United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SSA PACIFIC, INC., Respondent.	OSHRC Docket No. 14-1450

Appearances:

Niamh E. Doherty, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California,
For Complainant

Joseph M. Galosic, Esq., Law Offices of Joseph M. Galosic, Irvine, California,
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). On July 30, 2014, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite, which was located at the Port of Benicia, Benicia, California. (Tr. 10). Respondent was engaged in longshoring operations, which, on the day of the inspection, involved the discharge of over 1,600 General Motor vehicles from the marine vessel known as the Madame Butterfly. (Tr. 31; Exs. C-1). OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging two serious violations

and a proposed penalty of $2,550.00. Respondent timely contested the Citation. The case was designated for Simplified Proceedings pursuant to Subpart M of the Commission Rules of Procedure. *See* 29 C.F.R. § 2200.200 *et seq.*

The trial took place on May 27, 2015, in Los Angeles, California. Four witnesses testified at trial: (1) Lisa Trecartin, Compliance Safety and Health Officer ("CSHO"); (2) Dustin Sullivan, Respondent's Lead Superintendent; (3) Jason Coelho, another superintendent for Respondent; and (4) Matt Bekes, Respondent's Terminal Manager. Both parties timely submitted post-trial briefs. After reviewing the parties' arguments and the record, the Court issues the following Decision and Order.

II. Stipulations[1]

The parties stipulated to the following:

1. The worksite or job site was located at Port of Benicia, Benicia, California on or about July 30, 2014.

2. Inspection Number 987333 was conducted by the Occupational Safety and Health Administration at Port of Benicia, Benicia, California, on July 30, 2014.

3. The regulation at 29 C.F.R. § 1918.22 is at issue.

4. The regulation at 29 C.F.R. § 1952.172 is at issue.

III. Factual Background

On July 30, 2014, Respondent, a longshoring company, was in the process of discharging over 1,600 motor vehicles from the marine vessel Madame Butterfly. (Tr. 31). That same day, pursuant to its Local Emphasis Program (LEP) on longshoring operations, Complainant

1. The parties' stipulations can be found in the parties' *Joint Stipulation Statement*, which was filed with the Court on May 15, 2015. These stipulations were read in open court and can be found on page 10–11 of the transcript.

dispatched CSHOs Lisa Trecartin and Jack Reich[2] to Respondent's worksite, which was located at berth 95 in the Port of Benicia. (Tr. 30; Ex. C-1). After conducting an opening conference, the CSHOs proceeded to inspect Respondent's work operations, which included carbon monoxide exposure testing, a review of OSHA 300 logs, and observation of the discharge process. (Tr. 31–32). Most of the inspection took place inside the ship, which was accessed by the stern ramp at the back (aft) of the vessel. (Tr. 30, 66, 131; Ex. C-1). It was not until CSHO Trecartin exited the vessel and returned to Respondent's dockside office that she observed a plank that had been haphazardly lashed to the gangway[3] at the midpoint of the ship (midship), roughly 300 feet away from the stern ramp. (Tr. 33–34; Ex. C-1, C-2, C-5, C-6). This plank had been lashed to the gangway in an apparent attempt to facilitate entry onto the gangway, which, without the plank, rested two-to-three feet above the dock. (Tr. 102–104; Ex. C-5, C-6, C-7). After observing an unidentified individual wearing a green vest and Superintendent Coelho utilize the ramp, CSHO Trecartin determined that a violation had occurred.

On the morning of July 30, 2014, Dustin Sullivan, Respondent's lead superintendent, boarded the Madame Butterfly by using the gangway described above. (Tr. 134). At that time, the gangway (sans plank) was flush with the "bull rail", which is a raised curb at the edge of the dock. (Tr. 134–35). Sullivan boarded the ship to perform his daily walkthrough and to meet with the Chief Mate of the ship to exchange paperwork and discuss any issues of concern. (Tr. 133–34, 143). On this particular day, Sullivan and the Chief Mate determined they would not be able to use the gangway due to obstructions, the rising tide, and the fact that the winch that controls the height of the gangway was broken and could not lower the gangway any further. (Tr. 144–

2. CSHO Reich did not testify at hearing.

3. At various points in the transcript, the "gangway" was also referred to as the "accommodation ladder". According to 29 C.F.R. § 1918.22, a "gangway" is "any ramp-like or stair-like means of access provided to enable personnel to board or leave a vessel, including *accommodation ladders*, gangplanks, and brows." For the sake of simplicity, the Court shall refer to the ladder as a gangway.

