United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MANSON CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 14-0816

APPEARANCES:

Ashley A. Briefel, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Ann Roesenthal, Associate Solicitor of Labor for Occupational Safety and Health; Nicholas C. Geale, Acting Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Aaron K. Owada, Esq., AMS Law PC, Lacey, WA
For the Respondent

ORDER

On December 1, 2016, Administrative Law Judge Peggy S. Ball issued a Decision and Order in this case affirming Items 4b, 5a, and 6 of the citation. The judge's decision was directed for review on January 11, 2017, and a Briefing Notice was subsequently issued on February 2, 2017. The Briefing Notice requested that the parties brief certain issues solely related to Item 6, which alleged a serious violation of 29 C.F.R. § 1926.1431(k)(3). *See Bay State Refining Co.*, 15 BNA OSHC 1471, 1476 (No. 88-1731, 1992) ("While the Commission has authority to consider any issues raised in a case directed for review . . . the Commission at the same time has discretion to limit the scope of its review.").

On April 26, 2017, the Secretary notified the Commission by letter of his decision to withdraw Item 6. This withdrawal resolves the only item selected for review. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985) (holding that the Secretary's

discretion to withdraw citation is unreviewable). Therefore, we set aside the judge's Decision and Order to the extent that it is inconsistent with the Secretary's notice of withdrawal and accord the remainder of her decision the status of an unreviewed judge's decision. *Allstate Services Ltd.*, 23 BNA OSHC 1052, 1053 (No. 09-0035, 2010).

SO ORDERED.

/s/
Heather L. MacDougall
Acting Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 27, 2017

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DECISION AND ORDER

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 OSH Act). Following a complaint regarding workers engaged in unsafe practices, the Occupational Safety and Health Administration (OSHA) commenced an inspection of Manson Construction Company's (Manson's) worksite at the Vashon Island Ferry Terminal near Seattle, Washington on February 13, 2014. (Stip. 1, 2, 5; Ex. C-3.) As a result of this inspection, Manson was issued a Citation and Notification of Penalty (Citation) that included twelve serious violations, some of which were grouped together. (Sec'y Br. at 2.)

Respondent filed a timely notice of contest, bringing this matter before the Commission. Prior to trial, the Secretary withdrew Items 1, 2b, 3, 4c, 5b, and 5c. (Tr. 9-10.) A trial was held on the remaining items (2a, 2c, 4a, 4b, 5a, and 6) from July 14 to 17, 2015 in Seattle, Washington. (Tr. 10.) Afterwards, both parties filed post-trial briefs. For reasons set forth

below, Items 2a, 2c, and 4a of the Citation are vacated and Items 4b, 5a, and 6 of the Citation are affirmed, with penalties assessed as indicated below.

I. JURISDICTION

Section 10(c) of the Act confers jurisdiction over this action upon the Commission. The parties have stipulated and the record establishes that at all times relevant to this action, Respondent was 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). (Stip. 4, 12.)

II. FACTUAL BACKGROUND

On February 13, 2014, Robert Scott, an OSHA Compliance Officer (CO), commenced an investigation of Manson's worksite at the Vashon Island Ferry Terminal. (Stip. 2, 5.) During his site visit, he witnessed three workers wrapping what appeared to be steel cable around the pilings of an offshore marine structure used by ferry boats. (Stip. 6; Tr. 33-34, 36, 42, 45, 515.) The marine structure CO Scott observed is called a "dolphin" and it is a "group of timber and PVC pilings lashed together and standing generally upright several hundred yards offshore from the ferry terminal and to which a ferry can be moored." (Stip. 3.)

Employees conducted the work, described as re-lashing the dolphin, mainly from a crane-suspended personnel platform that Manson refers to as a jilly lift. (Stip. 6-9; Ex. C-5; Tr. 103, 515.) The crane suspending the jilly lift was floated out to the vicinity of the dolphin on a derrick barge. (Tr. 171.) The jilly lift did not have guardrails, handrails, or toe boards around all four sides. (Stip. 11; Ex. C-5; Tr. 666.) At the jilly lift's base there were two slots into which a wooden plank up to ten inches wide could be inserted or extended outward. (Tr. 52, 286, 411.) Manson referred to these planks as "jitter boards." (Tr. 45.) CO Scott observed at least one worker using the jilly lift to transfer to and from top of the dolphin. (Tr. 45; Ex. C-5.) He also

saw an employee sit, stand, and kneel on top of the dolphin to conduct lashing work. (Stip. 9; Ex. C-5.) None of the workers were using fall protection at any point. (Stip. 10; Ex. C-5.) The workers on the jilly lift and the one on the dolphin were, however, wearing personal flotation devices. (Tr. 622, 669.)

OSHA conducted a second site inspection on March 17, 2014. (Tr. 51.) At that time, the work on the dolphin had been completed but CO Scott and another CO, Edward DeLach, were able to more closely view the jilly lift which had been used on February 13, 2014. (Tr. 51-52.)

III. DISCUSSION

A. Applicable Law

All of the alleged violations arise under the construction standards contained in 29 C.F.R. § 1926. An employer must comply with these standards if its employees are "engaged in construction work," an activity defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12. The re-lashing of the dolphin fits within the standard's definition of construction and Respondent admits that it was engaged in construction work.[1]

For the Secretary to establish a violation of any OSHA construction standard, he must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more 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. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st

[1] Respondent did not challenge in its Answer the allegation in the Complaint that it was a business engaged in commercial construction. (Compl. ¶ II.) Therefore, this fact is deemed admitted. 29 C.F.R. § 2200.34(b)(2).

Cir. 1982). The Secretary has the burden of proving each of these elements by a preponderance of the evidence. *Id*.

All of the standards alleged to have been violated are mandatory safety standards promulgated pursuant to section 5(a)(2) of the OSH Act (29 U.S.C. § 654(a)(2)). Because their requirements must be adhered to whenever a worker encounters the specified condition, the Secretary is not required to prove that noncompliance creates a hazard. *See e.g., Austin Bridge Co.,* 7 BNA OSHC 1761, 1765-66 (No. 76-93, 1979); *Research-Cottrell, Inc.*, 9 BNA OSHC 1489, 1497 (No. 11756, 1981). Each of the cited standards also provides specific ways for the employer to eliminate the hazard, so the Secretary did not need to demonstrate feasibility of compliance. *See e.g., Modern Continental/Obayashi v. OSHRC*, 196 F.3d 274, 282 (1st Cir. 1999) (Secretary did not have to show that fall protection standard was feasible as applied); *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor,* 674 F.2d 1177, 1189 (7th Cir. 1982) (Secretary did not have to show feasibility of machine guarding required by a standard promulgated pursuant to section 5(a)(2)); *Long Beach Container Terminal, Inc.*, 811 F.2d 477, 479 (9th Cir. 1987) (employer had the burden to prove compliance was not possible).

Respondent raises two affirmative defenses—infeasibility and greater hazard—for which it bears the burden of proof. To establish infeasibility, Respondent must show that: (1) literal compliance with the terms of the cited standard was infeasible, and (2) an alternative protective measure was used or there was no feasible alternative measure. *See e.g., Otis Elevator Co.*, 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013). The greater hazard defense requires Respondent to prove: (1) compliance with the hazard is more hazardous than noncompliance; (2) alternative means of protection are unavailable; and (3) either a variance has been sought and denied or a

variance application would be inappropriate. *Dole v. Williams Enters.,* 876 F.2d 186, 188 (D.C. Cir. 1989); *True Drilling Co. v. Donovan*, 703 F.2d 1087, 1090 (9th Cir. 1983).

B. Violations of Subpart L of the Scaffold Standard – Items 2a, 2c, and 4a

1. Items 2a and 2c – Violations of 29 C.F.R. § 1926.451(b)(2) and (c)(2)(iii) – Width of Scaffold Platforms and unstable objects used as working platforms

In these citation items, the Secretary alleges that the jitter boards, which could be extended out from the base of the jilly lift, were scaffold platforms that failed to comply with scaffold safety standards. The cited standard defines "scaffold" as "any temporary elevated platform … used for supporting employees or materials or both," and specifies that a "platform" is "a work surface elevated above lower levels." 29 C.F.R. § 1926.450(a). It requires that "each scaffold platform and walkway shall be at least 18 inches (46 cm) wide" and precludes "[u]nstable objects" from being used "as a work platform." 29 C.F.R. §§ 1926.451(b)(2), 1926.451(c)(2)(iii). These standards are found in Subpart L (Scaffolds), which specifically exempts derrick or crane suspended personnel platforms from its purview. 29 C.F.R. § 1926.450(a) (Subpart L "does not apply to crane or derrick suspended personnel platforms"). *See also* Cranes and Derricks in Construction, 75 FR 47906, 47919 (Aug. 9, 2010) (in the section discussing the amendments to Subpart L, OSHA specified that "[p]ersonnel platforms suspended by cranes or derricks are now regulated by § 1926.1431"). The parties dispute whether this exemption applies to either the jilly lift or the jitterboards.

a) *Jilly Lift*

The jilly lift was suspended by a crane and was not attached to a building or other permanent structure. (Tr. 113, 171.) Accordingly, Respondent asserts it falls squarely within the exemption to the scaffold standard for personnel platforms suspended by a crane. (Resp't Br. at 17.) The Secretary appears to agree with Respondent that the jilly lift was a crane suspended

personnel platform in that, in connection with Item 5a, he alleges that the jilly lift did not comply with the requirements for such equipment. However, the Secretary attempts to evade the scaffold standard's exclusion of crane suspended personnel platforms by arguing that the exception applies only to properly constructed equipment. (Sec'y Br. at n.12.) Following this rationale, if a crane suspended platform did not comply with Subpart CC (the Crane and Derrick Standard) it would then be considered a scaffold subject to Subpart L.

