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. FIRST MARINE, LLC, Respondent.	OSHRC Docket Nos. 18-1287 & 18-1288

ON BRIEFS:

Joseph M. Berndt, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Seema Nanda, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

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For the Respondent

Carl Marshall, Attorney; Ryan A. Hahn, Attorney; The Miller Law Firm, Paducah, KY
For the Respondent

DECISION

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

First Marine, LLC owns and operates a shipyard in Calvert City, Kentucky. Following a fatal explosion at the shipyard, the Occupational Safety and Health Administration conducted an inspection and issued First Marine five citations. Two of the citations alleged a total of eighteen safety violations (No. 18-1287) and the remaining three citations alleged a total of seventeen health violations (No. 18-1288). The parties settled all but four serious safety violations, five serious health violations, and three willful health violations. The settled items were severed from each case (No. 20-0178) and the remaining items were consolidated for hearing and disposition.

Following a hearing, Administrative Law Judge John B. Gatto vacated the four remaining safety violations, vacated six of the health violations, and affirmed the two remaining health violations, characterizing one as serious and one as willful. The only citation item at issue on review is the willful health violation (Citation 2, Item 2 (No. 18-1288)), which alleges that First Marine failed to "ensure that each employee that enters a confined or enclosed space and other areas with dangerous atmospheres is trained to perform all required duties safely." 29 C.F.R. § 1915.12(d)(1). For the following reasons, we affirm the violation and recharacterize it as serious.

BACKGROUND

At the time of the explosion, First Marine had been working for about a month to repair and rebuild the *William E. Strait*, a large inland river towboat that was struck by a barge and then sank in the Mississippi River. The *William* was transported to First Marine's shipyard for repair where it was initially in dry dock and then placed into the Tennessee River and moored for further repair. At the time, some of the boat's doorways and windows had not yet been repaired and remained open to the outside, including those in the upper engine room.[1] Because the weather was cold and wintry, workers engaged in repairing the boat had covered these openings with plastic tarps and welder's blankets to retain heat and prevent the wind from blowing in. Diesel heaters were also used to provide heat for workers onboard, and a subcontractor working for First Marine had placed a propane heater in the lower engine room.[2]

Shipyard operations at the time of the incident were overseen by First Marine superintendent Ronald Thorn. Other First Marine supervisors present at the shipyard included David Byrum, the dry dock foreman who oversaw the company's welders; Curtis Jones, the head electrician; and Robert Miller, a carpentry crew manager. In addition to its own employees performing welding, cutting, electrical, and carpentry work on the *William*, First Marine contracted with numerous subcontractors to perform additional work, including Rupke Blasting and Painting, which provided workers to pressure wash and paint water tanks, and Thermal Control and

[1] The upper engine room is located on the boat's main deck. It has exterior doorways on the starboard and port sides of the vessel with three interior doorways leading to the generator room, the control room, and a hallway to the galley. The upper engine room also has several exterior window openings.

[2] The lower engine room, located on the bottom deck of the vessel, was accessible to workers by a stairway located in the middle of the upper engine room's floor. The lower engine room does not have any windows and is surrounded by bulkheads.

Fabrication, which provided workers to install insulation. First Marine employees, as well as those of subcontractors, used multiple potentially hazardous substances, including propane, propylene, diesel, kerosene, and compressed oxygen to fuel equipment and heaters while working onboard the *William*.

On January 19, 2018, workers, including First Marine employees, arrived at the shipyard around 7:00 a.m. Upon boarding the boat, most of them, including head electrician Jones, immediately noticed a gas odor that they had not typically smelled. No atmospheric testing was conducted at this time or at any point before the explosion occurred. Some of the workers moved aside the materials covering the openings in the upper engine room to ventilate the area. About ten to fifteen minutes after Jones boarded the boat, he and two members of his crew initiated a search of the lower engine room to determine the source of the gas odor. Jones testified that he assumed the smell was coming from a propane tank he observed Rupke workers changing on the heater that the subcontractor had placed in the lower engine room. According to Jones, fans he had previously wired between the lower and upper engine rooms were running on the port and starboard sides to ventilate the area. A First Marine employee also set up fans to ventilate a compartment in the forward section of the boat, known as the "deck locker," after smelling gas in that area.

