UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,
Complainant,

v.

SHORELINE FOUNDATION, INC.,
Respondent.

OSHRC DOCKET No. 13-2055

MEMORANDUM OPINION AND ORDER

The above-styled action comes before the Court on Respondent Shoreline Foundation, Inc.'s ("Shoreline") *Motion for Summary Judgment*, filed April 30, 2014. Complainant Thomas E. Perez, Secretary of Labor, United States Department of Labor ("the Secretary") filed an *Opposition Response to Respondent's Motion for Summary Judgment* on May 21, 2014. After discovery was concluded, the Secretary filed an *Amended Opposition Response to Respondent's Motion for Summary Judgment* on September 3, 2014.[1] Shoreline filed a *Reply to Complainant's Amended Opposition Response to Respondent's Motion for Summary Judgment* on September 10, 2014 and the Secretary filed *Complainant's Motion for Leave to Reply to New Issues Raised in Respondents Reply to Opposition to Summary Judgment* on September 12, 2014.[2] The Court having reviewed all arguments and evidence submitted by the parties, and relevant law, and being otherwise fully informed, finds that Shoreline's *Motion for Summary Judgment* should be **DENIED**.

[1] The amended opposition response was filed on August 25, 2014 but was not properly served electronically until September 3, 2014.

[2] Since *Complainant's Motion for Leave to Reply to New Issues Raised in Respondents Reply to Opposition to Summary Judgment* was a procedural motion, the Court granted the motion prior to the expiration of the time for response as permitted by 29 C.F.R §2200.40(c).

BACKGROUND

This litigation concerns Shoreline's alleged violations of the Occupational Safety and Health Act of 1970 ("the Act") on or about or May 23, 2013. On or about January 21, 2014, the Secretary served his Complaint in support of his Citation and Notification of Penalty, issued November 15, 2013, alleging that Shoreline committed five serious violations of the Act. The first three citations involve regulations relating to confined spaces in shipyard employment. The Secretary also asserts that there was no ramp for the employees to safely board the barge as required by 29 C.F.R. § 1915.74(c)(2).[3] Lastly, the Secretary argues that Shoreline did not ensure a Personal Flotation Device ("PFD") was worn pursuant to 29 CFR § 1915.152(a).

As to the three citations relating to confined spaces, the Secretary alleges first that Shoreline did not ensure that sealed and non-ventilated spaces were visually inspected and tested by a competent person to determine the atmospheric oxygen content prior to initial entry into the space by an employee pursuant to 29 CFR § 19l5.l2(a)(1). Second, the Secretary asserts that Shoreline failed to test bilges to ensure posting warning labels were not required pursuant to 29 CFR § 1915.l6(b). Third, the Secretary alleges that Shoreline did not ensure that each employee entering a confined or enclosed space was trained to perform all required duties safely as required by 29 CFR § 1915.12(d)(1).

Shoreline contends that the Secretary cannot prove the *prima facie* elements of his claim to establish that the Act was violated. More specifically, Shoreline argues that the Secretary cannot meet his burden of establishing the "knowledge" element of the cited violations.[4]

[3] Initially, the Secretary alleged a violation of 29 C.F.R. § 1915.74(a)(1). However, the Court granted the Secretary's motion to amend the standard alleged in Item 3 of the Citation to assert a violation of 29 C.F.R. § 1915.74(c)(2) in lieu thereof.

[4] Shoreline argues in its motion for summary judgment that although it "does not concede that it created a hazard in that it performed in accordance with industry and worksite standards and procedures. For purposes of this motion,

UNDISPUTED FACTS[5]

Shoreline, a Florida-based company, provides specialty marine, heavy highway, and deep foundation construction services at locations throughout the eastern United States and the Caribbean. The incident that precipitated the investigation by OSHA was the death of a Shoreline employee, Russell Rivenburg, which occurred after he entered or fell into the interior of a barge on May 23, 2013. Stanley Burcham was the lead OSHA investigator on the incident. (Burcham Dep., pp. 11-12.) Rivenburg was a Mechanic Supervisor for Shoreline and had the sole responsibility for repairing Shoreline equipment. He was also the individual that the project managers and superintendents would call if items needed repair (Daher Dep., p. 40). His primary duties entailed supervising mechanics and truck drivers, and overseeing equipment repairs. (Mot. Summ. J. Ex. B). Rivenburg worked for Shoreline for thirteen (13) years. (*Id.*; Ex. C). Further, he had worked around barges for over thirty (30) years.

