrano were responsible for setting up the rig and that he was considered to be an on-site supervisor, which was confirmed by Bittle. (Tr. 188, 210). More specifically, Angles testified that he set up the rig with the hole in the floor at the very beginning in order to accommodate the V-door. (Tr. 189, 201). In other words, the on-site supervisors were responsible for creating the condition. Further, the floor hole was in the direct line of sight of the rig operator, Medrano. (Tr. 55–56). This constitutes both actual and constructive knowledge of the condition on behalf of Angles and Medrano. Given their positions as on-site supervisors, the Court finds that their knowledge is properly imputable to Respondent. Thus, the Court finds that Complainant has proved its *prima facie* case.

5. The Violation Was Serious

The Court finds that the violation was serious, albeit for slightly different reasons than initially envisioned by Complainant. Part of the problem with Complainant's initial characterization was the fact that the putative injury was based on the presumption that an employee would fall through the floor hole to the ground over seven feet below. (Tr. 56). As noted above, however, a floor hole is defined such that an employee cannot fall through it and still be considered a "floor hole" pursuant to the standard. *See* 29 C.F.R. § 1910.21(a)(1). That

said, the floor hole still presents a potential trip and fall hazard. As testified to by Klostermann, if one of the floor hands were to step into the hole during the process of removing pipe, they would be exposed to potential amputation hazards from the traveling blocks, elevators, and other moving machine parts. (Tr. 56). Furthermore, the still photographs taken from Klostermann's inspection video also show a gap in the handrail adjacent to the hole. (Ex. C-4, C-10). Thus, although Respondent's employees may not have been able to fall through the hole itself, they could still step into it, trip, and fall over the side of the rig floor. In that respect, based on his experience as a CSHO, the Court accepts Klostermann's conclusion that a fall from a height of over seven feet would result in a serious injury.[4]

6. Respondent Has Not Established an Affirmative Defense

In its *Answer*, Respondent asserted the affirmative defense of impossibility of performance, indicating that "it was impossible to guard the floor hole with standard railings according to the requirements of 29 C.F.R. 1910.23(a)(8)." *Answer* at ¶ IX. While it may have been impossible to guard the hole with standard railings, that is not the only possible or available means by which Respondent could have abated the hazard. Section 1910.23(a)(8)(ii) also provides that the floor hole shall be guarded by a standard railing *or* "[a] floor hole cover of standard strength and construction." In that respect, Angles testified that it would have been possible to fabricate a floor hole cover to guard the space voided by the removable floor section. (Tr. 189–90). Based on the testimony of Angles, and the availability of alternate means of

4. Complainant contends that Klostermann was not qualified to opine on the possible injuries resulting from a fall of more than seven feet. *See Resp't Br.* at 7. The Court disagrees. CSHO Klostermann has conducted "about 1,400" inspections during his tenure with OSHA. (Tr. 22). In that time, he has undoubtedly inspected and reviewed cases involving falls from such heights and perhaps even lower. Further, there are an abundance of cases indicating that a fall from heights of approximately 7 feet would result in serious injury. *See, e.g., Teddy Mosley Painting*, 24 BNA OSHC 1706 (No. 12-2154, 2013) (ALJ) (seven feet); *Saul Ramirez*, 23 BNA OSHC 2067 (No. 11-0412, 2011) (ALJ) (employee received serious injury after fall from eight feet); *North Atlantic Fish Co., Inc.*, 19 BNA OSHC 1608 (No. 98-0848 *et al.*, 2001) (ALJ) (finding fall from 6 feet could result in serious injuries such as broken bones or death).

abatement within the standard itself, the Court finds that Respondent has failed to prove that it was impossible to comply with the standard.

Based on the foregoing, the Court finds that Respondent violated 29 C.F.R. § 1910.23(a)(8) and that the violation was serious. Accordingly, Citation 1, Item 2A shall be AFFIRMED.

B. Citation 1, Item 2B

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.23(c)(1): Open-sided floors and platforms four feet or more above adjacent floor or ground level were not guarded with standard railings (or equivalent) and toeboards:
>
> (a) On or about April 12, 2013, for employees tripping pipe out of the well while working from the rig floor and exposed to a potential fall hazard of approximately 7 feet, 8 inches, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.

The cited standard provides:

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
>
> (i) Persons can pass,
> (ii) There is moving machinery, or
> (iii) There is equipment with which falling materials could create a hazard.