46). Accordingly, at the request of Sullivan, the Chief Mate agreed to raise the gangway so that it could not be used as a point of ingress or egress. (Tr. 146–47).

After meeting with the Chief Mate, Sullivan met with his walking bosses, who were responsible for directing the work of the union labor.[4] (Tr. 126). During that meeting, Sullivan discussed any unusual circumstances with the vessel, how the operation would be implemented, and in what order vehicles would be removed from the vessel. (Tr. 125). One of the superintendents, also known as the lead dock boss, was in charge of giving a safety talk at the beginning of the shift, when the longshoremen arrived. (Tr. 128; Ex. R-4, R-5). According to Sullivan, the safety talk on July 30, 2014 included a discussion of the proper means of access to the vessel—the stern ramp—which did not include the gangway. (Tr. 147–148, 152). The other superintendents, as well as the terminal manager, were notified about the gangway issues as well. (Tr. 161).

The longshoremen who work for Respondent are not permanent employees. (Tr. 124). Instead, they report to their local union hall in the morning, line up, and wait for their names to be called. (Tr. 124). When called, they receive a ticket, which indicates to whom they will report and where they need to do so. (Tr. 124). The longshoremen provide those tickets to the lead walking boss, who records their names in a log for the purposes of payroll.[5] (Tr. 155; Ex. R-7). After reporting to the walking boss, the longshoremen participate in the aforementioned safety talk and then report to their workstations on the ship. (Tr. 125, 130).

CSHO Trecartin arrived after discharge operations had begun. After meeting with Bekes, CSHO Trecartin was on board the Madame Butterfly approximately four hours. (Tr. 72). After a

4. The walking bosses are also longshoremen who report to a local union hall; however, they report to a different hall than the longshoremen engaged in general labor. (Tr. 125).
5. The longshoremen report to the walking bosses (also union labor), who in turn report to the superintendents, which are permanent employees of Respondent. (Tr. 117, 125, 215–18).

lunch break, Bekes asked Coelho to take CSHO Trecartin to the observation deck at the top of the ship. (Tr. 210). The easiest way to accomplish this was by way of the elevator next to the gangway entrance. (Tr. 180–81). Coelho drove CSHO Trecartin down to the gangway entrance from the dock office, which was located by the stern ramp. When they arrived at the gangway, Coelho and CSHO Trecartin observed it had been lowered and a plank had been attached to its lower edge. (Tr. 181). CSHO Trecartin asked whether any of Respondent's employees used the gangway, and Coelho told her that only the ship's crew members used that entrance.[6] (Tr. 36). Due to the gangway's condition, Coelho and CSHO Trecartin drove back to the stern ramp and entered from there. (Tr. 181). As they entered the vessel via the stern ramp, Coelho spoke with a crew member and asked him to raise the gangway so that it could not be accessed. (Tr. 182). In addition, Coelho walked to the gangway entrance (from the inside) and checked the door, which was padlocked.[7] (Tr. 183).

After Coelho and CSHO Trecartin exited the ship, Coelho left CSHO Trecartin at the dock office. Although the actual sequence of events is not entirely clear, there is no dispute that, at this time, CSHO Trecartin observed an individual wearing a neon vest access the gangway to enter the ship. (Tr. 36–37; Ex. C-3, C-4). Shortly thereafter, she also observed Coelho walk up the gangway as well. (*Id.*). Coelho acknowledged that he made a mistake by accessing the gangway with the short ramp attached, but testified that he was only attempting to quickly abate the hazard identified by CSHO Trecartin. (Tr. 185). CSHO Trecartin pointed out the violation to Bekes, who recognized the issue and directed the crew of the ship to remove the plank from the

6. The ship's crew members are not employees of Respondent.
7. According to Sullivan, Coelho and Bekes, Respondent's employees do not have access to the controls that lower or raise the gangway, nor do they have keys to unlock the door at the top of the gangway. (Tr. 133, 139, 192, 204–205)

gangway, which abated the hazard. (Tr. 58, 215, 222). Coelho was disciplined by Respondent for accessing the gangway in that condition. (Tr. 219).