A. The May 23 Incident

Shoreline was hired by the Port of Palm Beach to demolish and rebuild a sea wall. A crane was to be used to remove debris from the project. Prior to the start of the project, Rivenburg was tasked with supervising a crane mechanic from a vendor company who was fixing the crane's fuel pump. (McGee Dep., p. 16; Varela Dep., pp. 16, 19). The crane was located on barge MB 1503, docked at 1 East 11th Street, Slip 3 Riveria Beach, Florida. Robert Vaughn, the crane mechanic, was employed by Cummins Power South. (Mot. Summ J. Ex. F). Barge MB 1503 is owned by Shoreline. (Ex. G). The seawall project was not slated to begin until

---

however, [Shoreline] contends that the Secretary cannot meet his burden to produce evidence meeting the knowledge element of the Claim." Mot. Summ. J. p. 10.

[5] The following facts are taken from Shoreline's *Concise Statement of Material Undisputed Facts* contained in its motion for summary judgment. Each fact cites to documents and evidence in the record, which references are incorporated herein. Any facts asserted by Shoreline that were not properly addressed by the Secretary are considered undisputed for purposes of the summary judgment motion. *See* Fed. R. Civ. P. 56(e)(2).

June 3, 2013, and no other workers were present at the site on May 23, 2013. (Varela Dep., p. 22).

On May 23, 2013, Rivenburg arrived at the Port at around 7:30 AM. (Varela Dep., p. 36). At 8:12 A.M. John McGee, Shoreline's Vice President, sent an email to Fred Maxwell, Shoreline's General Superintendent, and Sal Daher, Shoreline's Project Superintendent. (McGee Dep. pp. 29-30). In the e-mail, McGee asked if the barge had been checked for damages because a pile had been accidentally dropped on the deck, and, if it hadn't, he requested that it be checked "sometime next week." (*Id.)* McGee wanted the exterior of the barge to be looked at to get a sense of "how bad" the damage was because Shoreline intended to hire an independent company to inspect and repair the barge before the upcoming American Bureau of Shipping (ABS) inspection in mid-September of that year.[6] (*Id*.) More specifically, McGee wanted measurements to be taken of a visible dent on the deck of the barge to determine how long and wide the dent was, or a picture to be taken of the dent to determine how big it was. (*Id.* at 28, 33). Both Maxwell and Daher understood this to be the intent of McGee's email. (Maxwell Dep., p. 69).

After the email was sent, Daher called Rivenburg to check how the repair of the crane was going. (Daher Affidavit, ¶ 12). Whenever equipment needed to be repaired, or if new equipment needed to be ordered, Daher would contact Rivenburg. (*Id.* at 10). During that same phone call, Daher mentioned McGee's email asking that someone look at visible damage on the deck of the barge within the week. (*Id*. at 12). No other direction was given. (*Id.* at 13-15). At no point did any Shoreline employee instruct Rivenburg to open the hatch and enter into the bilge of the barge to conduct the inspection. (*Id*. at 13).

[6] ABS is a classification society that develops industry standards for design, construction, and survey of vessels and offshore structures. ABS conducts an annual hull survey and a dry docking survey every four (4) or five (5) years to ensure companies are in compliance with its standards, and to assess damage, repairs and modifications as needed.

Respondent's management has been consistent in its position that no Shoreline employee expected Rivenburg to enter into the bilge of the barge. (McGee Dep., pp. 28, 33; Varela Dep., p. 74; Maxwell Dep., p. 69; Daher Affidavit, ¶¶ 13-16). Moreover, Burcham, the OSHA investigator did not find any evidence that there was an expectation that Rivenburg would remove the hatch and enter the bilge of the barge. (Burcham Dep., pp. 56-58). Further, Burcham indicated that in order to examine the substructure of a barge, there would need to be artificial lighting, but that none was found on the site. (Burcham Dep., pp. 62, 76).

Rivenburg called Varela between 10:30 AM and 11:30 A.M. to let him know he was testing the crane. (Varela Dep., pp. 36, 47). Varela advised Rivenburg to wait for him to return to the port so he could be escorted out of the port. (*Id*. at 37). Rivenburg never mentioned his intent to enter into the bilge of the barge. (*Id*.) After the repair work on the crane was completed, Vaughn went to his truck to complete paperwork. (Mot. Summ. J. Ex. L). Rivenburg stayed behind and opened the hatch of the barge with a sledge hammer he had borrowed from Vaughn. (Mot. Summ. J. Ex. F). After he opened the hatch, Rivenburg entered or fell into the bilge of the barge. He died of asphyxia due to environmental deprivation of oxygen. (Mot. Summ. J. Ex. M).