29 C.F.R. § 1910.23(c)(1).

1. The Standard Applies

The rig floor at issue is an open-sided platform that can be equipped with guardrails. (Tr. 65; Ex. C-4, C-10). Klostermann measured the rig floor to be seven feet, eight inches above the ground. (Tr. 64). Thus, the cited standard applies.

2. The Terms of the Standard were Violated

In its brief, Respondent admits that "[t]he evidence does indicate that the proper guards on the rig were not in place." *Resp't Br.* at 6. Further, the still photos taken by Klostermann clearly show an elevated platform with guardrails missing in multiple places, as well as a chain rail that does not comply with the requirements of a "standard railing". *See* 29 C.F.R. § 1910.23(e). Based on Klostermann's photos, and Respondent's admission, the Court finds that the terms of the standard were violated.

3. Respondent's Employees Were Exposed to the Hazard

Although the hazard to which Respondent's employees were exposed in this Citation Item are slightly different than those described in Citation 1, Item 2A, the Court finds that the rationale applied in Section VI.A.3 of this *Decision* is equally applicable to the present Citation Item and incorporates it herein. The floor hands worked on the rig floor for approximately three hours a day for two days. During that time, they operated machinery located at the center of the rig floor, thereby placing them on the outer part of the platform during operations, which only provided an area of three-and-a-half feet. (Tr. 70; Ex. C-4, C-10). Without adequate guardrails, the floor hands were exposed to the potential for falls of over seven feet.

4. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

As noted above, both Angles and Medrano were responsible for setting up the servicing rig, which included installing guardrails. In lieu of repeating the same discussion, the Court incorporates its findings of facts and conclusions of law discussed in Section VI.A.4, *supra*. Accordingly, the Court finds that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition.

5. The Violation Was Serious

Because the hazard of falling from a height of over seven feet was also discussed with respect to the previous Citation Item, the Court hereby incorporates its findings of fact and conclusions of law discussed in Section VI.A.5, *supra*.

Based on the foregoing, the Court finds that Respondent violated 29 C.F.R. § 1910.23(c)(1) and that the violation was serious. Accordingly, Citation 1, Item 2B shall be AFFIRMED.

C. Citation 1, Item 2C

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.24(b): Fixed stairs were not provided for access from one structure level to another where operations necessitated regular travel between levels and for access to operating platforms at any equipment which requires attention routinely during operations:
>
> (a) On or about April 12, 2013, for the employees climbing from the truck platform to the work over rig floor with a step of approximately 33 inches high between the levels, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.

The cited standard provides:

> *Where fixed stairs are required*. Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required. (It is not the intent of this section to preclude the use of fixed ladders for access to elevated tanks, towers, and similar structures, overhead traveling cranes, etc., where the use of fixed ladders is common practice.) Spiral stairways shall not be permitted except for special limited usage and secondary access situations where it is not practical to provide a conventional stairway. Winding stairways may be installed on tanks and similar round structures where the diameter of the structure is not less than five (5) feet.

29 C.F.R. § 1910.24(b).

As noted in the Citation Item narrative, Respondent was cited for failing to provide a set of fixed industrial stairs between the truck platform and the servicing rig platform. Respondent provided a set of stairs to access the truck platform; however, when accessing the rig platform from the truck, employees had to ford a 33-inch high, 10-inch wide gap. (Tr. 82; Ex. C-11). In order to accomplish this, employees had to steady themselves on a guardrail located on the truck platform and hoist themselves up to the rig platform. (Tr. 84). According to Klostermann, the guardrail was not secured in place and would bow out approximately four inches when the employees grabbed onto it. (Tr. 84, 155–56). During his inspection, Klostermann noted that a set of detachable stairs was located near the servicing rig but were not installed. (Tr. 84; Ex. C-11 at 3). According to Angles, the height of the blowout preventer at the wellhead prevented proper installation of the stairs. (Tr. 88).

Although it is clear that Respondent should have provided a safe means of ingress and egress from the rig platform to the truck platform, the Court finds that the standard cited by Complainant does not apply to the cited condition. Section 1910.24(b) describes situations wherein fixed industrial stairs are *required*. According to section 1910.24(a), "[t]his classification includes interior and exterior stairs around machinery, tanks, and other equipment, and stairs leading to or from floor, platforms, or pits." 29 C.F.R. § 1910.24(a). Thus, based on the language of 1910.24(b), it would seem reasonable to assume that fixed stairs were required to access the rig platform from the truck.