At the conclusion of the inspection, CSHO Trecartin advised Bekes that she would be recommending the issuance of a citation for the gangway. The Citation was issued on August 26, 2014.

IV. Jurisdiction

Respondent disputes that Complainant has jurisdiction over the cited condition. Specifically, Respondent contends that the plank, which is not a permanent fixture of the vessel, falls under CalOSHA jurisdiction because the plank "was portable, not part of the ship's means of access and merely led to or connected the ship's means of access to the dock." *Resp't Br.* at 4. In other words, Respondent asserts Complainant's jurisdiction ends at the bottom of the gangway, and CalOSHA's jurisdiction begins at the plank. The Court disagrees.

Longshoring operations are defined as "loading, unloading, moving or handling of cargo, ship's stores, gear, or any other materials, into, in, on, or out of any vessel" and are governed by Part 1918 of the Code of Federal Regulations. 29 C.F.R. § 1918.2. A "gangway" is defined as *any* ramp-like or stair-like means of access provided to enable personnel to board or leave a vessel, including accommodation ladders, gangplanks, and brows." *Id.* (emphasis added). On the face of it, Respondent's activities on July 30, 2014 were subject to Complainant's jurisdiction, and the gangway should be regulated as such.

Respondent contends, however, that the plank is neither part of the ship nor part of its regular means of access and, therefore, not subject to Complainant's jurisdiction. This argument is specious at best. According to 29 C.F.R. § 1952.172, which outlines the contours of the jurisdictional agreement between Complainant and CalOSHA, "The U.S. Department of Labor

will continue to exercise authority, among other things, with regard to . . . longshore operations on vessels from the shore side of the means of access to said vehicles." 29 C.F.R. § 1952.172(b)(2)(i). This understanding is reflected in the recently revised agreement between Complainant and CalOSHA, which preserves federal jurisdiction over "[l]ongshore operations on all vessels from the shore side of the means of access to said vessels." (Ex. C-8).

To suggest, as Respondent has, that the plank in this case is not part of the shore side of the means of access is absurd. It matters not whether the plank was a permanent fixture of the boat or whether the definition of "gangway" includes portable items that connect a ship's means of access to the dock. Regardless of whether the definition of "gangway" includes explicit references to portable items or temporary steps, the definition is expansive enough on its face to cover the plank at issue in this case. As noted above, a "gangway" refers to "*any* ramp-like or stair-like means of access provided to enable personnel to board or leave a vessel, including accommodation ladders, gangplanks, and brows." 29 C.F.R. § 1918.2 (emphasis added). The definition starts by providing broad-based categories of implements that can be used as a means of access; in fact, by the use of the term "any", the definition casts as broad a stroke as possible. The subsequent examples provided—accommodation ladders, gangplanks, and brows—are not intended to establish the limits of what is regulated by Part 1918; rather, they are merely examples of ramp-like or stair-like means of access.

The plank that was lashed to the accommodation ladder may not be a permanent part of the vessel, but that is of little consequence—the definition provides no indication that the shore side means of access must be a permanent part of the ship. Rather, at its most basic, the plank is a ramp-like means of access that was intended to enable personnel to access the vessel from the shore side. This was made clear by the fact that CSHO Trecartin observed two individuals use

the plank to access the ship. (Ex. C-3, C-4). To suggest otherwise would disregard the expansive definition of "gangway" provided by 29 C.F.R. § 1918.2. Further, the plank, though not physically a part of the ladder, was intentionally lashed to it to facilitate access onto the vessel. In other words, the Court views the plank as nothing more than an extension of the access point to the vessel, which, under the terms of the regulations, constituted the means of access from the shore side to the vessel. Accordingly, the Court finds that Complainant properly asserted jurisdiction over the condition.

Additionally, based on the record, the Court finds that it has jurisdiction over this proceeding and that Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

V. Applicable Law

To establish a violation of an OSHA standard, Complainant must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

VI. Discussion

A. Citation 1, Item 1

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

> 29 CFR 1918.22(b): Each side of the gangway, and the turntable if used, did not have a hand rail with a minimum height of 33 inches (0.84 m) (measured perpendicularly from rail to walking surface at the stanchion) and a mid-rail.

a. Port of Benicia, "Madame Butterfly", Berth 95, third hatch – On 7/30/14 it was observed that a plank over water and leading to the accommodation ladder of PCC Madame Butterfly, was not equipped with handrails thereby creating a fall hazard.