The Court does not find support in either the language of the applicable standards or known legal authority for the Secretary's argument that if a crane suspended platform does not comply with Subpart CC (the Crane and Derrick standard) then, by default, it becomes a scaffold subject to Subpart L. *See Crown Pacific v. OSHRC*, 197 F.3d 1036, 1040 (9th Cir. 1999) (if the standard is not ambiguous and plain meaning is contrary to the Secretary's interpretation deference is not appropriate). The cited standard expressly carves out crane suspended personnel platforms for separate regulation, presumably because of safety factors unique to hoisted personnel. 29 C.F.R. § 1926.450(a) (stating that it does not apply to "crane or derrick suspended personnel platforms"). Rather than being dependent upon whether the equipment is compliant, the exception hinges upon the nature of the equipment, i.e., whether it is or is not a crane or derrick suspended personnel platform. 29 C.F.R. §§ 1926.450(a), 1926.1431. And on that question there does not appear to be a valid dispute—the jilly lift was connected to a crane and Manson was using it to hoist personnel. (Stip. 9; Tr. 171.) Accordingly, the Court finds the jilly lift was a crane suspended personnel platform, not a scaffold subject to the cited standard.

b) *Jitter Boards*

The Secretary also asks the Court to find the jitter boards were a separate and distinct piece of equipment that needed to comply with the scaffold standard's requirement for scaffold

platforms to be at least 18 inches wide and stable. (Sec'y Br. at 8-9.) Respondent counters that the jitter boards are part of a crane suspended personnel platform and therefore are exempt from the cited scaffold standard. (Resp't Br. at 17.)

The record does not sufficiently support the Secretary's approach. The jitter boards were not free-floating or connected to any other structure, but were attached to and held in place by equipment suspended by a crane. (Tr. 113, 656-57.) Although the jitter boards were not connected directly to the crane, they were only in the air and available for use when the crane was hoisting the jilly lift. *Id.* In essence, the jitter boards served as an extension of the jilly lift, which Manson specifically designed to accommodate them. (Tr. 478, 710.) Employees could not use the jitter boards as working platforms except when they were anchored to the jilly lift, which, as discussed above, was a crane suspended personnel platform. (Tr. 113, 656-57.) Dale Cavanaugh, a retired OSHA Assistant Regional Administrator, testified that the jitter board "would be a scaffold in any other application." (Tr. 364.) That may well be an accurate assessment but the issue before this Court is whether the scaffold standard applies to the jitter boards as the Respondent was using them. On this question, for the reasons discussed above, there is insufficient evidence to support the view that the jitter boards are not an integral part of a crane suspended personnel platform.

Complainant has not established a legal or factual basis for the Court to ignore the exclusion of suspended personnel platforms in the cited standard as to either the jilly lift or the jitter boards.[2] Therefore the Court vacates Items 2a and 2c.

[2] Since the cited standards do not apply, the Court does not further address the remaining requirements to establish violation of 29 C.F.R. § 1926.451(b)(2) and (c)(2)(iii).

2. Item 4a – Violation of 29 C.F.R. § 1926.451(g)(1)(vii) – Failure to Provide Fall Protection to the Workers on the Jitter Board

As with Items 2a and 2c, the Secretary also argues in connection with Item 4a that the jitter boards are a scaffold to which the scaffold fall protection requirements found in 29 C.F.R. § 1926.451(g)(1)(vi) apply. (Sec'y Br. at 14.) This standard requires employees to be protected by a personal fall arrest system or a guardrail system when they are on a scaffold more than 10 feet above a lower level. 29 C.F.R. § 1926.451(g)(1)(vii). There is no dispute that there were no safety nets or guardrails and the workers were not wearing personal fall arrest systems. (Ex. C-5, C-6; Stip. 10; Resp't Br. at 5.) The dispositive issue is whether the jitter boards are part of a crane suspended personnel platform and therefore exempt from the cited standard under 29 C.F.R. § 1926.450(a). On that question, consistently with the findings above, the Court concludes the Secretary failed to establish the applicability of the cited standard. The jitter boards are an extension of the jilly lift and could only be used in conjunction with it. (Tr. 113, 478, 656-57, 710.) Accordingly, the entire piece of equipment is a crane suspended platform exempt from the cited standard under 29 C.F.R. § 1926.450(a). As the Secretary has not established applicability, the Court vacates Item 4a.

C. **Item 4b – Violation of 29 C.F.R. § 1926.501(b)(1) – Failure to Provide Fall Protection to the Worker on top of the Dolphin**

Whenever a worker is on a walking or working surface six feet above a lower level to which he can fall, he must be protected from falling by "the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1). The standard broadly defines "lower levels" to include, among other things, "*water*, equipment, structures and the ground." 29 C.F.R. § 1926.500(b) (emphasis added). The employee observed on top of the dolphin was not wearing fall protection and was working approximately twenty-four feet above the water's surface. (Tr. 856; Stip. 10; Ex. C-6.)

As a preliminary matter, the parties dispute the scope of the Secretary's burden of proof. (Sec'y Br. at 7; Resp't Br. at 19.) Respondent asserts that the cited standard is performance oriented and, as such, the Secretary must establish a fall would have presented a hazard to the employee who fell, and that the employer recognized the hazard. (Resp't Br. at 19.) According to Respondent, the Secretary did not meet this burden because any fall from the dolphin would have resulted in the employee landing in open water as opposed to a hard surface; and the Secretary failed to establish that falling into open water was a hazard, let alone a hazard the employer recognized. *Id.* at 18-19. The Secretary disputes Respondent's characterization of the cited standard as being performance oriented and argues instead that it is a specification standard for which the existence of a hazard is presumed. (Sec'y Br. at 7-8.) He also disputes Respondent's allegation that there was no hazard. *Id.* at 12.

In making its argument that the Secretary had to prove the presence of a hazard, Respondent attempts to apply a single Ninth Circuit case, *Greyhound-Lines-West v. Marshall,* 575 F.2d 759 (9th Cir. 1978), concerning an entirely different standard related to personal protective equipment (Subpart E), to the fall protection standards found in Subpart M at issue here. (Resp't Br. at 19.) Performance standards, like the one concerning an employer's obligation to identify appropriate personal protective equipment at issue in *Greyhound Lines*, are broadly written and "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Thomas Indus. Coatings, Inc*., 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007). Performance standards only require action on the part of the employer if there is a hazard. *Id.* Thus, the Commission has concluded that the Secretary must show a hazard before an employer is found to have been in violation of such standards. *Id.* In contrast, specification standards detail the precise equipment, materials, and work processes

required to eliminate hazards. *Cleveland Wrecking Co.,* 24 BNA OSHC 1103, 1106 (No. 07-0437, 2013) (concluding that the fall protection requirements found in 29 C.F.R. § 1926.501(c) constitute a specification standard). This detail specifying abatement methods distinguishes a specification standard from a performance standard. For specification standards, a hazard is presumed. *Id.* The fact that a standard requires the use of personal protective equipment does not mean it is a performance standard. Rather, the determining issue is whether the standard contains the method by which the hazard is to be abated. *See Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 441(5th Cir. 1977) (employer had the duty to show compliance with guarding standard was not feasible). If it does, then the burden of proof is on the employer to demonstrate that the remedies contained in the standard are not feasible under the particular circumstances. *Cleveland Wrecking,* 24 BNA OSHC at 1106.

The Commission has consistently treated the standards found in Subpart M-Fall Protection as specification standards for which the Secretary's prima facie burden is limited to showing applicability, violation of the standard, employee exposure, and knowledge. *See e.g., Modern,* 196 F.3d at 282 (Secretary did not have the burden to show fall protection standard was feasible as applied); *Brennan v. OSHRC,* 513 F.2d 10232, 1035 (2d Cir. 1975) (same); *Fabi Constr. Co., Inc.*, 370 F.3d 29, 38 (D.C. Cir. 2004) (fall protection standard treated as specification standard); *Nuprecon LP,* 23 BNA OSHC 1817, 1818 n.3 (No. 08-1037, 2012) (violation of the fall protection standard, 29 C.F.R. § 1926.501(b)(1), treated as a specification standard); *MJP Constr. Co., Inc.*, 19 BNA OSHC 1638, 1642 n.6 (No. 98-0502, 2001) (same). In *Cleveland Wrecking,* the Commission determined that even though the fall protection standard at issue in that case permits some discretion on the part of the employer, that discretion does not turn the standard into a performance standard and thus require an expanded burden of proof. 24

BNA OSHC at 1106 (discussing 29 C.F.R. § 1926.501(c)). *See also Marion Power Shovel Co., Inc.*, 8 BNA OSHC 2244, 2246 (No. 76-4114, 1980) (concluding that 29 C.F.R. § 1926.252(e)(1)(i) is a specific duty standard despite the various alternative methods of compliance permitted).