That said, there are two key problems with the application of this standard to the condition on the rig platform. Klostermann interpreted the term "fixed industrial stairs" to mean "stairs that are secured in place." (Tr. 80). While that interpretation carries some cachet, it does not comport with the manner in which the term "fixed" is used in Subpart D. There is no definition for the term "fixed industrial stairs" in Subpart D, but there is a definition for a "fixed

ladder". According to Section 1910.21(e)(2), "A fixed ladder is a ladder *permanently* attached to a structure, building, or equipment." 29 C.F.R. § 1910.21(e)(2) (emphasis added). The Court finds that these standards should be read in conjunction. *See In Pari Materia*, Black's Law Dictionary (10th ed., 2014) ("It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject."). In that respect, Klostermann's definition does not go far enough—it is not sufficient for a stairway (or ladder) to be merely secured in place; rather, they must be permanently attached. This construction is further supported by the fact that the standard itself states, "It is not the intent of this section to preclude the use of *fixed ladders* for access to elevated tanks, towers, and similar structures . . . where the use of fixed ladders is common practice." 29 C.F.R. § 1910.24(b) (emphasis added). Considering that the rig platform was adjustable and that the stairs that would normally be in place are detachable—due in no small part to the fact that the well-servicing rig is a portable unit—there is no sense in which the stairs identified in Exhibit C-11 could be considered "fixed" under the language of 1910.24(b). (Ex. C-11 at 3).

Second, Klostermann testified that there was more than one way for Respondent to abate the hazard. Angles told Klostermann that they did not attach the stairs to the rig platform because the height of the blowout preventer caused the rig floor to be set at a different height than the set of stairs that Angles and Medrano brought to the worksite. (Tr. 88–89). When questioned about this explanation at trial, Klostermann testified that the height of the blowout preventer should have been factored into account in advance of setting up the rig, which would have allowed them to select the appropriate set of stairs for the job. (Tr. 89). To the extent that different sets of stairs can be used to accommodate varying rig floor heights, those stairs will not be "fixed" according to the standard. Further, and perhaps more problematic was Klostermann's

response to how Respondent could have abated the condition. He stated, "Longhorn could have installed stairs *or even a ladder* to access the rig floor." (Tr. 89) (emphasis added). The implication, of course, is that there was more than one way to abate the hazard. The cited standard, however, covers those situations where fixed stairs are required, not optional. Clearly, Respondent could have used stairs to provide proper ingress and egress to the rig platform; however, the Court finds that the standard does not mandate that Respondent was required to do so under this set of facts.[5] Accordingly, Citation 1, Item 2C shall be VACATED.

D. Citation 1, Item 3

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.133(a)(1): Protective eye equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:
>
> (a) On or about April 12, 2013, for employees tripping pipe out of an oil well and exposed to struck-by hazards from the tongs and pipe and chemical splash hazards, including but not limited to, drilling fluid and crude oil, while wearing regular plastic prescription lenses, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.

The cited standard provides:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazard from flying particles, molten metal, liquids, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

29 C.F.R. § 1910.133(a)(1).

Klostermann observed one of Respondent's employees wearing prescription glasses that did not include side shields. (Tr. 96–97; Ex. C-12). In his opinion, prescription glasses do not meet the same criteria as safety glasses because they do not have the same hardness and are thus inadequate to protect against flying objects.[6] (Tr. 98). In that respect, Klostermann identified the following hazards present at the worksite, which he believed required the use of protective eye

5. By so holding, the Court does not condone Respondent's failure to provide any means whatsoever to access the rig platform.
6. Complainant did not introduce evidence in support of Klostermann's opinion.

equipment pursuant to the standard: (1) the potential for hydraulic hoses to become disconnected and strike a person in the eye; (2) the potential for hot hydraulic fluid to splash in employees' eyes if the hoses were to become disconnected; (3) the potential for employees being struck by falling objects underneath the derrick; (4) the potential for the hydraulic pump to kick, causing the tongs to strike an employee in the face; (5) the use of hand tools, which could kick back and hit the employee in the face; (6) the potential splashing from chemicals and/or oil coming from the well. (Tr. 98–100).