Work commenced on the *William*, including work in the lower engine room and work involving welding and cutting that required the use of gas and compressed oxygen. At approximately 9:15 a.m., an explosion occurred on the boat, killing three workers, including a First Marine employee working in the deck locker and injuring several others.[3]

DISCUSSION

Under the citation item at issue, the Secretary alleges a willful violation of 29 C.F.R. § 1915.12(d)(1), which requires employers to "ensure that each employee that enters a confined or enclosed space and other areas with dangerous atmospheres is trained to perform all required duties safely." Specifically, the Secretary claims that First Marine allowed its employees "to enter

[3] The cause of the explosion and where it originated is not known, and the parties stipulated that OSHA did not determine the type of gas that exploded or its source as part of its investigation. The United States Coast Guard and Kentucky State Police both investigated the incident and were not able to determine the explosion's cause. Nonetheless, the cause of the explosion is irrelevant here, as it has no bearing on the training violation at issue on review.

confined and enclosed spaces to perform work, such as but not limited to, pulling electrical wire, plumbing, pipe fitting, and arc welding and cutting with a torch, without training [them] on the hazards of confined and enclosed spaces, exposing [them] to atmospheric, fire, and explosion hazards."

To prove a violation, "the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Only the noncompliance element of the alleged violation and its willful characterization are at issue on review.[4]

A. Noncompliance

"To establish noncompliance with a training standard, the Secretary must show that the employer failed to provide instructions that a reasonably prudent employer would have given in the same circumstances."[5] *Trinity Indus., Inc.*, 20 BNA OSHC 1051, 1063 (No. 95-1597, 2003) (affirming training violation alleged under § 1915.12(d)), *aff'd*, 107 F. App'x 387 (5th Cir. 2004) (unpublished); *accord W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1235 (No. 99-0344, 2000) (when interpreting general safety program standards, the Commission considers "whether a ' "reasonable person" examining the generalized standard in light of a particular set of circumstances, can determine what is required . . . .' "), (quoting *R&R Builders, Inc.*, 15 BNA OSHC 1383, 1387 (No. 88-282, 1991), *aff'd*, 285 F.3d 499 (6th Cir. 2002); *Northwood Stone & Asphalt Inc.*, 16 BNA

[4] In its petition for discretionary review, as well as in both of its review briefs, First Marine argues that the judge erred in finding the cited training standard applied. We decline to address this issue. S*ee S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1599 n.1 (No. 94-3393, 2011) ("Although the parties briefed Citation 2, Item 40, as requested, we decline to review the judge's disposition of this item."); 29 C.F.R. § 2200.92(a) ("The issues to be decided on review are within the discretion of the Commission.").

[5] The Sixth Circuit is a relevant circuit here, as First Marine's shipyard is in Kentucky. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."); s*ee Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

OSHC 2097, 2099 (No. 91-3409, 1994) (affirming training violation based on finding that reasonably prudent employer would have trained employees on common overhead power line hazards), *aff'd*, 82 F.3d 418 (6th Cir. 1996) (unpublished). If the employer rebuts the allegation of a violation "by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided." *Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1086 (No. 91-2494, 1997); *see Atl. Battery Co.*, 16 BNA OSHC 2131, 2176-77 (No. 90-1747, 1994).

The judge found noncompliance based on the testimony of five First Marine employees present on the day of the explosion—Mathew McCoy, Jerry Price, Manuel Macario Garcia, Victor Pineda, and B.K. According to the judge, their testimony demonstrated that they lacked "a firm grasp of proper safety procedures." The judge rejected testimony from three First Marine supervisors—Thorn, Byrum, and Miller, who all claimed that they had adequately trained employees—on the grounds that the company provided no documentation of such training as required by a separate OSHA shipyard provision. *See* 29 C.F.R. § 1915.12(d)(5) ("The employer shall certify that the training required by paragraphs (d)(1) through (d)(4) of this section has been accomplished."). The judge also stated that "[a]s management personnel who still work for First Marine, the supervisors are motivated to close ranks and declare First Marine provided the required training."