Just like the fall protection violation standard at issue in *Cleveland Wrecking*, the cited standard here requires fall protection whenever the walking/working surface with an unprotected side or edge is six feet or more above a lower level, but permits the employer to choose one of three specified methods. 29 C.F.R. § 1926.501(b)(1); Safety Standards for Fall Protection in the Construction Industry: Final Rule, 59 Fed. Reg. 40672, 40680-40682 (1994) (preamble to the fall protection standards); *Nuprecon,* 23 BNA OSHC at 1820. Although the standard at issue here has some flexibility, it limits the employer's choice to one of three specified methods and employers lack discretion to not provide fall protection. *Id.* The Court finds that 29 C.F.R. § 1926.501(b)(1) is not a performance standard, and therefore the Secretary was not required to establish hazard recognition and proof of industry custom as Respondent alleges. *See e.g. A.E. Burgess Leather Co. v.* OSHRC, 576 F.2d 948, 950-51 (5th Cir. 1978) (declining to require proof of hazard recognition and industry custom in connection with a violation of a machine guarding standard that permitted various types of compliance). Instead, the Secretary's prima facie case required a showing of applicability, violation of the standard, employee exposure, and knowledge. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

a) *Applicability*

As noted above, the cited standard requires fall protection for anyone working six feet or more above a lower level and this requirement does not vary because the lower level is water, the ground, or a structure. 29 C.F.R. §§ 1926.500(b) (definition of lower level), 1926.501(b)(1). In

addition to the standard's plain language, two OSHA interpretation letters bolster the Secretary's position. (Exs. C-16 & C-17.) These letters emphasize that fall protection is required for employees working over water, either on a scaffold platform or otherwise. *Id.* OSHA's Letter of Interpretation dated February 9, 2004, emphasizes that the "lower level" referred to in § 1926.501 could be water. (Ex. C-16 at 2.) The letter also notes that the provision of life jackets is in addition to the fall protection requirements, not in lieu of them. *Id.* An earlier OSHA Letter of Interpretation, dated September 28, 1999, also emphasized that employers must provide fall protection, not just life jackets, when the distance from the working platform to the water surface exceeds six feet. (Ex. C-17 at 1.) Indeed, even Respondent appeared to recognize that the fall protection standards do not make a distinction between falling onto land and falling into water. (Resp't Br. at 4; Tr. 440-41, 448.) Therefore, the Court finds that the cited standard applied. *See Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385 (No. 92-262, 1995) (concluding that the fall protection requirements applied even when surface below was water).

The Court notes that Manson's Vice President for Equipment, Shawn Hillis, testified that the company chose to follow the Army Corps of Engineers' EM-385 manual, which requires fall protection only when working more than 25 feet over water, rather than OSHA's more stringent standards. (Tr. 682-84; Ex. C-26 (excerpt from EM-385 manual).) The EM-385 manual is not codified, and as such does not have the force and effect of law. *BME & Sons, Inc.*, 23 BNA OSHC 1731, 1735 (No. 10-0248, 2011) (Welsh, J.). Indeed, Manson's Director of Safety acknowledged that EM-385 was something the Army Corps put together for contractors and that it applied to the workers on the jilly lift, but did not cover the worker on the dolphin. (Tr. 427, 487.) So it is not even clear whether Manson thought the EM-385 exception to fall protection requirements for work over water applied to the worker on the dolphin. (Tr. 487.) Further, even

if Manson thought the EM-385 manual's fall protection requirements applied to the worker on the dolphin, the manual itself indicates that when more stringent requirements are set out in 29 C.F.R. § 1926, those requirements take precedence over what is set forth in EM-385. (Ex. C-26 at 2.) Thus, in order to follow EM-385, Manson still needed to comply with the cited standard and provide fall protection to the worker on the dolphin.

b) *Violation of 29 C.F.R. § 1926.501(b)(1)*

There is no dispute that the worker on the dolphin was not using fall protection on February 13, 2014. (Stip. 10; Ex. C-5; Tr. 855-56.) Respondent argues that if an employee fell, it could have lowered the jilly lift to rescue him. (Resp't Br. at 13; Tr. 672.) It also asserts that there is no evidence of debris in the water that could have injured a falling employee and further notes that employees were wearing personal flotation devices. (Resp't Br. at 18; Tr. 432.)

Even accepting Respondent's assertions as true does nothing to undermine the Secretary's undisputed evidence that the worker on the dolphin did not have fall protection as required.[3] (Stip. 10; Ex. C-5.) Respondent's arguments, at best, go to the violation's gravity. The purpose of the OSH Act is to prevent accidents. *See generally Mineral Indus. & Heavy Constr. Grp. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981) ("The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors"). Thus, the fact that an employer has taken a required step to reduce injury in the event of an accident does not mean that there has been no violation of a mandatory safety standard. *Id.*

[3] The Court notes that CO Scott and OSHA Area Director Dave Baker testified that an employee falling off the top of the dolphin could have struck the dolphin itself, the jitter boards, or the jilly lift. (Tr. 70, 179-80.)

c) *Exposure to the Violative Condition*

"Exposure to a violative condition may be established either by showing actual exposure or showing access to the hazard was reasonably predictable." *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995). Exhibit C-6 depicts the employee working atop dolphin without fall protection. (Tr. 541.) That employee, Anthony Barr, admitted that he could have hit either the water or the bottom part of the dolphin if he had fallen off the structure. (Tr. 541, 615.) This is sufficient to show actual exposure to the violative condition.

d) *Respondent Knew, or Should Have Known of the Violative Conditions*

The worker on top of the dolphin was a supervisor and another supervisor was within a few feet of him on the jilly lift. (Ex. C-6 at 2-3; Tr. 46, 55. 497-98.) *See Hamilton Fixture,* 16 BNA OSHC 1073, 1089 (No. 88–1720, 1993) (an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir.1994); *Minnotte Contracting & Erection Corp*., 6 BNA OSHC 1369, 1371-72 (No. 15919, 1978) (employees working without tied-off safety belts were in plain view and within sight of a foreman). CO Scott witnessed and videotaped the worker on top of the dolphin from a public road. (Tr. 36, 38.) The lack of fall protection was open, obvious, and in plain view. *Ted Wilkerson, Inc.,* 9 BNA OSHC 2012, 2016 (No. 13390, 1981) (a leadman "would have been in a position to observe" the employee in the hazardous situation); *Am. Airlines, Inc.,* 17 BNA OSHC 1552, 1555 (No. 93-1817, 1996) (consolidated) (finding knowledge when conditions were in plain view and supervisory personnel were present). This is sufficient to establish Respondent's knowledge of the violative condition.

2. Affirmative Defenses

a) *Infeasibility Defense*

An employer arguing that compliance with a standard was infeasible must show that: (1) literal compliance with the terms of the cited standard was infeasible, and (2) an alternative protective measure was used or there was no feasible alternative measure. *Rockwell Int'l Corp*., 17 BNA OSHC 1801, 1807 (No. 93-54, 1996) (consol.); *Avcon Inc., et al.,* 23 BNA OSHC 1440, 1454 (No. 98-0755, 2011) (consol.); *E&R Erectors, Inc. v. Sec'y of Labor*, 107 F.3d 157, 163 (3d Cir. 1997) ("[t]he burden of establishing an affirmative defense is on the employer, and every element must be established"). It is not enough to show that compliance is difficult, expensive, or would require changes to operations. *See Long Beach*, 811 F.2d at 479 (a workable method of abatement defeated defense); *Hughes Bros., Inc*., 6 BNA OSHC 1830, 1835 (No. 12523, 1978) (difficulty of compliance was not sufficient to defeat citation); *Gregory & Cook Inc*., 17 BNA OSHC 1189, 1190-92 (No. 92-1891, 1995) (guarding was technologically and economically feasible).

In terms of the first element of the defense, feasibility of compliance, as discussed above, the cited standard required employees to be protected by "a guardrail system, safety net system, or personal fall arrest system." 29 C.F.R. § 1926.501(b)(1). (Tr. 139.) Manson only discusses why it believes that a personal fall arrest system would have been infeasible.[4] (Tr. 768.) *See Dun-Par Engineered Form Co.,* 13 BNA OSHC 2147, 2149 (No. 79-2553, 1989) (requiring proof as to why each fall protection method permitted by the standard was not feasible). According to Manson, personal fall arrest systems were infeasible because there was no suitable

[4] Manson did offer testimony suggesting that the safety nets would create a greater hazard. That claim is discussed in the following section.

anchor point for such a system. (Resp't Br. at 20-21.) In addition, Bradley Dillon, of Guardian Fall Protection, gave expert testimony that it would not be possible for a worker to remain in fall restraint at all times because of the dolphin's shape. (Tr. 782.)