Respondent argues that its employees were not exposed to any of the hazards listed within the language of the standard, such as flying particles or molten metal. (Tr. 160). Respondent further argues that Complainant failed to prove that its employees were exposed to volatile organic compounds or caustic liquids. Klostermann testified that he was "not entirely sure" what liquids were present at the worksite, because he did not perform any sampling. (Tr. 161). Klostermann admitted that he did not have any evidence that Respondent's employees were actually exposed to any of the hazards listed in the standard. (*Id.*).

According to Commission precedent, "the scope of section 1910.133(a)(1) is narrow." *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994). However, because it is so broadly worded, "it is appropriate to apply the reasonable person test in assessing compliance with the standard." *Id.* (quoting *Philadelphia, Bethlehem & New England R.R.*, 11 BNA OSHC 1345, 1347 (No. 77-2200, 1983)). Thus, personal protective equipment is mandated only "if a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment." *Id.* In that respect, [t]he Secretary must show more than the mere possibility of or a potential for injury . . . ." *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776 (Nos. 90-0050 *et al.*, 1996). Instead, the Commission has held that "the Secretary

must prove the existence of a *significant risk of harm* in each case where he proceeds under a standard that does not incorporate a finding that that risk exists." *Anoplate Corp.*, 12 BNA OSHC 1678, (No. 80-4109, 1986) (emphasis added); *see also Donovan v. General Motors Corp.*, 764 F.2d 32, 35 (1st Cir. 1985) (holding that proof of hazard under PPE standard requires a demonstration that there is a significant level of risk).

The Court finds that the hazards listed above do not rise to the level of a significant risk of harm. Klostermann characterized the above-listed hazards in terms of the "chance" or "potential" that they would come to fruition. (Tr. 100). There was no evidence to indicate, let alone a suggestion, that the hydraulic hoses regularly disconnected or "kicked", thereby exposing employees to struck-by or splashing injuries. The well had been cemented, cased, and plugged, which prevented the potential release of hydrocarbons from the well. (Tr. 158). Klostermann could not identify the chemicals that were present at the worksite, nor did he demonstrate that, even if there were caustic chemicals stored at the worksite, employees were actually exposed to them. (Tr. 160). The level of risk associated with the potential hazards identified by Klostermann was too attenuated to warrant a finding that a reasonable person familiar with the circumstances surrounding those conditions would conclude that safety glasses were necessary. *See General Motors*, 764 F.2d at 36 (upholding Commission's conclusion that "Secretary did not establish a 'generic hazard' based solely on the inherent risk in handling heavy automotive parts").

In reality, Respondent's employees may well have been exposed to a significant risk of harm, and a reasonable person may have concluded that hazard existed such that protective eyewear was required. However, it is Complainant's obligation to meet this burden of proof. The evidence presented at trial did not illustrate what a reasonable person familiar with industry practice would have done under similar circumstances, nor did Complainant prove that

Respondent's employees were exposed to a significant risk of harm. Accordingly, Citation 1, Item 3 shall be VACATED.

E. Citation 1, Item 4A

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.157(c)(4): Portable fire extinguishers were not maintained in a fully charged and operable condition:
>
> (a) On or about April 12, 2013, for the employees engaged in oil well servicing operations with hydrocarbon vapors present with two fire extinguishers present on the rig being full discharged, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.
>
> The cited standard provides:
>
> The employer shall assure that portable fire extinguishers are maintained in a fully charged and operable condition and kept in their designated places at all times except during use.

29 C.F.R. § 1910.157(c)(4).

Klostermann found two extinguishers on Respondent's rig that he determined were not maintained in a fully charged and operable condition. One extinguisher was missing its safety lock, and its gauge indicated that it was empty. (Tr. 107; Ex. C-14 at 1). A second extinguisher, which was found on the ground, did not have a gauge and also had a broken safety lock. (Tr. 107; Ex. C-14 at 2). Klostermann testified that Angles told him that one of the extinguishers had been discharged. (Tr. 107). Neither Complainant nor Respondent performed a test to determine whether the subject fire extinguishers were fully charged or operable. Instead, Complainant relied entirely on the gauge (or lack thereof) and the missing safety lock. Angles testified that the gauges were unreliable and that the only way to judge whether they were fully charged and operable was to pick them up and feel the weight. (Tr. 184–85).

1. The Standard Applies

According to 29 C.F.R. § 1910.157(a), "The requirements of this section apply to the placement, use, maintenance, and testing of portable fire extinguishers provided for the use of employees." The fire extinguishers at issue were installed by Angles and Medrano for the use of the servicing rig employees. (Tr. 110, 196). Thus, the standard applies.