B. Shoreline Work in Marine Confined Spaces

In order to be certified for seaworthiness, the barges are subjected to annual inspections, and dry dock inspections conducted by ABS every four (4) to five (5) years, including the confined spaces of the barges. (Mot. Summ. J. Ex. N). Before the inspections take place, Shoreline hires independent companies to inspect the barges and make any repairs that might be necessary. (Mot. Summ. J. Ex. O, P, Q, R, and S). On or about August 7, 2013, Shoreline hired Beyel Brothers to inspect barge MB 1503 and repair it as per ABS specifications. (Ex. 0). The invoice clearly states that Beyel Brothers was hired for the 5-year renewal of the barge to "do

inspection with ABS and repair barge as per ABS specifications." (*Id.*) In 2013 alone, Shoreline spent over $200,000.00 on inspections and repairs of barge MD 1503.

For the previous ABS inspection in 2008, Shoreline hired Jones Boat Yard to inspect barge MB 1503. (Burcham Dep., pp. 30-31). One of the itemized costs in the invoice that Shoreline paid for was for a "marine chemist & inspection". (Id.; Burcham Dep., p. 33). A marine chemist conducts an atmospheric evaluation of the bilge of the barge prior to entry. (Burcham Dep., p. 40). Rivenburg was present in 2008, when the hatches to barge MB 1503 were opened 24 to 48 hours and were aired out with fans, before the inspector entered into the interior of the barge. (McGee Dep., pp. 40, 55, 58).

Every Shoreline manager testified that no Shoreline employee is qualified to perform an inspection of the interior of the barge, and no Shoreline employee had ever before entered into a marine confined space during the course of his employment. (McGee Dep., pp. 25, 33-35, 41, 57; Varela Dep., p. 74; Maxwell Dep. pp. 54, 70). When repairs need to be made to barges, Shoreline hires other companies such as Jones Boat Yard, Inc., Able-Bodied Marine, Inc. and Beyel Brothers, Inc. to do so. (Mot. Summ. J. Ex. O, P, Q, R, and S).

C. Shoreline Safety Training and Enforcement of Safety Policies

Throughout his years with the company, Rivenburg received extensive training provided by Shoreline on various topics, including: SAFE Systems of America's Basic Rules for Construction and Hazard Communication Orientation; National Safety Council safety training in Flagger work; Consolidated Rigging & Marine Supply's Rigging and Crane Signals seminar; United Rental's Excavation Safety seminar; Caterpillar's Operator Safety Training for Forklift Trucks; and America's First Aid and Safety Resource training on Bloodborne Pathogens. (Mot. Summ. J. Ex. T). The Basic Rules of Construction training included a discussion on work in

confined spaces which emphasized, among other things, the importance of testing the atmosphere before entry, and the presence of assigned safety standby employees who would be able to render assistance should an emergency occur. (Mot. Summ. J. Ex. U, p. 22). Rivenburg also received the OSHA 10-hour certification, and was certified in CPR and First Aid. (Mot. Summ. J. Ex. V). Shoreline employees also participate in weekly safety meetings. (Mot. Summ. J. Ex. W). Each week a different safety topic is covered such as crane and rigging safety, and construction work in confined spaces. (*Id.)* Rivenburg attended these weekly meetings. (*Id.)* Further, all Shoreline employees had access to the company's Safety Manual which, among other things, requires all employees to wear coast guard-approved Personal Flotation Devices (PFD) when working near water, and also describes in great length the company's policy and procedure for safely entering and/or working in confined spaces in construction. (Mot. Summ. J. Ex. X). During the course of the investigation, Burcham determined that Shoreline's Safety and Health Training program was above average. (Burcham Dep., pp. 68-69). Burcham also determined that Shoreline's written Safety and Health program and its communications to employee was average. (*Id.)*

All Shoreline employees are provided with life vests, and any other personal protective equipment they might need to fulfill their duties. (McGee Dep. pp., 61-62; Maxwell Dep., p. 58). Shoreline also has a disciplinary system for employees who violate company safety rules. A warning is issued for a first violation; followed by a second warning; ultimately followed by termination. (Mot. Summ. J. Ex. Y). On one occasion in 2007, Rivenburg was issued a first warning for failure "to enforce SFI safety policy by allowing personnel to work in or around water without wearing their life jackets as required by corporate policy" as a job superintendent. (Mot. Summ. J. Ex. Z).