The cited standard provides:

> Each side of the gangway, and the turntable, if used, shall have a hand rail with a minimum height of 33 inches (.84 m) measured perpendicularly from rail to walking surfaces at the stanchion, with a midrail. Rails shall be made of wood, pipe, chain, wire, rope, or materials of equivalent strength and shall be kept taut always. Portable stanchions supporting railings shall be supported or secured to prevent accidental dislodgment.

29 C.F.R. § 1918.22(b).

i. The Standard Applies

According to the scope and application paragraph of Part 1918, "The regulations of this part apply to longshoring operations and related employments aboard vessels." 29 C.F.R. § 1918.1(a). The Court previously found, and the parties do not dispute, that Respondent was engaged in longshoring operations on the day of the inspection. Further, as discussed above in Section IV, *supra*, the Court also finds that the makeshift plank and accommodation ladder, taken as a whole, constitutes a gangway for the purposes of 29 C.F.R. § 1918.22(b). Thus, the Court finds that the standard applies.

ii. The Terms of the Standard were Violated

Further, the Court has no problem finding that the terms of the standard were violated. Insofar as the plank was a part of the gangway, it is subject to the same requirements as the accommodation ladder to which it was attached. That means, pursuant to 29 C.F.R. § 1918.22(b), the plank was required to have a suitable handrail and midrail, which it did not have. Accordingly, the Court finds that the terms of the standard were violated.

iii. Respondent Did Not Know, nor Could it Have Known, of the Violative Condition

The essence of this case hinges on the question of knowledge. Complainant offers two separate bases upon which knowledge can be found. First, Complainant contends that the condition was open and obvious and, therefore, should have been seen by Respondent. Second, Complainant contends that Respondent had direct knowledge of the condition because Coelho, one of Respondent's superintendents, actually walked up the unprotected gangway. In response, Respondent argues that it had no reason to believe that the condition existed because Sullivan had discussed the issue with the vessel's Chief Mate, who had agreed to raise the gangway to prevent access to it—and had, in fact, done so prior to the beginning of Respondent's operations. Further, as to Coelho's knowledge, Respondent contends that it would be improper to impute his knowledge of his own wrongdoing to Respondent because it was not foreseeable that he would access the gangway. For slightly different reasons, the Court agrees with Respondent that Complainant failed to establish actual or constructive knowledge of the violation.

As a general rule, "[t]he 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). Thus, Complainant "establishes a prima facie showing of knowledge by proving that a supervisory employee was responsible for the violation." *Aquatek Systs., Inc.*, 21 BNA OSHC 1400 (No. 03-1351, 2006). However, Respondent may rebut Complainant's *prima facie* showing of knowledge "with evidence that it took reasonable measures to prevent the occurrence of the violation." *Id.* (citing *Dover Elevator*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993)). "In

particular, the employer must show that it had a work rule that satisfied the requirements of the standard, which it adequately communicated and enforced." *Id.*

With respect to Complainant's argument that Respondent could have known of the condition due to its open and obvious nature, the Court finds that Complainant failed to establish how long the condition existed. In response to Respondent's claim that the condition did not exist for any appreciable amount of time, Complainant, citing to *L.R. Willson & Sons, Inc.*, argued even brief exposure to a hazard can constitute a violation and that duration of exposure is more properly considered in the penalty assessment context. *Compl't Br.* at 8 (citing *L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1986). First, the holding in *L.R. Willson* regarding the duration of exposure had nothing to do with the issue of constructive knowledge; rather, it addressed the applicability of competing fall protection standards and determined that the duration of the hazard does not impact the determination of whether the terms of the standard were violated. *L.R. Willson*, 773 F.2d at 1386. Second, whether brief exposure to a hazard can constitute a violation says nothing about whether a condition existed long enough for Respondent to be aware of it. Third, contrary to Complainant's argument, the Commission has held that the length of time that a condition exists has a direct impact on whether Respondent could have, with the exercise of reasonable diligence, known of the condition. *See Cranesville Block Co., Inc./Clark Division*, 23 BNA OSHC 1977 (No. 08-0316 *et al.*, 2012) (holding that complainant's failure to introduce evidence regarding length of time condition existed, respondent's inspection program, or its exercise of reasonable diligence precluded a finding of constructive knowledge).