2. The Terms of the Standard were Violated

The terms of section 1910.157(c)(4) essentially require three things: (1) the extinguisher must be fully charged; (2) it must be operable; and (3) it must be kept in its designated place. In a case involving almost identical facts (and arguments) to the one at bar, ALJ Blythe noted:

> Respondent contends that, since gauges are not required, the CO was not entitled to rely on them for evidence that the extinguishers were not fully charged, that the absence of safety pins is likewise not proof the extinguishers were inoperable, and that tests should have been performed.
>
> It is true that the CO easily could have determined, by squeezing the release, whether the fire extinguishers were under any pressure, but this would not have determined if they were fully charged. Under the circumstances, he was entitled to rely on the gauges to determine whether they contained a full charge. This is true even though, as respondent points out, § 1910.157(c)(4) does not mention pressure gauges. The level of pressure on the gauges is at least some evidence that the extinguishers were not operable. Absence of the safety pins alone would not be evidence that the extinguishers were inoperable, as the CO conceded (Tr. 41); but it corroborates the evidence provided by the gauges since safety pins ordinarily are not removed until extinguishers are used to combat a fire.

Culberson Well Svc., Inc., 11 BNA OSHC 1677 (No. 82-1162, 1983) (ALJ).

This Court agrees with the rationale of ALJ Blythe as it applies to the fire extinguisher with the gauge showing as "empty". (Ex. C-14 at 1). Given the information available to Klostermann, the Court finds his determination that this particular fire extinguisher was not fully charged and operable was reasonable. Not only did the gauge read "empty", but the safety lock was missing, and Angles told Klostermann that it had been discharged. (Tr. 107). As ALJ Blythe noted, the missing safety lock, in and of itself, is not an indication that the extinguisher was

inoperable; however, "it corroborates the evidence provided by the gauge[] since safety pins are not removed until extinguishers are used to combat a fire." *Culberson*, 11 BNA OSHC 1677.

Although Respondent contends that cold weather can impact the gauge, there was no indication as to what the temperature was at the worksite in the days leading up to the inspection, nor was such information provided to Klostermann. (Tr. 183). Further, the Court is not persuaded by Respondent's method of lifting the extinguisher to assess whether it is fully charged and operable. (Tr. 184). At best, such a method will tell you if an extinguisher has *some* retardant in it; however, the weight gives no indication if it is "fully charged", let alone whether it is operable.

With respect to the extinguisher without a gauge, the Court simply does not have enough information to determine whether it complied with the standard. There was no evidence that a gauge was required, nor was there any indication of its condition independent of the broken safety lock. In other words, the broken safety lock did not corroborate any other evidence about the fire extinguisher. Thus, the Court concludes that the terms of the standard were violated as applied to the extinguisher with the gauge that read "empty".

3. Respondent's Employees Were Exposed to the Hazard

Respondent exposed its employees to potential burn hazards because it failed to have fully charged and operable fire extinguishers at the worksite. If a fire were to break out, which is not an unprecedented occurrence at an oil and gas well, and one of Respondent's employees attempted to put out the fire with an inoperable or less-than-fully-charged fire extinguisher, they could be burned if the extinguisher failed to work. As previously noted, the extinguishers were in place for use by any of Respondent's employees, thus exposing all of Respondent's employees to the hazard. (Tr. 110).

4. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

As noted above, both Angles and Medrano were responsible for setting up the servicing rig, which included installing fire extinguishers. (Tr. 110). In lieu of repeating the same discussion, the Court incorporates its findings of facts and conclusions of law discussed in Section VI.A.4, *supra*. Accordingly, the Court finds that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition.

5. The Violation Was Serious

Klostermann testified that attempting to fight a fire without a functioning fire extinguisher could result in potential burn injuries, which would require medical care. (Tr. 112). Accordingly, the Court finds that the violation was serious. Citation 1, Item 4A shall be AFFIRMED.

F. Citation 1, Item 4B

Complainant alleged a serious violation of the Act as follows:

> 29 CFR 1910.157(e)(2): Portable fire extinguishers were not visually inspected at least monthly.
>
> (a) On or about April 12, 2013, for the employees engaged in oil well servicing operations with hydrocarbon vapors present and two fire extinguishers present on the rig being full discharged, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.
>
> The cited standard provides:
>
> Portable extinguishers or hose used in lieu thereof under paragraph (d)(3) of this section shall be visually inspected monthly.