D. The Investigation

Stanley Burcham, the lead OSHA investigator, has been employed with OSHA on and off for about ten (10) years. (Burcham Dep., p. 7). During the course of the investigation, Burcham concluded that Shoreline was going to repair the vessel for the purpose of recertification solely based on his review of the e-mail sent by McGee. (Burcham Dep., pp. 35-36, 54). However, Burcham acknowledged that there was nothing in the email itself indicating that an examination of the substructures of the barge needed to be conducted. (*Id.* at 54). Burcham found no evidence that Rivenburg received the email, or any evidence with regard to the communication of the contents of the email to Rivenburg. (Id. at 58). No Shoreline employee told Burcham that the company intended to conduct the repair or inspection themselves. (*Id*. at 35-36). In fact, Burcham did not uncover any evidence of any communication to Rivenburg regarding the actions he took on the barge on the day of the accident. (*Id*. at 59).

Further, Burcham found no evidence that would establish that any manager of Shoreline expected or instructed Rivenburg to examine the substructure of the barge, or that anyone from Shoreline had actual or constructive knowledge that Rivenburg was going to enter into the bilge of the barge. (*Id.* at 56, 58, 80). As part of his investigation, Burcham did not make inquiries as to McGee's reasons for sending the email, or with regards to what type of damages needed to be repaired for the reclassification. (*Id.* at 59). Further, Burcham testified that he uncovered no evidence that any Shoreline employee, aside from Rivenburg on this one occasion, ever entered the bilge of any barge, or entered any confined spaced while working within the course of his employment. (*Id.* at 46, 64). Burcham also testified that upon review of the invoices from Beyel brothers, there is no indication that Shoreline was involved in any aspect of the repair of the barge. (*Id.* at 39-40). Further, Burcham found there was a ring buoy on the vessel. (*Id.* at 90).

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure, as made applicable to these proceedings through Commission Rule 61, 29 C.F.R §2200.61, provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In making that determination, the Supreme Court recently reiterated that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton,* 572 U.S. ——, 134 S.Ct. 1861, 1863, —— L.Ed.2d —— (2014) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S.Ct. 2505 (1986)).

Thus, courts must view the evidence "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598 (1970); see also *Anderson, supra*. Courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau v. Haugen,* 543 U.S. 194, 195, n. 2, 125 S.Ct. 596 (2004). A "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249.

LEGAL STANDARD TO DEMONSTRATE VIOLATIONS

The citations at issue are grounded on Section 5(a)(1) of the Act, which provides that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). It has long been established that the Act does not impose strict or absolute liability on employers for all harmful workplace conditions; rather it attaches liability when there is some nexus between the employer and the alleged violation, and where harm can be prevented. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722

F.3d 1304, 1306 (11th Cir. 2013) (citing *Central of Ga. R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 623 (5th Cir. 1978). Thus, while the importance of adequate supervision and training in safety-related matters is crucial for providing safe and healthful working conditions, courts have consistently refused to require employers to take measures "beyond those which are reasonable and feasible." *Id.*; (citing *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 569 (5th Cir. 1976).

Under the law of the Eleventh Circuit, the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements. *ComTran Grp., Inc.*, 722 F.3d at 1307 (citations omitted). As indicated *supra*, Shoreline does not concede that it created a hazard in that it performed in accordance with industry and worksite standards and procedures but for purposes of the pending summary judgment motion, "contends that the Secretary cannot meet his burden to produce evidence meeting the knowledge element" for the three citations relating to confined spaces (Citations 1, Item la, lb, and 2).

As for the knowledge element (the one at issue in this case), the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *Id.*, 722 F.3d at 1307-08 (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *Id.*, 722 F.3d at 1308 (citing *e.g., Secretary of Labor v. Kansas Power & Light Co.,* 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be

imputed to respondent"). An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. *ComTran Grp., Inc.*, 722 F.3d at 1308 (citing *e.g., Secretary of Labor v. Hamilton Fixture,* 16 O.S.H. Cas. (BNA) 1073, at *17–19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.,* 88 F.3d at 105–06 (citations omitted), with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable. *ComTran Grp., Inc.*, 722 F.3d at 1308.

However, "the Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct. A supervisor's 'rogue conduct' cannot be imputed to the employer in that situation." *Id.*, 722 F.3d at 1316. Rather, "employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards]." *Id.*

If (and only if) the Secretary makes out [his] prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct (citations omitted). This defense requires the employer to show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover

noncompliance; and (4) enforced the rule against employees when violations were discovered. *Id.*, 722 F.3d at 106 (citations omitted).

ANALYSIS

Citations 1, Item la, lb, and 2.

Shoreline argues that "there is not a scintilla of evidence that any Shoreline supervisor or employee had any expectation or knowledge that Mr. Rivenburg was going to enter a confined space that day." (Mot. Summ. J., p. 12.) "Burcham [ ] stated that he uncovered no evidence that any Shoreline employee had any actual or constructive knowledge that Mr. Rivenburg was going to enter into the bilge of the barge." (Reply Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 3; Burcham Dep., p. 78).