In this case, Respondent utilized every possible opportunity to prevent the occurrence of this hazard. Sullivan discussed the gangway with the ship's Chief Mate upon his arrival onsite.

The Chief Mate agreed to raise the gangway to prevent its use and did so. Sullivan communicated this issue to the walking boss in charge of the daily safety talk, which is given to the longshoremen prior to the beginning of work. This message was communicated to all longshoremen and Respondent's full-time employees, such as Bekes and Coelho. Employees were admonished to use the stern ramp where the vehicles were being unloaded, and not to use the gangway, which was located at midship. (Tr. 147–48, 152). This admonition appears to have been followed because nobody, not even the CSHO, observed a violation until the afternoon, which was hours after the inspection began. (Tr. 64–67). No evidence was tendered to establish when or by whom the gangway was lowered or when the plank was tied to the bottom of the gangway. There simply was no credible evidence to suggest that the violative condition of the gangway existed long enough that Respondent's representatives could have noticed it but failed to do so. At the point when Coelho did become aware of the condition, he acted immediately to remedy it. Thus, there was no independent evidence to suggest constructive knowledge should be imputed to Respondent.

That said, it is clear that Coelho had actual knowledge of the hazardous condition on the gangway. Not only did he observe the hazard, but, in an attempt to abate it, he ended up exposing himself to it. (Ex. C-4). Coelho testified that part of his duties as superintendent includes the supervision of the longshoremen, their work, and ensuring they are working safely. (Tr. 172). Thus, as stated by the Commission in *Aquatek*, Complainant established a *prima facie* showing of knowledge "by proving that a supervisory employee was responsible for the violation." *Aquatek*, 21 BNA OSHC 1400. However, that *prima facie* showing can be rebutted by Respondent "with evidence that it took reasonable measures to prevent the occurrence of the violation." *Id.*

As noted above, Respondent instituted a work rule, which required longshoremen to use the stern ramp for ingress/egress and to avoid the gangway ramp at midship. (Tr. 147–48, 152). This rule was designed to prevent the use of a gangway when such use was unsafe and was implemented whenever there was an impediment to lowering the gangway at midship.[8] (Tr. 139). In this particular case, the Chief Mate and Sullivan noted multiple impediments, including the bollard,[9] the broken winch, and the rising tide. As a result, the decision was made to raise the gangway to make it unavailable for use. That decision was then communicated to everyone, from the ship's crew to Respondent's superintendents to the longshoremen. Thus, all of Respondent's employees had been informed the gangway was supposed to be raised and the proper means of ingress and egress was the stern ramp. Given this communication, and in light of the fact that the gangway entrance was over 300 feet away from Respondent's primary work area, the Court finds Respondent acted with reasonable diligence to prevent the occurrence of these violations.

Further, the testimony was undisputed that this particular configuration was an outlier—in other words, all of Respondent's witnesses testified that they had never previously seen a plank strapped to the end of the gangway. (Tr. 169–70, 222–23). Thus, in terms of enforcement, Respondent had not been confronted with the need to discipline anyone for a violation of this particular work rule prior to this occurrence. *See Aquatek*, 21 BNA OSHC 1400 ("[The foreman] normally monitored his employees' compliance with safety rules by making daily visits to worksites, and had never discovered employees violating [respondent's] fall protection rule."); *see also Dover Elevator*, 16 BNA OSHC at 1287 (holding that increased efforts to monitor

8. The Commission has never required an employer to reduce its safety rules to writing. *See Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994) (Commission does not require safety rules to be written as long as rules are clearly and effectively communicated to employees).

9. A bollard is a short, thick post that is located on the dock. The lines from the ship are secured to the bollard in order to keep the ship secured to the dock. (Tr. 138; Ex. C-4, C-5, C-7).

employee compliance not required where employees involved had good safety record and had not previously been found in violation of safety rules). Coelho took it upon himself to access this ramp in an attempt to abate the condition, which was the first documented instance of an employee violating Respondent's work rule. In response, Coelho received a verbal reprimand for abrogating the rule. (Tr. 219).