29 C.F.R. § 1910.157(e)(2).

Due to the presence of apparently empty, or at least not fully charged, fire extinguishers with broken safety locks, Klostermann determined that Respondent failed to perform monthly visual inspections pursuant to section 1910.157(e)(2). (Tr. 113–14).

1. The Standard Applies

According to 29 C.F.R. § 1910.157(a), "The requirements of this section apply to the placement, use, maintenance, and testing of portable fire extinguishers provided for the use of employees." The fire extinguishers at issue were installed for the use of the servicing rig employees. Thus, the standard applies.

2. The Terms of the Standard were Violated

Neither Angles nor Bittle could credibly testify as to when the last monthly inspection of the fire extinguishers had occurred. (Tr. 185, 197, 214). Bittle testified that Respondent hired an outside company, Red Hot Fire Extinguisher Service, to perform its monthly inspections, but he could not confirm that the inspections were occurring. (Tr. 207, 218–19). In fact, Complainant requested documentation of the inspections and was told that records were not available. (Tr. 172).

Respondent contends that it did not maintain records of inspection because it relied upon Red Hot to perform and document the inspections. This is insufficient. As noted by Complainant, "Respondent cannot avoid its responsibility to its employees by a contract which transfers that obligation to a third party." *Sec'y Br.* at 39 (quoting *PBR, Inc.*, 8 BNA OSHC 1546 at *4 (No. 78-4833, 1980)). Although non-functioning fire extinguishers, by themselves, do not establish that a monthly inspection did not occur, that evidence, when coupled with Respondent's failure to provide any documentation whatsoever of inspections actually occurring, supports the reasonable inference that Respondent failed to comply with the standard. Respondent had an obligation to ensure that monthly visual inspections were occurring. Not one of the witnesses who testified, including the General Manager, could give any details regarding the contract with Red Hot or provide any information as to when or how these purported inspections were taking place. Accordingly, the terms of the standard were violated.

3. Respondent's Employees Were Exposed to the Hazard

Respondent exposed its employees to potential burn hazards because it failed to have fully charged and operable fire extinguishers at the worksite. This likely would not have occurred if Respondent had taken steps to ensure that monthly inspections were being performed—whether by Respondent's own employees or by an independent third party. If a fire were to break out, and one of Respondent's employees attempted to put out the fire with an inoperable or less-than-fully-charged fire extinguisher, they could be burned if the extinguisher failed to work. As previously noted, the extinguishers were in place for use by any of Respondent's employees, thus exposing all of Respondent's employees to the hazard. (Tr. 110).

4. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

Both Angles and Medrano were responsible for setting up the servicing rig, which included the installation of the subject fire extinguishers. Respondent's own safety policy indicates that fire extinguishers should be inspected monthly and documented. (Ex. C-13 at 4). Further, the policy states, "The supervisor is responsible for ensuring that all extinguishers are properly maintained and inspected." (*Id.*). Notwithstanding this responsibility, Angles stated that he did not know when the extinguishers were last inspected. (Tr. 185). Because it was Angles' responsibility to ensure that the extinguishers were properly maintained and inspected, and considering he and Medrano installed the fire extinguishers at the worksite, the Court finds that, at the very least, Respondent had constructive knowledge of the violation. Accordingly, the Court finds that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition.

5. The Violation Was Serious

For the same reasons expressed above in Section VI.E.5, the Court finds that the violation was serious. Accordingly, Citation 1, Item 4B shall be AFFIRMED.

G. Citation 2, Item 1

Complainant alleged a repeat violation of the Act as follows:

> 29 CFR 1910.23(d)(1)(iii): A stairway less than 44 inches wide, with both sides open, did not have a stair railing on both sides:
>
> (a) On or about April 12, 2013, for employees accessing the operator's station and the work over rig floor and exposed to a potential fall hazard of approximately 4.5 feet due to the stairway only having one stair rail, Longhorn Service Company Rig 33 at Laroque 34-12H near Alexander, ND.
>
> Note: Longhorn Service Company was previously cited for a violation of this occupational safety and health standard or its equivalent standard, which was contained in OSHA Inspection Number 315798082, Citation 1, Item 2, and was affirmed as a final order on March 8, 2012, with respect to a workplace located at Yoder 2H Well Pad Pisgah Rd, Troy, PA 16947.
>
> The cited standard provides:
>
> *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)(1)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:
>
> (iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.