Mr. Barr, the Manson supervisor who was on top of the dolphin, testified that the pilings which make up the dolphin were in such poor condition at the top that he would not have used them for an anchor point on top of the dolphin. (Tr. 552.) Despite this assertion, Mr. Barr acknowledged that he had not examined the steel plate at the top of the dolphin. (Tr. 552, 589-90, 601.) Nor did Manson's safety director (Moore) or its fall protection expert (Dillon) examine the steel plate or the rest of the dolphin before the decision not to use fall protection was made. (Tr. 449, 787) The steel plate was 3/4 of an inch thick and had a shackle used to hold ferries in place at night.[5] (Tr. 372; Ex. C-11 (schematic of dolphin).) Brian Endres, who was employed by the Washington State Department of Transportation (DOT), testified that he had no reason to believe that the steel plate and shackle were not firmly welded to the dolphin. (Tr. 848.) He indicated that when DOT employees work on the dolphins, they use fall protection. (Tr. 857-58.) Former OSHA Assistant Regional Administrator Cavanaugh also testified as to his belief that the steel plate and shackle could have been used as an anchor point. (Tr. 375, 880, 901.) Indeed, the shackles on the dolphins were used to moor 400-ton ferries. (Tr. 850.) Further, Manson did not explain why, if the steel plate had not been firmly in place, it could not have been welded sufficiently to make it a suitable anchor point. (Tr. 499.) All of these considerations undermine Manson's contention that there were no means available to anchor a

[5] Manson notes that the video showing the shackle was taken a year after the alleged violations. (Ex. C-9; Resp't Br. at 21.) It presented no evidence that the passage of time resulted in changed conditions at the top of the dolphin or that the shackle had been adequately evaluated before the citation was issued. Although Mr. Barr did not recall seeing the shackle, he made no assertion about the steel plate itself.

fall restraint system. *See So. Pan Servs., Co.,* 21 BNA OSHC 1274, 1278 (No. 99-0933, 2005) (requiring site specific evaluation of the availability of fall protection for leading edge work).

Manson also argues that there was not enough room on the top of the dolphin to use a fall arrest system. (Resp't Br. at 21.) Mr. Dillon testified that a 22 feet minimum fall clearance is required for a worker wearing a full body harness with an anchor point at foot level. (Tr. 856.) He noted that OSHA would calculate a lower minimum (nineteen feet). (Tr. 764.) Still, he opined that 22 feet was required if the calculation was made according to the assumptions set out in the American National Standards Institute (ANSI) voluntary consensus standard. *Id.*

Regardless of whether the fall clearance is calculated consistently with the OSHA methodology or the ANSI standard, the Court finds that Manson failed to show there was insufficient room for a fall arrest system. At the trial, Manson's counsel represented to witnesses that the dolphin was twenty feet above the water, but all of the witnesses described the height as one to five feet greater than that.[6] (Tr. 57, 669, 757, 856, 810.) CO Scott estimated the height to be "roughly" twenty-one feet. (Tr. 57.) Mr. Endres of the DOT calculated the dolphin's height to be approximately twenty-four feet above the surface of the water. (Tr. 855-56.) His estimate is consistent with that of Mr. Hillis, Manson's Vice President of Equipment, who indicated that the dolphin was about twenty-five feet high, and the schematic of the dolphin, which indicates a total height of twenty-eight feet. (Tr. 668-69; Ex. C-11.) Thus, Manson's counsel's unsupported representation that the person on top of the dolphin was twenty feet above the water is rejected. Since Mr. Dillion's opinion about whether there was sufficient height for a fall arrest system was based on counsel's unsupported representation of height, it is given less weight. It is unclear if

[6] In its brief, Manson also states, without citation to the record, that the height of the dolphin was twenty feet above the water level. (Resp't Br. at 21.)

he would have had the same opinion had he been told that the height of the dolphin was more than twenty-one feet high. Considering the discrepancies, the Court finds that it does not have sufficient information to conclude that the dolphin was not high enough to permit appropriate fall protection.

Finally, Manson argues that a fall restraint system would not be feasible because of the dolphin's irregular shape. (Resp't Br. at 21.) However, Manson never explained why the irregular shape rendered all fall restraint systems infeasible. Some fall restraint systems prevent a worker from getting close enough to the edge to fall, while others permit workers to move about more, because they have a longer reach, but lock in the event of a fall. (Tr. 370.) 29 C.F.R. § 1926.500 (defining personal fall arrest system and self-retracting lifeline/lanyard). Mr. Barr conceded that a self-retracting lanyard would have prevented him from falling very far and former Assistant Regional Administrator Cavanaugh indicated that such a system could be feasible. (Tr. 601-2, 901-2.) Mr. Dillion asserted that he was not aware of a self-retracting lanyard certified to be appropriate for use with an anchor point at foot level that was available at the time of the inspection. (Tr. 455-56.) He appeared to acknowledge that such systems were available—indeed they have been defined in 29 C.F.R. § 1926.501 since it first became a final rule in 1994. (Tr. 455.) However, he asserted that he was not aware of a system that had been "certified" for use with an anchor point at foot level. *Id.* He was not asked, and did not explain, whether he was referring to an OSHA certification or one to be provided by a manufacturer. (Tr. 454-56.) Nor did he indicate when certified systems became available. *Id.* Finally, he limited his opinion solely to his awareness of self-retracting systems with an anchor point at a worker's feet. (Tr. 455.) He did not address systems with anchor points at a higher point and Respondent

offered no clarification in its brief.[7] In contrast, Mr. Cavanaugh indicated that the anchor point did not need to be at the worker's feet because Manson could have welded a pole to the steel plate at the top of the dolphin. (Tr. 901.)

Even accepting that a certified self-retracting lanyard with an anchor point at foot level was not available, Respondent did establish why it could not have implemented a guardrail or safety net system. (Tr. 779, 781-3.) Area Director Baker indicated that a guardrail system could have been used and Respondent does not refute such assertion. (Tr. 244.) Because this is an affirmative defense, Manson had the burden to show compliance was infeasible, and its failure to offer sufficient evidence on why each of the standard's specified systems was infeasible defeats the defense. *See Altor, Inc.*, 23 BNA OSHC 1458, 1470 (No. 99-0958, 2011) (rejecting infeasibility defense in connection with a fall protection violation); *MJP*, 19 BNA OSHC at 1643 (rejecting feasibility defense in connection with violations of 29 C.F.R. § 1926.501(b)).

Finally, even if Manson had shown that literal compliance was infeasible, it failed to satisfy the second element of its burden—that an alternative protective measure was used or there was no feasible alternative measure. *See MJP,* 19 BNA OSHC at 1642. Manson did not employ any method of fall protection for the worker on top of the dolphin. When an employer cannot fully comply with the literal terms of a standard, it must nevertheless comply to the extent feasible. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2075 (No. 87-1359, 1991) (finding that limited guardrails may have been feasible and that therefore the defense was not established). There is no evidence that Manson considered the feasibility of fall protection at the

[7] Mr. Cavanaugh acknowledged that he did not know for certain if there was a self-retracting lanyard available that complied with the OSHA six foot fall limitation and three and half feet of deceleration requirement at the time of the inspection but indicated that he would be surprised if that was the case. (Tr. 903.)

worksite, prior to the inspection, let alone implemented any alternative measures. *See So. Pan,* 21 BNA OSHC at 1278 (requiring a site specific analysis of the need for fall protection); *MJP,* 19 BNA OSHC at 1642 (rejecting defense when employer failed to establish that alternative means of protection were being used or were unavailable). Thus, as Manson failed to demonstrate either the infeasibility of implementing any one of the methods of fall protection specified in the standard or the informed absence of other steps which could have been taken, its affirmative defense of infeasibility is rejected.

b) *Greater Hazard*

To the extent that Respondent intended to raise the greater hazard defense, the Court notes that this defense requires the employer to prove each of the following elements: (1) compliance with the hazard is more hazardous than noncompliance; (2) alternative means of protection are unavailable; and (3) either a variance has been sought and denied or a variance application would be inappropriate. *Dole,* 876 F.2d at 188; *True Drilling*, 703 F.2d at 1090.

As discussed above, the cited standard permits the use of safety nets, fall arrest systems, or guardrails as methods of fall protection. 29 C.F.R. § 1926.501(b)(1). While Manson offered evidence about whether safety nets and personal fall arrest systems would present a greater hazard, it did not present evidence on whether the use of guardrails would have created a greater hazard. (Tr. 555, 729.) *See State Sheet Metal Co.,* 16 BNA OSHC 1155, 1159 (No. 90-1620, 1993) (consol.). Manson also has not applied for a variance or explained why doing so would be inappropriate. *See Spancrete Ne., Inc.,* 15 BNA OSHC 1020, 1022-23 (No. 86-521, 1991) ("We need not inquire whether [the employer] has proved the first two elements of the defense, because it is clear that the company has introduced no evidence on the third"); *Loomis Cabinet Co. v. OSHRC,* 20 F.3d 938, 943 (9th Cir. 1994) (greater hazard defense cannot be raised without

the employer "first exhausting the procedures for obtaining a variance"); *Altor*, 23 BNA OSHC at 1470 (rejecting greater hazard defense in connection with a fall protection violation when there was no explanation for not seeking a variance). Instead of rejecting the defense on the basis of this failure, the Court discusses remaining requirements.