On review, First Marine acknowledges that many of its employees testified that they had not been formally trained, but also claims that these "employees consistently testified that they were trained to perform their jobs safely" through informal, on-the-job training. The company asserts that "when asked more specific questions about their knowledge and training of gas odors and shipyard hazards, it was clear that employees understood and appreciated the dangers associated with the smell of gas." In response, the Secretary contends that noncompliance is proven not only by employee testimony but by the actions of employees on the day of the incident, including the smoking of cigarettes "on a vessel that smelled of gas, particularly in a space that was actively having the smell of gas vented out of it." The Secretary asserts that "First Marine did not train its employees on even the most basic principles of working safely in these areas – e.g., what to do when they encountered signs of a gas leak or First Marine's safety protocols when there is a potential gas leak on a vessel." According to the Secretary, "[a] reasonably prudent employer would, at a minimum, have provided training on these basic principles in the same circumstances."

We find that the record establishes noncompliance with the cited training provision. As the judge found, five First Marine employees who were present on the day of the explosion affirmatively testified that First Marine had not provided them with training about hazards they may encounter at the shipyard including those associated with enclosed spaces and dangerous atmospheres. *See Trinity Indus.*, 20 BNA OSHC at 1064 (affirming § 1915.12(d)(2)(ii) violation based on employees' testimony that they were not specifically trained on the health effects of Tectyl and rejecting claim that their general awareness of hazard avoidance sufficed to inform them of the specific health effects).

McCoy, a carpenter, stated that he had not been trained in what to do if he smelled gas while on a vessel and did not think the smell present on the boat the morning of the explosion was dangerous or important. Price, also a carpenter but with prior experience as a welder, stated that his supervisor had not provided him with training on shipyard hazards and that he had not attended any First Marine safety meetings before the explosion. Like McCoy, Price said that despite the smell of gas, he had no safety concerns that morning; he continued to smoke a cigarette while boarding the boat after talking about the smell with another worker. Garcia, an electrician, testified that he was not trained on confined or enclosed spaces or what to do if he smelled gas, but that morning the smell of gas in the lower engine room was "a little stronger than usual," so he went looking for the source with head electrician Jones, then returned to work. Pineda, an electrician who worked alongside Garcia, testified that he was also not trained in shipyard hazards but knew to tell his supervisor if he smelled gas. That morning, he joined Jones and Garcia in searching for the odor's source before continuing to work in the lower engine room. Finally, B.K., a welder who was injured in the explosion, claimed that he was not trained by the company on the hazards associated with using propylene or compressed oxygen in confined spaces and did not know if he was working with propane or propylene. B.K. explained that after smelling gas in the deck locker that morning, he set up and ran three fans in the area for about thirty minutes to try to get the smell of gas out. He also acknowledged that during this time, he and another First Marine employee (who died from injuries he sustained in the explosion) smoked cigarettes close to where he had just smelled gas.[6]

[6] One First Marine employee who was not present on the day of the explosion testified that he had received safety training from the company. Adam Leroy, a First Marine welder, stated that when he started with the company in 2017, he was trained on working in confined spaces through hands-

In addition to this testimony, the conduct of these employees on the day of the explosion further demonstrates that they lacked sufficient training on the fire and explosion hazards associated with gas. Indeed, in some instances, they failed to tell a supervisor about the odor or otherwise determine that the space or atmosphere was safe before resuming their work, and three employees, including B.K. and Price, smoked cigarettes in the very area where they had smelled gas. *See CMC Elec. Inc. v. OSHA*, 221 F.3d 861, 866 (6th Cir. 2000) (finding employees were not trained to understand electrocution hazard as evidenced in part by their confusion in improperly performing the task, as well as the lack of specific instruction they received).

We also find that the testimony from First Marine supervisors Thorn, Byrum, and Miller, who claimed that employees were adequately trained on the hazards posed by dangerous atmospheres and confined and enclosed spaces, does not rebut the credible testimony from these five employees.[7] Notably, the supervisors' testimony lacks sufficient detail as to what safety information was purportedly conveyed to employees about these known hazards and therefore, does not refute the more specific testimony of the five employees who said they lacked training and/or were unable to identify such hazards. Miller, the carpentry supervisor, testified that he provided informal one-on-one safety and compliance training to his crew, but his description of the training shows it was primarily focused on work practices. He explained that if his crew had concerns about the smell of gas, he "would hope" they would immediately notify him and he would have "taken action," but he never said whether he had in fact instructed them to do so. Thorn, the

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on learning while paired with an experienced employee. The judge stated that he was not discrediting Leroy's testimony about the training he received but also noted that "Leroy did not work on the *William* after the vessel left dry dock." We find that even if Leroy's testimony is credited, it does not alter or outweigh the collective testimony of the five employees who said they had not been trained on these hazards.