Under this particular set of facts, the Court finds Respondent should not be charged with knowledge, actual or constructive, of the hazardous condition. At the point when the condition was discovered by CSHO Trecartin, Coelho was the only representative of Respondent who was aware of the condition, or who even could have been aware of the condition through the exercise of reasonable diligence. Acting with good intentions, and a fair amount of haste, Coelho exposed himself to the hazardous condition on the gangway in order to abate such condition. His actions in that moment were contrary to a clear and adequately communicated work rule, which Respondent had not previously needed to invoke as a basis for discipline because it had not encountered this unusual circumstance. The Court does not find these facts establish Respondent had knowledge of the hazard and failed to prevent the violation from occurring.

iv. Respondent's Employees were Exposed to the Hazard

Although it is clear that at least one of Respondent's employees—Coelho—was exposed to the violative condition, in the interests of being complete the Court here addresses Complainant's arguments regarding the other "employee" CSHO Trecartin saw using the gangway and also the gangway's potential use as an emergency exit.

"To establish exposure, 'the Secretary . . . must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *Delek Ref., Ltd.*, 25 BNA OSHC 1365 (08-1386, 2015)

(citing *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). *See also Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976).

One of the key elements of the foregoing test is that the individual exposed must be an *employee*. The individual CSHO Trecartin observed walking on the gangway/plank contraption was not specifically identified at the time of the violation, nor did CSHO Trecartin undertake any further investigation to identify the purported employee in the neon vest.[10] Bekes testified that the ship's crew members—who are not employees of Respondent—were on the ship at the time of the inspection.[11] (Tr. 223). Without more information regarding the individual's identity, the Court cannot determine whether that person was an employee of Respondent or a crew member. Thus, the Court finds that Complainant failed to prove employee exposure to the hazard based upon the presence of the worker in the neon vest.

As to Complainant's argument that employee exposure to the hazard was reasonably predictable by virtue of potential use of the gangway as an emergency exit, the Court is equally suspect. According to the safety talk given on the morning of July 30, 2014, Respondent's employees were directed to use the nearest exit during an emergency, including the gangway. Thus, on the face of it, Respondent's employees could have been exposed to the makeshift, hazardous gangway plank if an emergency had occurred. However, as Coelho testified, the gangway exit from the ship was padlocked from the inside. In the event of an emergency, this exit would have been unavailable to Respondent's employees. As such, it was not reasonably predictable that an employee could have been exposed to the hazard. This conclusion is

10. No explanation was established as to why this individual was able to enter the ship through a door which Respondent employees testified they could not enter because it was locked.
11. In fact, according to Bekes, each of the entryways onto the ship is required to be manned by a crew member for security purposes. (Tr. 223).

bolstered by the fact that Respondent's employees were told not to use the gangway, which was over 300 feet away from the designated entrance, during work operations.

In light of Complainant's failure to establish actual or constructive knowledge of the hazardous condition, the Court finds that Complainant failed to prove a violation of the cited standard. Accordingly, Citation 1, Item 1a is hereby VACATED.

B. Citation 1, Item 1b

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

> 29 CFR 1918.22(g): Gangways were not kept clear of supporting bridles and other obstructions which impeded employee passage.
>
> a. Port of Benicia, "Madame Butterfly", Berth 95, third hatch – On 7/30/14 it was observed that a plank leading to the accommodation ladder of PCC Madame Butterfly obstructed the landing platform adjacent to the ladder thereby contributing to a fall hazard.

The cited standard provides:

> Gangways shall be kept clear of supporting bridles and other obstructions, to provide unobstructed passage. If, because of design, the gangway bridle cannot be moved to provide unobstructed passage, then the hazard shall be properly marked to alert employees of the danger.

29 C.F.R. § 1918.22(g).

The foregoing citation item is also directed at the plank described in Citation 1, Item 1a. *See* Section VI.a, *supra*. In this instance, however, Complainant alleges that the plank created an obstruction to the accommodation ladder, thereby creating a trip-and-fall hazard. (Ex. C-5, C-6). Although the Court agrees the plank appears to present an obstruction to the gangway that could pose a tripping hazard, the Court finds Complainant has failed to prove a violation for the same reasons described above in Section VI.a.iii, *supra*. Accordingly, Citation 1, Item 1b is hereby VACATED.