Concerning the first element of the defense, Paul Huber, a professional engineer and manager at Manson, gave expert testimony concerning the suitability of safety nets as fall protection. (Tr. 728.) He indicated that it would be safer to fall into open water where there are no obstructions rather than into a safety net. (Tr. 729.) His opinion was limited to situations where a person would encounter no obstructions in the fall. *Id.*

However, Manson did not establish that a person falling from the dolphin would not encounter any obstructions. First, the dolphin tilted at an angle such that an employee falling off the top could strike the base, which was wider than the top. (Tr. 56, 70, 179-80, 641; Ex. C-11.) Second, even though the video does not appear to show debris near the base of the dolphin when the photograph was taken, Area Director Baker and CO DeLach both testified that debris was frequently present in the water of Puget Sound. (Tr. 170, 236-37, 263-64.) Third, a person falling off the dolphin could strike the jilly lift. (Ex. C-6; Tr. 175.) Besides the possibility of obstructions, the Secretary also presented evidence that falling into open water was a serious hazard. (Tr. 174, 265.) Thus, the Court finds that Manson did not establish that using a safety net would have created a greater hazard than providing no fall protection.

Manson also argues that it could not use the personal fall arrest systems permitted by the standard, because doing so would have introduced a tripping hazard. (Tr. 555, 557.) That possibility is insufficient to excuse noncompliance with the cited standard. *See Forest Park Roofing Co*., 8 BNA OSHC 1181, 1185 (No. 76-1844, 1980) (noting that safety lines could

create a trip hazard but finding that insufficient to establish greater hazard defense for a violation of the fall protection requirements found in 29 C.F.R. § 1926.28(a)); *J.W. Conway, Inc.,* 7 BNA OSHC 1718, 1719 (No. 15942, 1979) (rejecting the argument that the possibility of a trip hazard rendered fall protection infeasible). As former OSHA Assistant Regional Administrator Cavanaugh testified, crews can be trained to avoid the trip hazard when the anchor is at floor level. (Tr. 880.) Further, as discussed above, although Mr. Barr indicated that an anchor point at the level of his feet would have created a trip hazard, neither he nor any other witness established that this risk was greater than the risk associated from noncompliance.[8] (Tr. 720.) Mr. Barr acknowledged that a self-retracting lanyard system attached to an anchor would have limited his fall. (Tr. 555, 601-2.) The fact that compliance may create a different hazard is not sufficient to establish the defense. *See Marion,* 8 BNA OSHC at 2248; *Forest*, 8 BNA OSHC at 1185.

In any event, even if Manson had shown that compliance with the standard would be more hazardous than noncompliance, Manson failed to establish the other elements of the defense—that alternative means of protection were unavailable and that it either sought a variance or that a variance application would be inappropriate. As for the availability of alternative means of protection, while Manson offered testimony as to why safety nets could not be used, it did not establish that there was not any type of personal fall arrest system that could have been implemented. (Tr. 729.) It did not explain why a guardrail system could not have been implemented. *See State Sheet,* 16 BNA OSHC at 1159 ("[b]efore an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater

[8] For example, Mr. Huber, one of Manson's engineers who gave expert testimony, indicated that an anchor point at the level of someone's feet was "not as desirable" as one higher up. (Tr. 720.) He did not indicate that it presented a greater hazard than no fall protection at all.

hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard").

Finally, as to the third element of the defense, Manson never sought a variance for any of its work practices, including those related to fall protection. (Tr. 451.) In its brief, Respondent argues that it was justified in not seeking a variance due to time constraints it was under to make repairs. (Resp't Br. at 22-23.) Even if this Court were to assume that the need to perform the work quickly could excuse a failure to apply for a variance, the Court finds that Manson did not establish that it did not have time to seek a variance from the requirement to have fall protection when employees worked from the top of dolphins. Manson regularly performed work at the ferry terminal and employees had re-lashed dolphins before. (Tr. 428.) While it may have been that on the first occasion of performing such work applying for the variance would have been difficult, Manson could have done so after the fact, knowing that it would be called on again to perform similar tasks. "The variance requirement is very much a part of an employer's burden of the affirmative defense of greater hazard." *Spancrete,* 15 BNA OSHC at 1023. The Court finds that Manson failed to establish any of the elements of the affirmative defense of greater hazard and thus rejects the defense.

3. Characterization and Penalty

Manson claims that falling into the water from the dolphin could not result in death or serious physical injury. (Resp't Br. at 18-19.) The Secretary disputes this, arguing that the dolphin tilted at an angle and so a worker might not fall directly into the water and asserts that even a direct fall into the water could result in serious injuries or death. (Sec'y Br. at 12-13, 20; Tr. 70, 174,179-80, 287, 367.)

A violation is classified as serious under section 17(k) of the Act if "there is substantial probability that death or serious physical harm could result" if an accident occurred. 29 U.S.C.

§ 666(k); *Compass Envtl., Inc*., 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). Substantial probability "refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result." *Illinois Power Co. v. OSHRC*, 632 F.2d 25, 28 (7th Cir. 1980). If the harm the standard was intended to prevent is "death or serious injury, a violation of the regulation is serious per se." *Phelps Dodge Corp., v. OSHRC*, 775 F.2d 1237, 1240 (9th Cir. 1984).

The Secretary offered evidence about injuries from a fall and the risk of inhalation if a worker tumbled into water from a trip or fall. (Tr. 262, 287.) CO Scott explained that a worker falling from the dolphin could strike the jilly lift or the dolphin itself on his way down and this could result in serious injury.[9] (Tr. 70-71.) In addition, a person falling into the water could strike debris.[10] (Tr. 263-64, 298, 366.) CO DeLach agreed with CO Scott's assessment of the seriousness of this item. (Tr. 177, 265.) He elaborated that the injuries could be serious and permanent and even result in death. (Tr. 175, 179.) Further, the average temperature of water near the Vashon Island ferry terminal in February is 46 degrees Fahrenheit. (Ex. 30 (temperature table); Tr. 298.) As CO DeLach explained, a person falling into cold water such as this has a tendency to inhale due to the shock of the cold water. (Tr. 262.) This can lead to drowning. *Id.* Former Assistant Regional Administrator Cavanaugh also testified that because the fall would be into water, drowning was a possibility. (Tr. 174, 407.) The Court finds the violation is properly classified as a serious citation. *See Boh Bros. Constr., Co.,* 24 BNA OSHC 1067, 1075 (No. 09-

[9] Raleigh Mederios, a service representative for United Brotherhood of Carpenters who worked for Manson on various occasions, also acknowledged falling from the dolphin could be hazardous. (Tr. 825).

[10] The Court notes that there is no testimony about debris being present on the date alleged in the citation. (Tr. 236-37, 631.)

1072, 2013) (affirming judge's determination that exposure to water related hazards such as drowning was serious); *Peavey Co.*, 16 BNA OSHC 2022 (No. 89-2836, 1994) (affirming a violation for a lack of fall protection on rail cars as serious). In the event of an accident from the violation, there was a substantial probability of serious injuries.

The OSH Act imposes a penalty of up to $7,000 for a serious violation.[11] 29 C.F.R. § 666(b). As the final arbiter of penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history, and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc*., 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). Gravity depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

Evaluating the gravity of the violation, the Court finds that although the injury from a fall could have been minor, it also could have been catastrophic. (Tr. 71, 177, 179, 262.) CO Scott indicated that he saw one employee working without fall protection from the top of the dolphin. (Tr. 70.) The employee was working on the edge of the dolphin, increasing the risk that a fall would bring him over the edge. (Tr. 179.) Manson did take some precautions, by providing personal flotation devices and a lifesaving skiff, which could potentially reduce the harm caused by a fall. (Tr. 177.) However, these precautions did not lessen the likelihood of a fall. (Tr. 177-

[11] The Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015) granted OSHA the ability to increase the statutory minimum and maximum penalties for violations of the OSH Act. OSHA has exercised this authority but the revised penalties apply only to violations occurring after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016); 29 C.F.R. § 1903.15(d). All of the violations in the instant matter occurred prior to November 2, 2015, so the statutory maximum applicable here is $7,000. 29 U.S.C. § 666.

79.) Manson is a large employer with over 250 employees. (Tr. 176.) It has been cited for a serious violation within the past five years. (Tr. 176, 179, 237.) As for good faith, although Manson had some safety policies, it did not fully comply with them for this project. The Secretary initially proposed a $6,000 combined penalty for Citation 1, Items 4a, b and c. (Tr. 12.) As noted above the Secretary withdrew Citation 1, Item 4c and the Court vacated Citation 1, Item 4a. The Court reduces the penalty commensurately with the reduction of citation items. Having considered all of the penalty factors, the Court finds that a penalty of $3,500 is an appropriate penalty amount for Citation 1, Item 4b.

D. Item 5a – Violation of 29 C.F.R. § 1926.1431(b)(1) – Guarding of personnel platform

The cited standard, found in Subpart CC, Cranes and Derricks in Construction, requires that platforms used to hoist employees must comply with specified guarding requirements.[12] 29 C.F.R. § 1926.1431(b)(1). The Secretary alleges that the jilly lift used by Manson employees is a personnel platform within the meaning of the cited standard and that it was not equipped with a guardrail system as required. (Sec'y Br. at 18-19; Stip. 8.) Respondent does not appear to dispute the merits of this citation item, but does assert the affirmative defenses of infeasibility and greater hazard. (Resp't Br. at 23.) It also argues that if its defenses are rejected, the violation should not be characterized as serious. *Id*. at 18-19, 23.