[7] As noted, the judge essentially discredited the supervisors' testimony due to what he viewed as their purported motivation to "close ranks." While the Commission typically defers to a judge's demeanor-based credibility findings, the judge's finding here is not demeanor-based. *See E.R. Zeiler Excavating Inc*., 24 BNA OSHC 2050, 2057 (No. 10-0610, 2014) (appropriate for Commission to defer to judge's demeanor-based credibility findings when supported by the record). In addition, discrediting their testimony entirely is inconsistent with the record given that, as discussed below, at least one employee (B.K.) corroborated testimony from his supervisor that daily work meetings were held in the boat's breezeway. Thus, while we disagree with the judge's wholesale rejection of this testimony, we find that the supervisors' testimony is simply outweighed by the testimony of the five employees whose statements and actions demonstrate their safety training was lacking.

shipyard superintendent, testified that weekly safety meetings were held and that employees were trained on-the-job by pairing new employees with experienced employees. Like Miller, Thorn stated that employees should stop work and report the smell of gas to their supervisor, but he did not say whether this instruction was ever communicated to employees.[8] *See Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016 (No. 90-2668, 1992) (rejecting employer's argument that dangerous conditions "were obvious and that a reasonable employee would be aware of the dangers and act accordingly [because] that contention erroneously places the burden on employees to be more aware and alert than their employer, and an employer cannot assume that its employees will all observe certain dangers and understand the significance of what they see").

While testimony from Byrum, First Marine's dry dock supervisor who oversaw the welding crew, suggests that he made some effort to instruct his crew about torch hose safety at meetings he held in the boat's breezeway, the instructions he described giving employees focused more so on work practices than safety.[9] Indeed, B.K., a member of his crew, confirmed that such meetings were held with welders almost every day and during these meetings "they would just tell us what to do." In any event, the sufficiency of any safety instructions Byrum provided is undermined by testimony from B.K., who made clear that he lacked training on the hazards of compressed oxygen and did not even know whether he was working with propane or propylene. And, as noted, B.K. acknowledged smoking in the area where fans were running to vent the gas odor on the morning of the explosion.

Jones, the only First Marine supervisor onboard the *William* the morning of the explosion, acknowledged that it was his responsibility to ensure employees worked safely and he had the

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[8] Thorn further testified that First Marine had hired an outside company to provide employee training on torch safety and how to use gas lines in a safe manner, but he did not state whether this occurred prior to the explosion, nor did he identify which employees, other than himself, participated. We note that when asked about the training they received from First Marine, none of the employees mentioned this particular training.

[9] Byrum also testified that the training he provided employees was not documented. According to Thorn, however, the company had sign-in sheets from the breezeway meetings Byrum held and had provided them to its counsel, but these documents are not in the record. Although, as noted, the judge relied on First Marine's presumed failure to document its training as a basis for affirming the violation at issue here given that such documentation is required under a separate shipyard provision (29 C.F.R. § 1915.12(d)(5)), First Marine was not cited for a violation of that provision. As such, we reject the judge's reliance on this testimony and do not consider it here in analyzing noncompliance with the provision that was actually cited.

authority to correct any employee working unsafely. But neither party questioned him about the training he gave the employees under his supervision. Likewise, while the Secretary correctly points out that Jones "did not stop work, evacuate the vessel, or contact the Shipyard superintendent" on the morning of the explosion, he does not argue that Jones himself lacked sufficient training, and the record is silent on any training First Marine provided him (or any other supervisor).[10] Jones' testimony, therefore, neither supports finding that First Marine failed to provide sufficient training nor refutes the testimony of the five employees who testified they lacked training.

In sum, the weight of the evidence establishes that First Marine failed to provide training that met the requirements of § 1915.12(d)(1). Accordingly, we agree with the judge that the Secretary has established noncompliance and affirm the violation.