VII. Affirmative Defenses

In addition to asserting that it did not have knowledge, actual or constructive, of the violative condition, Respondent has also claimed that the violation was the product of unpreventable employee misconduct. Although the Court has already determined that the foregoing citation items should be vacated, it nonetheless addresses the employee misconduct defense, because it provides additional impetus for vacating the citation items alleged by Complainant.

The defense of unpreventable employee misconduct requires "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1040 (No. 90-945, 1993). 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 were discovered. *Burford's Tree, Inc.*, 22 BNA OSHC 1948 (No. 07-1899, 2010).

As discussed above, the Court has already found that Respondent had a work rule designed to prevent the violations and adequately communicated such rule to supervisors and rank-and-file employees. *See* Section VI.a.iii, *supra*. The Court also found that the rule was effectively enforced when violations were discovered. Although Respondent did not introduce a hard copy of its disciplinary policy, Bekes testified that such a policy was in place with respect to his full-time employees, who were the superintendents. (Tr. 215). Respondent's policy has graduated methods of discipline, ranging from verbal to written, that can lead to termination. Bekes testified he has fired employees for violations in the past. (Tr. 215). Bekes also testified that the process is somewhat similar with respect to the union labor (longshoremen), though he

admitted that when a longshoreman is "fired" it usually means that they are fired from the employer they are working for that day but that they will just go back to the union hall for a different assignment the next day. (Tr. 216–17). In either case, Respondent's witnesses testified that it does not have an extensive history of discipline on this rule because it had never been an issue until the day of the inspection. That said, in this instance, Respondent acted consistently with its stated enforcement policy by disciplining Coelho for accessing the make-shift plank in an attempt to abate the hazard. *See Aquatek*, 21 BNA OSHC 1400 (holding that reprimand of foreman after discovering he had violated safety rule demonstrates effective enforcement).

Finally, the Court also finds that Respondent took reasonable steps to discover violations of the work rule at issue. As Sullivan testified, not only did he meet with the Chief Mate to discuss and remedy the gangway issue, but he also testified that he, as well as other superintendents, performed a walk-through of the vessel to ensure that everything was in order and that no hazards were present. The superintendents, as well as longshoremen, were informed of the gangway issue and were directed to use only the stern ramp for accessing and exiting the ship. Further, Respondent employs its superintendents, as well as walking bosses, to observe the work being performed to ensure that it is done safely and in accordance with procedure. (Tr. 120–26, 176).

Supervisor Coelho's attempt to protect employees and remedy the hazard by using the defective gangway to ask a crew member through the ship entrance to raise the gangway back up to an unusable posture constitutes the sum and substance of established employee exposure. As noted above, the gangway entrance was located 300 feet away from the stern ramp entrance where Respondent's work was being performed, and the longshoremen had been directed to use

only the stern ramp.[12] There was no evidence that this rule had ever been violated in the past, nor was there any reason to believe that anyone working for Respondent should reasonably have been expected to use the gangway to perform their work.[13] According to CSHO Trecartin, her interviews revealed that Respondent's employees were well-versed in their jobs and the rules that governed them. (Tr. 32). *See Dover Elevator*, 16 BNA OSHC at 1287 (holding that increased efforts to monitor employee compliance not required where employees had good safety record and had not previously been found in violation of safety rules). When Coelho observed the condition, he immediately informed a member of the crew to have it remedied. Based upon this set of facts, the Court is not convinced Respondent could have taken any additional actions to prevent this condition from occurring. Even though a supervisor's involvement in a violation typically indicates that an employer's safety program is lax, in this instance the Court finds Coelho's actions to be idiosyncratic, unforeseeable, and inconsistent with the work rule governing access to the gangway.

12. Respondent's superintendents actually drove a vehicle between the stern ramp and the gangway (which was adjacent to the main office) due to the distance. (Tr. 179, 181, 189).
13. The same cannot be said of the vessel's crew; however, they are not employees of Respondent.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a, and its associated penalty, are hereby VACATED.
2. Citation 1, Item 1b is VACATED.

SO ORDERED

/s/
Peggy S. Ball
Judge, OSHRC

Date: December 7, 2015
Denver, Colorado