1. Secretary's prima facie case- applicability, violation, exposure and knowledge

The jilly lift was suspended from a derrick-mounted crane and used to hoist employees from the derrick's deck to the dolphin. (Tr. 71; Stip. 7.) According to CO Scott, this means it

[12] Specifically, the standard states: "[w]hen using equipment to hoist employees, the employee must be in a personnel platform that meets the requirements of paragraph (e) of this section." 29 C.F.R. § 1926.1431(b)(1).

was a "personnel platform," within the meaning of the standard. (Tr. 46, 71.) Manson's engineer appeared to agree with this assessment when he indicated that he had consulted the requirements for personal lifting systems found in ASME B-30.23 and the OSHA standards for personnel platforms when designing the jilly lift. (Tr. 706-7.) The Court concurs and concludes that the jilly lift was a personnel platform being used to hoist personnel and therefore it needed to comply with the cited standard's guarding requirements.

Specifically, the cited standard requires personnel platforms to be equipped with a guardrail system that meets the requirements of Subpart M (Fall Protection). 29 C.F.R. §§ 1926.1431(b)(1), 1926.1431(e). Under Subpart M, the personnel platform needs a guardrail system, safety net, or personal fall arrest system when employees are six feet or more above a lower level.[13] 29 C.F.R. § 1926.501(b)(1). It is undisputed that no safety net was being used and that employees were not wearing a personal fall arrest system. (Stip. 10, 11; Ex. C-5.) Without such protections, the jilly lift needed to have guardrails around all four sides. (Tr. 148.) However, the guardrail system only went around three sides. (Ex. C-5; Stip. 11; Tr. 72.) The fourth side was open, with neither a grab rail nor a toe board. *Id.* Therefore, the Court agrees that the jilly lift did not comply with the requirements of 29 C.F.R. § 1926.1431(b)(1).

Relevant to employee exposure to the cited condition, CO Scott observed three employees on the jilly lift with the unguarded side. (Exs. C-5, C-6; Tr. 36, 186.) Although a chain could have been attached to the open side, Manson's foreman indicated that no one engaged the chain when the workers were being hoisted to the dolphin on February 13, 2014. (Tr. 605.) This evidence is not contested, and the Court concludes that the Secretary established

[13] The jilly lift was more than six feet above the surface of the water. 29 C.F.R. § 1926.500(b) (definition of lower level). (Ex. C-5; Tr. 58, 667.)

exposure to the violative condition. *See Phoenix Roofing*, 17 BNA OSHC at 1079 (actual exposure to unguarded skylight established exposure).

Finally, in terms of knowledge, the three sided jilly lift was being used in the open by at least two supervisors. (Ex. C-6.) As noted above, the foreman was aware that one side of the jilly lift was completely open. (Tr. 604-5.) Manson's Vice President for Equipment (Hillis) was also aware that the jilly had an open side. (Tr. 666.) He acknowledged that he was aware that the jilly lift was being used even though its guardrail system only protected three sides. (Tr. 667-8.) In addition, there is no dispute that CO Scott witnessed and videotaped the violative condition from a public road. (Tr. 37-38.) Accordingly, the Court finds that Respondent knew of the violative condition. *See Hamilton Fixture,* 16 BNA OSHC at 1089; *Ted Wilkerson*, 9 BNA OSHC at 2016; *Am. Airlines,* 17 BNA OSHC at 1555.

2. Affirmative Defenses

a) *Infeasibility*

As discussed above, to establish the affirmative defense of infeasibility, an employer must show: (1) literal compliance with the terms of the cited standard was infeasible, and (2) an alternative protective measure was used or there was no feasible alternative measure. *Otis*, 24 BNA OSHC at 1087. Respondent argues that in order to perform the lashing work it was necessary for the jilly lift to have an open side because of the amount of force it takes to drive the staples into the dolphin. (Resp't Br. at 23.) As for the second element of the burden, Respondent alleges that alternative protective measures could not have been implemented because they would create pinching and/or ergonomic hazards. *Id.* The Secretary responds by arguing that Respondent failed to show either infeasibility or that there were no feasible alternative measures of fall protection that could have been implemented. *Id.* at 28.

With respect to whether literal compliance with the standard was possible, Mr. Huber, the professional engineer who designed the jilly lift, acknowledged that it was possible to install a fourth guardrail. (Tr. 739-40.) Likewise, Mr. Barr acknowledged that they could weld almost anything onto the jilly lift. (Tr. 612.) Mr. Huber also admitted that Manson had enough money to build a jilly lift that would protect workers in a manner consistent with OSHA standards. (Tr. 741-42.)

Respondent does not dispute this evidence showing it was technically possible for the jilly lift to comply with the standard's requirements. Instead, it argues that a complete guardrail system would have precluded the necessary work from being done. However, Mr. Barr admitted that he hammered staples into the dolphin at chest height, which would be sufficiently above the level of a guardrail. (Tr. 606.) Although he noted that some workers prefer to hammer at different levels, he indicated that this was a matter of personal preference, not work necessity. *Id.* And it appears that at least one other worker also hammered the staples in at chest level, as the video shows Greg Stewart hammering staples into the dolphin above the level of where a compliant guardrail would have been. (Ex. C-5.)

Further, even if it was not possible to conduct all of the lashing work with a fourth guardrail in place, this only goes to one instance in the use of the jilly lift—when the lashing work was being performed. This argument does not shield application of this standard when the personnel platform was being used to hoist or move employees rather than for actual lashing work. 29 C.F.R. § 1926.1431; Cranes and Derricks in Construction, 75 FR 47906, 47911 (Aug. 9, 2010) (§ 1926.1431 "addresses fall protection when employees are being hoisted"). Manson offers no explanation as to why it would be infeasible for the jilly lift to have been enclosed when it was being used to lift employees to the height of the top of the dolphin or when

employees were being transported to the work site. (Resp't Br. at 23.) Manson's engineer acknowledged that it would be possible to install a compliant removable guardrail, so the workers could at least have been protected during lifting operations even if the rail had to be removed occasionally for certain work. (Tr. 739-40.)

Finally, Manson does not offer evidence of any alternative protection used, or why such alternative protection was infeasible during the lifting operation. For example, the jilly lift had a stanchion for a chain to go across the side that did not have guardrails. (Tr. 604.) Manson fails to explain why this could not have been used while the jilly lift was hoisting employees or during other operations. (Tr. 605.) Thus, the Court finds that Respondent failed to establish the defense of infeasibility.

b) *Greater Hazard*

As noted above, the greater hazard defense requires the employer to prove that: (1) compliance with the hazard is more hazardous than noncompliance; (2) alternative means of protection are unavailable; and (3) either a variance has been sought and denied or a variance application would be inappropriate. *Dole,* 876 F.2d at 188; *True Drilling*, 703 F.2d at 1090.

Manson argues that putting up the guardrail during lashing operations would have exposed workers to a pinch point and ergonomic hazards. (Resp't Br. at 23; Tr. 691.) With respect to the pinch point, a Manson pile driver testified that the work could still be accomplished and the pinch point avoided if the jilly lift was lowered so that the guardrail would not be in the line of work. (Tr. 607.) As for the ergonomic hazard, Manson's Vice President for Equipment, Mr. Hillis, testified that lowering the jilly lift to avoid the pinch hazard would create an ergonomic hazard. (Tr. 681.) However, Manson never did an ergonomic evaluation of

lashing work conducted from the jilly lift and did not offer other evidence to support this view point. *Id.*

Further, Manson offers no explanation as to what greater hazard would have been present if there had been a guardrail in place during operations other than lashing. The Secretary did not target this citation to Respondent's failure to have a guardrail during lashing, and both of the potential alternative hazards suggested by Respondent would occur (if at all) only during such work, not lifting or transport operations. (Tr. 681.) Nor does Manson explain why other types of fall protection, such as a fall arrest system could not have been used during operations when a guardrail presented a hazard.[14]

Finally, Manson acknowledges that it never sought a variance and does not even acknowledge that such an application would have been appropriate. (Tr. 451.) *Altor*, 23 BNA OSHC at 1470; *Loomis Cabinet*, 20 F.3d at 43. Accordingly, Respondent did not meet its burden of proof with regard to showing a greater hazard.

3. Characterization and Penalty

As discussed above, a violation is classified as serious if "there is substantial probability that death or serious physical harm could result" if an accident occurred. 29 U.S.C. § 666(k); *Compass*, 23 BNA OSHC at 1136; *Illinois Power*, 632 F.2d at 28; *Phelps Dodge*, 775 F.2d at 1240. When assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history, and good faith. *J.A. Jones*, 15 BNA OSHC at 2213-14; *Trinity*, 15 BNA OSHC at 1483.

[14] As noted above, Mr. Dillion questioned the availability of a self-retracting lanyard certified for a tie off point at the feet. (Tr. 455.) However, he did not address the use of a self-retracting lanyard with a tie off point above the level of a worker's feet.

Manson's Vice President for Equipment, Mr. Hillis, acknowledged that employees could fall off the open side of the jilly lift. (Tr. 667.) However, Manson claims that such a fall could not result in death or serious physical injury. (Resp't Br. at 18-19.) The Secretary disputes this, arguing that the violation was appropriately characterized as serious and warrants the proposed penalty of $7,000. (Tr. 12, 71.)