B. Characterization and Penalty

" 'A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.' " *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2222 (No. 09-0004, 2014) (consolidated) (quoting *Hern Iron Works, Inc.* 16 BNA OSHC 1206, 1214 (No. 89-433, 1993)). "This state of mind is evident whe[n] the employer was actually aware, at the time of the violative act, that the act was unlawful," or when the employer "possessed a state of mind such that if it were informed of the standard, it would not care." *Id.* (quoting *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004)); *see also A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (stating that "conscious disregard" and "plain indifference" are two "alternative" forms of willfulness); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1188 (No. 00-0553, 2005) ("conscious disregard of . . . the safety and health of employees" reflects willfulness). The Sixth Circuit has stated that a willful violation is action "taken knowledgeably by one subject to the statutory

[10] Jones testified that he had been trained in 2011 by a previous employer as a "competent person" under OSHA's shipyard standard but was not designated by First Marine to serve in that capacity at the shipyard. *See* 29 C.F.R. § 1915.4(o) (defining "competent person" as one "who is capable of recognizing and evaluating employee exposure to hazardous substances or to other unsafe conditions and . . . specifying the necessary protection and precautions to be taken to ensure the safety of employees as required by the particular regulation under the condition to which it applies"). Byrum had also been previously trained as a competent person, but he too was not designated to serve as one at the shipyard. Thorn and another supervisory employee served as the shipyard's competent persons.

provisions in disregard of the action's legality;" conduct is willful if it is "conscious, intentional, deliberate, and voluntary." *Nat'l Eng'g & Contracting Co. v. Herman,* 181 F.3d 715, 721 (6th Cir. 1999) (citations omitted); *see also Chao v. Greenleaf Motor Exp., Inc*., 262 F. App'x 716, 719 (6th Cir. 2008) (unpublished).

For the following reasons, we find the Secretary has failed to establish that First Marine acted with either intentional disregard or plain indifference and therefore, reverse the judge's conclusion that the training violation is properly characterized as willful.

Intentional/Conscious Disregard

Although the judge did not explicitly find that the Secretary established intentional disregard in affirming the violation as willful, the Secretary argues on review that First Marine had a heightened awareness of the cited provision's training requirement yet consciously disregarded that obligation because employees were allowed to continue working aboard the *William* on the day of the explosion even after a gas odor was detected. In response, First Marine claims it "reasonably believed the employees expected to work in confined spaces, enclosed spaces, and dangerous atmospheres had received sufficient training to do so safely."

We find the Secretary has not established that First Marine consciously disregarded the cited provision. The company does not dispute that it was aware of the standard's training obligation—although the company's safety manual does not directly reference or incorporate the cited provision, such training is identified in the manual as required and the testimony from First Marine's supervisors discussed above makes clear they were aware of this requirement.[11] The record, however, lacks evidence that First Marine was actually aware that its training was insufficient. *See Envision Waste Servs., LLC*, No. 12-1600, 2018 WL 1735661 at *6 (OSHRC, Apr. 4, 2018) (finding violation not willful when "it is not clear that the safety manager ever indicated to the CO that, prior to OSHA's inspection of the facility, he was cognizant of his failure

[11] First Marine has a Safety and Health Manual, which includes a Hot Work section stating: "The Supervisor or Safety Manager is responsible for training and implementation of the outlined procedures." Similarly, the Fire Safety Plan in the manual states: "The Supervisor is responsible for training employees and implementation of the outlined procedures." The manual "encourage[s]" employees "to report hazards and unsafe conditions in the workplace to their supervisor" and provides that a supervisor will take prompt and appropriate action to determine if a hazard exists and to correct a hazard. The Hot Work and Fire Safety Plan sections of the manual also provide requirements for hot work issues such as ventilation, testing, and permits.

to provide training in 2011 to the particular employees at issue here"); *MJP Constr. Co.*, 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001) ("[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature."), *aff'd,* 56 F. App'x 1 (D.C. Cir. 2003) (unpublished).

First Marine had four experienced supervisors at the shipyard who had all completed competent person training. In addition, as the company points out, Thorn, Byrum, and Miller all testified that they believed employees had been sufficiently trained through various means, including weekly safety meetings, daily work meetings with welders, and on-the-job instruction. While we find their testimony is insufficient to rebut the evidence establishing the company's noncompliance, there is nothing in the record to suggest that any of these supervisors, and therefore First Marine, were actually aware that the company's training obligation was not being met. *Cf. Active Oil Serv., Inc.*, 21 BNA OSHC 1092, 1099 (No. 00-0482, 2005) (finding willful violation based on evidence that supervisor was aware of training requirement and had no basis for believing employee was trained yet assigned untrained employee role of confined space entry supervisor). Indeed, the Secretary does not point to any evidence, such as a prior OSHA citation or an external audit, that would have put First Marine on notice that its training was deficient. *See A.J. McNulty & Co., Inc. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) ("[P]rior citations for identical or similar violations may sustain a violation's classification as willful."); *A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 1205 (Nos. 91-0637 & 91-0638, 2000) (affirming willful violation of hazardous communication training standard based on finding that employer had heightened awareness of duty to train and knowledge of widespread presence of hazardous substance from prior audit reports), *aff'd*, 295 F. 3d 1341 (D.C. Cir. 2002).