29 C.F.R. § 1910.23(d)(1)(iii).

1. The Standard Applies

This Citation Item is directed at the flight of stairs that provided access from the ground level to the truck platform. (Ex. C-15). As the photograph shows, the stairway had more than four risers, was open on both sides, and had only one handrail on the right-hand side. According to Klostermann, the width of the stairway was 24 inches. (Tr. 121; Ex. C-15 at 3). Thus, the standard applies.

2. The Terms of the Standard were Violated

In its brief, Respondent admitted that the terms of the standard were violated. *Resp't Br.* at 12. The Court agrees. As required by the standard, stairways with four or more risers, with

both sides open, and which measure less than 44 inches across, require handrails on both sides. The stairway at issue only had one handrail, thus the terms of the standard were violated.

3. Respondent's Employees Were Exposed to the Hazard

Klostermann observed Respondent's employees going up and down the stairs to access both the operator's station, which was located on the truck platform, and the rig floor. (Tr. 122–23). Klostermann testified that Angles told him the stairway had been in this condition since the rig had been set up, which meant that Respondent's employees were exposed to the hazardous condition for at least two days. (Tr. 123). Klostermann also noted that Respondent's employees were usually carrying tools with them as they went up and down the stairs, thereby increasing the likelihood that a fall would occur. (Tr. 122).

4. Respondent Knew or, With the Exercise of Reasonable Diligence, Could Have Known of the Violative Condition

As previously noted, both Angles and Medrano were responsible for setting up the servicing rig, which included installing the stairway. Accordingly, the Court incorporates its findings of facts and conclusions of law discussed in Section VI.A.4, *supra*. Accordingly, the Court finds that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition.

5. The Violation Was Properly Characterized as Repeat

"A violation is repeated under section 17(a) of the Act if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch*, 7 BNA OSHC 1061 (No. 16183, 1979). One of the ways in which Complainant can establish substantial similarity is by showing that the prior and present violations are for failure to comply with the same standard under section 5(a)(2) of the Act. *Id.* A *prima facie* showing of substantial similarity can be rebutted by evidence that the conditions and hazards associated with the violations are different. *Id.*

Respondent was cited for a violation of 29 C.F.R. § 1910.23(d)(1)(iii) in 2011, which became a final order of the Commission on March 8, 2012. (Tr. 127–31; Ex. C-17). Specifically, Respondent was cited for having a flight of stairs leading to the rig floor that was not fully equipped with standard railings. (*Id.*). Because both the current and prior violations involved the same standard and exposed employees to the same hazard, the Court finds that the two violations are substantially similar. Accordingly, Citation 2, Item 1 was properly characterized as "Repeat".

Respondent mistakenly argues that this Citation Item was improperly characterized as a serious violation of the Act. *Resp't Br.* at 12. No such allegation was made in the Citation. Because Respondent has not put forth evidence to rebut the allegation of substantial similarity, Citation 2, Item 1 shall be AFFIRMED as a repeat violation of the Act.

VII. Unpreventable Employee Misconduct

In addition to claiming the affirmative defense of impossibility of performance, which was dealt with previously, Respondent has also alleged that the violations at issue were the product of unpreventable employee misconduct. In order to prevail on this defense, Respondent must prove that: (1) it has work rules designed to prevent the violation; (2) that it has adequately communicated those rules; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations are discovered. *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010). "A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1017, 1991), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992). For the reasons that follow, Respondent's affirmative defense is rejected.

Although Respondent had work rules designed to prevent the foregoing violations, Respondent did not put forth any evidence that its work rules were communicated to its

employees, that it took steps to discover violations, or that it effectively enforced those rules when violations were discovered. (Ex. C-13). *See N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000) (holding that employers must exercise reasonable diligence to discern presence of violations, including adequate supervision of employees, inspecting work area, anticipating hazards, and taking measures to prevent occurrence of violations). With respect to floor holes, Angles testified that he was not aware of any policies that indicated permissible floor hole size on rig floors, nor was there any indication that he received training from Respondent on that issue. (Tr. 192). He also testified that he was not aware of any employees being disciplined for not following company rules regarding the foregoing violations. (Tr. 193, 195, 197–98). Bittle testified that rig crews do not have a formal checklist for setting up rigs, and Respondent failed to put forth any evidence of worksite inspections or disciplinary action related to violations of its safety program. (Tr. 215–216). *See Precast Svcs., Inc.*, 17 BNA OSHC 1454 (No. 93-2971, 1995) ("To prove that its disciplinary system is more than a 'paper program,' an employer must present evidence of having actually administered the discipline outlined in its policy and procedures."). The fact that these violations were committed by supervisors bolsters the Court's conclusion that Respondent's safety program was deficient. Accordingly, Respondent's defense of unpreventable employee misconduct is rejected.