Four of the Secretary's witnesses challenged Manson's assertion that a fall from the jilly lift could not result in serious physical harm. CO Scott, CO DeLach, Area Director Baker and former Assistant Regional Administrator Cavanaugh all testified that a fall from the jilly lift could have resulted in serious physical harm. (Tr. 69, 181, 298, 365.) CO Scott testified that a worker falling from the jilly lift could strike the dolphin or hit the water in a way that could cause serious injury. (Tr. 65, 69, 72, 75.) CO DeLach noted that the temperature of the water created a drowning hazard as a person has a tendency to inhale when exposed to cold water. (Tr. 262, 298.) The Court finds the violation is properly classified as a serious citation. In the event of an accident from the violation, there is a substantial probability of serious injury.

Three employees were exposed to a fall hazard due to the lack of compliant guarding on the jilly lift. (Tr. 186, 298.) Employees could lose their balance and either strike the inside of the lift or be ejected from it. (Tr. 186.) While they might fall directly into the water, it was also possible that they could hit the dolphin itself, a nearby boat, or debris. (Tr. 298, 367.) An employee also could get caught between the jilly lift and the dolphin itself. (Tr. 186.) For the same reasons set forth above in connection with the Court's findings for Item 4(b), the Court concludes that Manson is not entitled to penalty reductions for history or size. The Court notes the efforts of Manson to address the hazards with the use of PPE, rescue skiffs and the like.

Thus, having considered all of the penalty factors, the Court finds that a penalty of $6,000 is appropriate.

E. Item 6 – Violation of 29 C.F.R. § 1926.1431(k)(3) – Securing Personnel Platforms

The cited standard requires personnel platforms to be secured to the structure where the work is to be performed when employees are entering or exiting the platforms, unless the employer can demonstrate that securing to the structure would create a greater hazard.[15] 29 C.F.R. § 1926.1431(k)(3). The Secretary alleges that the jilly lift used by Manson employees is a personnel platform within the meaning of this standard and that it was not secured to the dolphin when the worker left the top of the dolphin to return to the jilly lift. (Sec'y Br. at 20.) Manson disputes the Secretary's allegation that it did not comply with the standard. (Resp't Br. at 9, 24.) It alleges a process called "over booming", wherein the crane operator brought the jilly lift up against the dolphin and then pushed the suspension point further toward the middle of the dolphin, was tantamount to securing the lift to the dolphin and therefore compliant to the cited requirement. *Id*. at 24. It also alleges that the Secretary had the burden of proving specific and technologically feasible methods of compliance and failed to do so. *Id.* Finally, Respondent raises the affirmative defense of greater hazard. *Id.*

[15] Specifically, the standard states:

> Before employees exit or enter a hoisted personnel platform that is not landed, the platform must be secured to the structure where the work is to be performed, unless the employer can demonstrate that securing to the structure would create a greater hazard.

29 C.F.R. § 1926.1431(k)(3).

1. Secretary's prima facie case

As noted above, Respondent alleges the Secretary had the burden to prove specific and technologically feasible methods of compliance. (Resp't Br. at 24.) However, The Commission has long held the burden of proving feasibility does not pertain to violations of section 5(a)(2) of the OSH Act such as those alleged in this item. *See e.g., Research*, 9 BNA OSHC at 1497. Other than in connection with personal protective equipment standards, neither the D.C. Circuit nor the Ninth Circuit departs from Commission precedent which does not require the Secretary to prove feasibility to establish violation of a standard promulgated under section 5(a)(2) of the OSH Act.[16] *See e.g., Long Beach*, 811 F.2d at 479; *Nat'l Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313 (9th Cir. 1979) (not requiring a showing of feasibility in connection with an alleged violation of a scaffold standard); *A.J. McNulty & Co*., 283 F.3d 328, 335 (D.C. Cir. 2002) (allegation that compliance was impossible or infeasible was an affirmative defense). Nor has any other circuit court held that the Secretary must prove feasibility in connection with a violation of 29 C.F.R. § 1926.1431(k)(3).

Similarly, the Secretary's prima facie burden is not altered by the fact that 29 C.F.R. § 1926.1431(k)(3) includes an express reference to the greater hazard defense. The cited provision specifically states that platforms "must be secured to the structure where the work is to be performed, unless the *employer* can demonstrate that securing to the structure would create a

[16] The D.C. and Ninth Circuits are the two Circuits to which this case could be appealed. Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case -- even though it may differ from the Commission's precedent. *See, e.g., Farrens Tree Surgeons, Inc*., 15 BNA OSHC 1793, 1794-95 (No. 90-998, 1992). The Court notes certain other appellate courts diverge from this general rule in narrow circumstances not applicable here. *See e.g., Gen. Elec. Co. v. OSHRC*, 540 F.2d 67, 69-70 (2d Cir. 1976) (concerning certain personal protective equipment standards), *Diebold, Inc. v. Marshall,* 585 F.2d 1327, 1333 (6th Cir. 1978) (vaguely worded machine guarding standard).

greater hazard." 29 C.F.R. § 1926.1431(k)(3) (emphasis added). This language is explicitly consistent with the usual rule that employers have the burden of establishing that compliance with a standard creates a greater hazard than non-compliance. *See C.J. Hughes Constr. Inc.,* 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) (noting that a party seeking "the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for the exception"); *Avcon,* 23 BNA OSHC at 1454 (concluding that the employer had the burden to show that the exception to fall protection requirements contained in 29 C.F.R. § 1926.501(b)(2) applied); *L&L Painting Co., Inc.,* 23 BNA OSHC 1986, 1991 (No. 05-0055, 2012) (employer had the burden of proving that historical monitoring exception applied); *A.J. McNulty*, 283 F.3d at 225 (concluding that the employer had the burden to show that the feasibility exception contained in 29 C.F.R. § 1926.501(b)(2)(i) applied). In *Falcon Steel Co*., 16 BNA OSHC 1179 (No. 89-2883, 1993) (consol.), the employer argued that because greater hazard and impossibility were integral parts of the fall hazard standard at issue (29 C.F.R. § 1926.550(g)) the Secretary should have the burden to prove them. 16 BNA OSHC at 1181. The Commission rejected this claim. *Id.* The Crane and Derrick fall hazard standard at issue in *Falcon* generally prohibited certain conduct unless certain alternatives "would be more hazardous" or "not possible because of structural design or worksite conditions." *Id.* at 1181 n.3 (discussing 29 C.F.R. § 1926.550, which at the time addressed the use of crane or derrick suspended personnel platforms). Even though the standard at issue in *Falcon* did not indicate which party had the burden to prove that the exception applied, the Commission concluded that the employer had the burden. *Id.* at 1181 *citing Dover Elevator Co.,* 15 BNA OSHC 1378, 1381 (No. 88–2642, 1991). In the present matter, the cited standard explicitly places the burden on the employer to show that securing the crane suspended platform to the dolphin while the employee was transferring to the platform

would have resulted in a greater hazard than not doing so. 29 C.F.R. § 1926.1431 (k)(3). Therefore Manson, not the Secretary, had the burden of proving that securing the personnel platform to the dolphin would have created a greater hazard.

Accordingly, the Court finds that the Secretary's burden was to establish: (1) applicability of the cited standard, (2) that the employer failed to comply with the terms of the cited standard, (3) that employees had access to the violative condition; and (4) that Manson either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra,* 9 BNA OSHC at 2129. For the reasons set forth below, the Court finds that he has met this burden.

a) *Applicability*

There is no dispute that the jilly lift was offshore and being used to hoist personnel when the employee who had been working on the dolphin entered it from the dolphin on February 13, 2014. (Ex. C-5; Tr. 544, 548.) Respondent does not contest the applicability of the cited standard, and, consistently with the discussion above, the Court finds that the jilly lift was a crane suspended personnel platform and therefore the requirements set out in Subpart CC, Cranes and Derricks in Construction, including the cited provision, applied. 29 C.F.R. § 1926.1431(k); Cranes and Derricks in Construction, 75 FR 47906, 47911 (Aug. 9, 2010) (§ 1926.1431 "addresses fall protection when employees are being hoisted").

b) *Violation*

As for whether there was a violation, the parties agree that nothing connected the jilly lift to the dolphin. (Tr. 72, 184; Ex. C-5.) Respondent alleges that the jilly lift was secured to the

dolphin because it was either over boomed or over swung.[17] (Resp't Br. at 9, 24). The Secretary disputes that the crane operator over boomed or over swung the jilly lift and further contends that even if he had, doing so was not a compliant method of securing the jilly lift to the dolphin. (Sec'y Br. at 21.)

Raleigh Madeiros, a member of the Carpenter's Union who had worked for Manson in the past, testified as a non-expert witness for Respondent. He acknowledged that the jilly lift should be secured when people are entering or exiting it. (Tr. 829, 833.) He explained that one method of accomplishing this is for the crane operator to over swing or over boom such that the jilly lift is pushed against the dolphin. (Tr. 833.) He acknowledged that there probably are other ways to secure the jilly lift during worker transfers as well. (Tr. 829.) He was not shown the video of Manson's worksite and did not offer an opinion as to whether the crane operator had in fact secured the jilly lift on the date referenced in the citation (February 13, 2014).