In sum, the Secretary has introduced no evidence that First Marine was aware of any deficiencies in its training such that it demonstrated a conscious disregard of the cited requirement. *See Gen. Motors Corp.*, 22 BNA OSHC 1019, 1043-44 (No. 91-2834E, 2007) (consolidated) (concluding Secretary did not establish willful characterization because even though employer "was keenly aware of the LOTO standard and its requirements," the record lacked evidence that employer "appreciated its procedure was deficient"); *Trinity Indus., Inc.*, 20 BNA OSHC at 1068 (finding training violation not willful because "the Secretary introduced no evidence that [employer] knew that its training program failed to comply with OSHA standards or that

[employer] would have failed to correct deficiencies in its program had it known of the duty to do so); *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003) ("Mere negligence or lack of diligence is not sufficient to establish an employer's intentional disregard for or heightened awareness of a violation.").

Plain Indifference

In affirming the violation as willful, the judge concluded that First Marine acted with plain indifference to employee safety based on supervisor Jones' "lack of urgency when he detected gas onboard the *William*" and "First Marine's choice of [Deron] Conaway as [its] safety director."[12] According to the judge, "[i]ndifference to employee safety is manifested in the behavior of Jones . . . who shrugged off responsibility to stop work or notify Thorn or another First Marine management official that a pervasive odor of gas was present aboard the *William*." The judge concluded that had Jones been properly trained, "he would have responded to the pervasive strong gas odor with more diligence." As for safety director Conaway, the judge found that he "was ill-equipped for the position" and the company had failed to provide him with training, safety documentation, or a description of his responsibilities and authority as safety director. Accordingly, the judge concluded that "[i]t is clear employee safety was not a paramount concern for First Marine."

On review, First Marine argues that Jones' response on the day of the explosion was consistent with his training because he smelled gas only in the lower engine room, was not aware that any other employees outside the lower engine room smelled gas, and he and two other employees attempted to identify the source of gas and believed they had done so when Jones saw the propane tank being changed out in the lower engine room. In addition, First Marine points out that Jones knew fans were running in that area to ventilate the space and thus, "[w]hile one can debate whether Jones made the proper choices that day, the choices he made" do not demonstrate a plain indifference to employee safety or the requirements of § 1915.12(d)(1).[13] Finally, First

[12] The judge also relied on testimony from Thorn, who acknowledged on direct examination that First Marine's hot work procedures were not being followed on the morning of the explosion but stated on cross-examination that he had previously tested the entire vessel twice and deemed it safe for hot work. Contrary to the judge, we read this testimony as not pertaining to the lack of training, so we do not rely on it.

[13] First Marine also claims that in his willful analysis, the judge inappropriately relied on testimony from Thermal Control employees who, First Marine contends, have an incentive to exaggerate or

Marine disputes the judge's finding that Conaway was not trained appropriately for his position as safety director.

We agree with First Marine. The gravamen of the violation here is a failure to train, not a failure to respond to the conditions present prior to the explosion. While Jones' response on the day of the explosion may have been deficient, it does not establish that Jones or First Marine was plainly indifferent to the cited *training* requirement. In fact, as previously noted, the Secretary has made no connection between Jones' conduct that day and either his training or the training he provided to employees he supervises. In any event, as First Marine points out and the Secretary does not dispute, Jones did take some action in response to the gas odor. He and two members of his crew went looking for the source of the odor shortly after boarding the boat and knew that ventilation fans were running in the area. And as Jones testified, he believed the odor was limited to the lower engine room and that the source was Rupke's propane tank. In short, while Jones could have done more to ensure the work area was safe, the actions he did take are inconsistent with a finding of plain indifference. *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2141 (No. 04-475, 2007) (finding LOTO violation not willful when "an adequately trained foreman would have known to lock out the conveyor before allowing employees to work underneath it[,] [b]ut [employer's] failure to adequately train its employees does not on this record rise to the level of plain indifference in order to establish a willful violation of § 1910.261(b)(1)"); *see Branham Sign Co.*, 18 BNA OSHC 2132, 2135 (No. 98-752, 2000) (failure to monitor employee use of safety equipment amounts to a lack of diligence that supports a finding of constructive knowledge, not plain indifference).