VIII. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201

(No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

With respect to each of the foregoing violations, Complainant considered Respondent's size, history of violations, and good faith. (Tr. 93–94). Respondent was not given credit for its size, because it employs approximately 400 employees across multiple states. (Tr. 93, 104, 118). Further, Respondent was not given credit for good faith due to the number of safety issues and violations present at the worksite. (Tr. 94, 105, 118). With the exception of Citation 2, Item 1, however, Respondent was given a ten percent reduction in penalty because it did not have a history of serious violations from its previous inspection in 2011. The Court agrees with these general assessments of Respondent and its worksite—the servicing rig was haphazardly put together, thereby exposing Respondent's employees to multiple hazards over the course of two days. Even more distressing is that many violations were open and obvious and could have been abated by tools or building implements that were readily available at the worksite. (Ex. C-4, C-10, C-11).[7]

For the purpose of assessing a penalty, Complainant grouped Citation 1, Items 2A, 2B, and 2C, because they involved interrelated fall hazards. Accordingly, Complainant assessed a grouped penalty of $4,500.00. Complainant determined that the violations were of high severity due to the hazards involved, but lower probability due to the likelihood that an accident would result. The Court agrees with Complainant's assessments as to Items 2A and 2B—employees were exposed to the potential for serious injury due to the trip and fall hazards identified by

7. As a side note, although the Court has found that certain violations were not supported by the evidence, the Court in no way condones the manner in which Respondent addressed those particular hazards.

Complainant. However, due to the short duration of the job (approximately three hours on two separate days), and the limited number of times that the rigs were accessed on a daily basis, the Court finds that the there was a lower probability of injury. Because Citation 1, Item 2C has been vacated, the Court finds that a grouped penalty of $3,000.00 is appropriate.

Citation 1, Items 4A and 4B, which address the fire extinguishers, were also grouped for penalty purposes. The Court agrees with Complainant's assessment that the violations were of low gravity and low probability. At the time of the violation, the well was cased, cemented, and plugged, which reduced the likelihood of a fire occurring. Further, as noted by Complainant, Respondent's employees were wearing fire retardant clothing. (Tr. 117; Ex. C-2). Accordingly, the Court finds that a penalty of $2,000.00 is appropriate.

Finally, the Court agrees with Complainant's assessment as to Citation 2, Item 1, for which he proposed a penalty of $15,000.00. Although a fall from approximately four feet would likely result in only sprains or contusions,[8] the Court finds that the violation was indicative of Respondent's emphasis (or lack thereof) on safety. Complainant identified multiple fall hazards in a relatively small work space. Thus, while there was a low probability that any one violation may result in an injury, the foregoing violations, viewed in the aggregate, illustrate that there were multiple opportunities for Respondent's employees to be injured. The fact that this violation was nearly identical to one that occurred in 2011 is yet another indication that Respondent has not learned from its previous mistakes and illustrates to the Court that it does not take seriously its obligation to provide a safe workplace. Accordingly, the Court finds that a penalty of $15,000.00 is appropriate.

8. Such injuries, although of lesser gravity, would nonetheless be properly characterized as "serious".

ORDER

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

1. Citation 1, Item 1 was withdrawn by Complainant.
2. Citation 1, Items 2A and 2B are AFFIRMED, and a grouped penalty of $3,000.00 is ASSESSED.
3. Citation 1, Item 2C and its associated penalty are VACATED.
4. Citation 1, Item 3 and its associated penalty are VACATED.
5. Citation 1, Items 4A and 4B are AFFIRMED, and a grouped penalty of $2,000.00 is ASSESSED.
6. Citation 2, Item 1 is AFFIRMED, and a penalty of $15,000.00 is ASSESSED.

SO ORDERED.

/s/
John H. Schumacher
Judge, OSHRC

Date: April 30, 2015
Denver, Colorado