Mr. Barr, the employee of Manson depicted in the video, testified that on February 13, 2014 the crane operator over swung the jilly lift into the dolphin.[18] (Tr. 544-45.) When asked whether the jilly lift moved when he stepped on it, Mr. Barr indicated that to his memory it did not move. (Tr. 545.)

The video contradicts Mr. Barr's recollection. (Ex. C-5.) In the video, a worker is seen stepping down off the dolphin onto the jilly lift, which begins to rock and move as the worker's weight shifts. *Id.* The jilly lift appears to move away from the dolphin and Mr. Barr is seen reaching for a grab bar as the other workers take hold of the wires connecting the jilly lift to the

[17] Mr. Barr indicated that over booming and over swinging were two separate crane maneuvers, either of which was intended to bring the jilly lift "tight" to the dolphin. (Tr. 522-24.)

[18] Neither the crane operator nor any of the other employees on the jilly lift testified.

crane. *Id.* Although the jilly lift was close to the dolphin, it was not pushed up against it in a stable manner, and movement of the jilly lift was visible. (Ex. C-5; Tr. 73, 184, 386, 421.) Thus the evidence supports the Secretary's position that the jilly lift was not secured to the dolphin or any other structure. (Ex. C-5; Tr. 66, 72, 386.)

Further, even if the Court were to accept Mr. Barr's testimony that there was no movement when his weight transferred to the jilly lift instead of what is seen on the video, Respondent could still be in violation. The standard does not include any exception for a personnel platform which is momentarily stable during transfer but not connected. 29 C.F.R. § 1926.1431(k)(3).

Mr. Huber, the Manson engineer who designed the jilly lift, noted that when a rig is on the water, there is motion all the time and people cannot rely on water to be smooth and calm. (Tr. 705.) Even Mr. Barr recognized the risk of swells, listing it as a risk on his job safety analysis form. (Ex. C-22; Tr. 591.) Not only was the platform suspended, but the crane suspending the platform was floating on deep water. While bringing the jilly lift close to the dolphin may have made it easier for the worker to transfer, this is not the equivalent of securing the equipment. *See The Duncanson-Harrelson Co.,* 9 BNA OSHC 1539 (No. 76-1567, 1981) (when evaluating a standard addressing cranes on barges, the Commission held that in order to be "secured" the crane had to be fastened to the barge).

The CO also testified that "over-booming" is not an appropriate method of securing personnel platforms. (Tr. at 399.) The Court need not resolve whether over-booming, if appropriately executed, satisfies the standard since the videographic evidence shows that the platform was not secured in a stable manner. (Tr. 399; Ex. C-5.) Accordingly, the Court finds that the cited standard was violated.

c) *Exposure*

In terms of exposure, CO Scott observed one employee enter the jilly lift when it was not secured. (Tr. 73.) The video is consistent with this testimony as it shows one worker transferring from the dolphin and two additional workers on the jilly lift itself. (Ex. C-5; Tr. 74.) This evidence is not contested and the Court concludes that the Secretary established exposure to the violative condition. *Phoenix Roofing*, 17 BNA OSHC at 1079.

d) *Knowledge*

As for knowledge of the violative condition, the worker involved in the transfer was a supervisor. (Tr. 514, 544.) He was aware that while a portion of the jilly lift abutted the dolphin, it was not otherwise secured to it. (Tr. 544-45.) As a supervisor, his knowledge is imputable to Manson. *See e.g., Kansas Power & Light Co.*, 5 BNA OSHC 1202, 1204 (No. 11015, 1977) (foreman's knowledge and approval of conduct is imputed to employer); *Hamilton Fixture,* 16 BNA OSHC at 1089. Further, CO Scott witnessed the violative conditions from a public road. The unsecured jilly lift was open, obvious, and in plain view. *Ted Wilkerson,* 9 BNA OSHC at 2016 (a leadman "would have been in a position to observe" the employee in the hazardous situation); *Am. Airlines,* 17 BNA OSHC at 1555. Therefore, the Secretary established Respondent's knowledge of the violative condition.

2. Affirmative Defense – Greater Hazard

As noted above, the greater hazard defense requires the employer to prove that: (1) compliance with the hazard is more hazardous than noncompliance; (2) alternative means of protection are unavailable; and (3) either a variance has been sought and denied or a variance application would be inappropriate. *Dole,* 876 F.2d at 188; *True Drilling*, 703 F.2d at 1090. Manson argues that securing the jilly lift to the dolphin with rope would create a greater hazard.

(Resp't Br. at 24.) The Secretary appears to accept Manson's contention that rigidly connecting the jilly lift to the dolphin might be problematic, but suggests several other ways to secure the jilly lift and make the transfer safer which the Respondent has not been shown to have considered. (Sec'y Br. at 22.) Further, according to the Secretary, even if that were not the case, Manson failed to apply for a variance, as required to sustain the defense. *Id.* at 29.

Manson's Vice President for Equipment, Mr. Hillis, testified regarding some of the safety concerns encountered when securing an object suspended by a floating crane to a fixed structure. (Tr. 686-87.) Another Manson employee, Mr. Huber, indicated that a worker must be careful when attaching a floating crane to something that is fixed to the land because tidal forces can cause suspension cables to break. (Tr. 703-4.)

However, Manson's own policies and procedures required crane suspended personnel platforms to be secured to the dolphin and witnesses described ways this could have been done. (Tr. 188.) Former Assistant Regional Administrator Cavanaugh explained that the standard does not require the jilly lift to be rigidly attached. (Tr. 386, 882.) CO Scott stated that there were several possible ways of securing the jilly lift without rigidly attaching it to the dolphin. (Tr. 75.) For example, Manson could have landed the lift on the dolphin itself or used cables. *Id.* Area Director Baker also agreed that the jilly lift could have been secured these ways. (Tr. 187-88.)

Manson does not refute the testimony of these witnesses. Even fully crediting the testimony of Mr. Hillis and Mr. Huber that securing the jilly lift with a cable could have created a greater hazard, Manson does not explain why landing the jilly lift on top of the dolphin was not an available method of compliance. (Tr. 75, 386.) Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection

listed in the standard. *M. J. Lee Constr. Co*., 7 BNA OSHC 1140 (No. 15090, 1979) (recognizing that literal compliance would have created a greater hazard but concluding that the employer did not make out the defense because it failed to use alternative means of protecting employees); *Hackensack Steel Corp*., 20 BNA OSHC 1387, 1391 (No. 97-0755, 2003) (defense fails because employer did not use alternative methods of protection). Manson did not even bring the jilly lift level with the top of the dolphin. (Ex. C-6; Tr. 72.) Instead, it required the worker to step down onto the jilly lift. *Id.* The record does not establish Manson fully explored alternatives to rigid, albeit temporary, attachment of the dolphin to the jilly lift to facilitate worker transfer. Therefore, the court finds that Manson failed to establish the second element of the defense.

Finally, as noted above, Manson never sought a variance for any of its work practices. (Tr. 451.) It does explain why seeking one for not securing the jilly lift would have been inappropriate. *See Altor*, 23 BNA OSHC at 1470; *Loomis Cabinet*, 20 F.3d at 43. The Court finds that Respondent did not meet its burden of proof with regard to showing a greater hazard and so the affirmative is rejected.

3. Characterization & Penalty

Manson does not challenge the characterization as serious or the proposed penalty amount. In terms of characterization, CO Scott indicated that the employee accessing the jilly lift had exposure to potentially serious injuries, including falling into the water, striking the dolphin or hitting the jilly lift. (Tr. 74-75.) Area Director Baker agreed with CO Scott's assessment of the seriousness of the hazard, as did the former Assistant Regional Administrator. (Tr. 187, 385-6.) The Court agrees with the characterization of Item 6a as serious. *See KS Energy Servs., Inc*., 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming characterization and penalty where neither was in dispute).

Turning to the penalty factors, Area Director Baker testified that severity and probability of harm warranted a penalty of $7,000.[19] He concluded that injuries from an incident could include death. (Tr. 188.) In terms of good faith, Manson had policies and procedures in place that required crane suspended personal platforms to be secured to the dolphin, but those policies were not followed. *Id.* The Court notes good faith is more indeterminate as to this citation in comparison with the other citations because of the complexity of assessing risks inherent in available options. Accordingly, having considered all of the penalty factors, the Court finds that a penalty of $4,000 is appropriate.

ORDER

The foregoing Decision constitutes the Court's Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Citation Items 1, 2b, 3, 4c, 5b, and 5c were withdrawn prior to trial. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Items 2a and 2c are VACATED and no penalty is assessed.
2. Citation 1, Item 4a is VACATED and no penalty is assessed.
3. Citation 1, Item 4b is AFFIRMED as a Serious violation and a penalty of $3,500 is ASSESSED.
4. Citation 1, Item 5a is AFFIRMED as a Serious violation and a penalty of $6,000 is ASSESSED.
5. Citation 1, Item 6 is AFFIRMED and a penalty of $4,000 is ASSESSED.

SO ORDERED.

[19] As noted above, $7,000 is the maximum possible penalty for this violation. 29 U.S.C. § 666.

/s/
Peggy S. Ball
Judge, OSHRC

Date: December 12, 2016
Denver, Colorado