Additionally, as noted, First Marine had a safety manual that required training employees, and the company held weekly safety meetings, daily work meetings with welders that periodically covered torch hose safety, and in some instances paired up less experienced employees with more experienced employees for on-the-job instruction. Again, while First Marine's training efforts were deficient, the Secretary has failed to provide sufficient evidence that the company was plainly indifferent to the standard's training requirement. *See AJP Constr., Inc.*, 357 F.3d 70, 74 (D.C.

misstate the truth because they have filed civil lawsuits against the company. The judge cited their testimony in finding that Jones' lack of urgency in responding to the gas odor lulled workers on the boat into a false sense of safety. As discussed below, we find Jones' actions that day do not rise to the level of plain indifference and therefore do not rely on this testimony.

Cir. 2004) (plain indifference can be established by showing employer "possessed a state of mind such that if it were informed of the standard, it would not care"); *Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007) (noting distinction between mere negligence and willfulness), *aff'd*, 262 F. App'x. 716 (6th Cir. 2008) (unpublished); *cf. Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1892-94 (No. 92-3684, 1997) (plain indifference found based on failure to provide employees with means essential for compliance—including safety program, training, and protective equipment— as well as supervisory involvement in the violation and apparent failure to take remedial action after recent receipt of two other citations for violations of same standard at other sites), *aff'd*, 131 F.3d 1254 (8th Cir. 1997).

Finally, we reject the judge's finding that Conaway's appointment as safety director is evidence of indifference to employee safety. The record supports First Marine's claim that at the time of OSHA's inspection, Conaway was transitioning into the role of safety director—while it is apparent from his testimony that he was not yet up to speed on First Marine's safety program at the time of the explosion, Conaway was performing walkaround inspections and making some effort to monitor safety at the shipyard. And although he had not previously worked as a safety official in a professional capacity, he was not, as the Secretary alleges, entirely without safety training given that he had earned a Bachelor of Science degree in occupational safety and health. The record also shows that the company took affirmative steps to prepare Conaway for the position, which included hiring an insurance company specializing in shipyards to audit the *William* and point out hazards to him. And he was not the only individual charged with safety responsibilities at the shipyard, as all of First Marine's supervisors also had safety responsibilities and several had competent person training. .

In sum, we find the Secretary has not established that First Marine—in failing to comply with the cited training requirement—acted with a willful state of mind. *See E.R. Zeiler Excavating, Inc.*, 24 BNA OSHC at 2053 (violation not willful when record is insufficient on key issues); *George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1983 (No. 93-0984, 1997) (same); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1727-28 (No. 95-1449, 1999) (same).

Penalty

The judge assessed the proposed penalty of $129,336 for the violation he affirmed as willful. Specifically, he found that First Marine was not entitled to any reduction in penalty for size, history, or good faith, and that the gravity of the violation was high. *See Mosser Constr.,*

Inc., 23 BNA OSHC 1044, 1047 (No. 08-0631, 2010) (citing 29 U.S.C. § 666(j) penalty factors). First Marine does not dispute that the violation should be recharacterized as serious if affirmed and neither party addresses penalty on review.[14] *See* 29 U.S.C. § 666(k) (violation is serious when there is "substantial probability that death or serious physical harm could result" from the hazardous condition at issue). Under these circumstances, we affirm the violation as serious and see no basis to disturb the judge's analysis of the penalty factors. Accordingly, given our recharacterization of the violation as serious, we assess a penalty of $12,934.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: April 6, 2023

[14] Indeed, a failure to instruct employees on the hazards of confined or enclosed spaces and other areas with dangerous atmospheres could, and potentially did in this instance, cause fatal and other serious injuries to employees. *See Pressure Concrete Constr., Co.*, 15 BNA OSHC at 2018 (characterizing failure to train violation under § 1926.21(b)(2) as serious when a worker was killed because it was "abundantly clear that the consequences of [the employer's] failure to instruct its employees could result in serious harm").