In response, the Secretary asserts that "[w]hen questioned, Mr. Maxwell, in the presence of two Shoreline Foundation owners, advised that Mr. Rivenburg should have opened all of the hatches on the barge and waited 24 hours before checking the air quality and make entry once it was deemed safe. (Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 4; Raja Aff.) "Assistant Superintendent Wheeler also stated it was common knowledge that if damages occurred to the barge Mr. Rivenburg or another Shoreline employee would open the hatches, and enter the bilge to check the extent of the damage after sufficient air quality was established." (Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 5; Wheeler Aff., p. 3).

Thus, the Secretary argues that this evidence "contradicts Respondent's statement that it there was an 'absence of any expectation that Mr. Rivenburg would have understood the communication by Mr. Daher as an instruction to enter the bilge.'" (Res. Mot. p. 13). Shoreline argues that Wheeler's testimony directly contradicts the unequivocal testimony of various

Shoreline employees who testified that no Shoreline employee ever checked the interior of barges for damages caused by a dent, and further, that his testimony is not reliable. (Reply Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 9.)

However, since "[t]he evidence of the [Secretary] is to be believed, and all justifiable inferences are to be drawn in his favor," *Tolan, supra*, 572 U.S. ——, 134 S.Ct. at 863, and the Court must view the evidence "in the light most favorable to the opposing party," *Adickes, supra*, 398 U.S. at 57, the Court concludes that there is a genuine dispute as to material facts related to the knowledge element for the three citations relating to confined spaces and therefore Shoreline is not entitled to a judgment as a matter of law on Citations 1, Item la, lb, and 2.

Citation 1, Item 3.

Shoreline initially argued in its motion that the Secretary "cannot establish the basic threshold requirement of a violation of the Act; that the regulation applied. Section 19l5.74(a) of the Act explicitly states that '[t]he employer shall not permit employees to board or leave any vessel, except a barge or river towboat, until the following requirements have been met... .'" (Emphasis in original.) (Mot. Summ. J., p. 16.) In its *Reply to Complainant's Amended Opposition Response to Respondent's Motion for Summary Judgment*, however, Shoreline argues that "the Secretary cannot, under any circumstances, meet [his] burden of establishing that the Act was violated." (Reply Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 11.)

Nonetheless, as the Secretary points out in his *Reply to New Issues Raised in Respondent's Reply to Opposition to Summary Judgment*, a review of the record evidence shows that Shoreline did not provide a ramp or gangway to access the barge until the day after Rivenburg passed. (Daher Dep., pp. 84-85). Additionally, Shoreline knew prior to this fatality that a ramp was not present at the port and also knew that the vertical distance from the barge

changed with the tide. (*Id.*, pp. 84-85; Ex. 8 Varela Dep., pp. 39-41). And the evidence suggests that the tide changed on the day Rivenburg was assisting the mechanic with the crane repair. (Varela Dep., pp. 41-44). Since the evidence of the Secretary is to be believed, and all justifiable inferences are to be drawn in his favor, the Court agrees with the Secretary that there is an issue of material fact as to whether employees of Shoreline were able to step safely to and from the barge as the standard requires or whether a ramp was needed. Thus, the Court concludes that there is a genuine dispute as to material facts related to the knowledge element of Citations 1, Item 3 and therefore Shoreline is not entitled to a judgment as a matter of law on Citations 1, Item 3.

Citation 1, Item 4.

The Secretary asserts in citation 1 Item 4 that "[o]n or about May 23, 2013, at the above addressed jobsite, an employee was engaged in maintenance work of the diesel engine of the crane on Barge MB 1503. The employer did not ensure a Personal Floatation Device was worn. However, Shoreline argues that OSHA's own evaluation of Shoreline's Safety and Health program rated Shoreline's safety and health training as 'above average'; and its written program, communication to employees, and preventative action taken were rated as 'average' by OSHA." (Reply Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 12.)

The Secretary argues that there is no evidence that Rivenburg was ever assigned a life vest. (Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 10.) In contrast, Shoreline argues that all Shoreline employees are provided with life vests, and any other personal protective equipment they might need to fulfill their duties. (McGee Dep. pp., 61-62; Maxwell Dep., p. 58). The Secretary also argues that "[a]s discussed above in paragraph C, there is a genuine dispute as to the accuracy of Respondent's safety program and training records" in

support of his argument that Shoreline had constructive knowledge of the alleged violation. (Compl't's Am. Opp'n Resp. to Resp't's Mot. Summ. J., p. 10.) However, in paragraph C, the Secretary argues that while Shoreline "has put forth documents that purport to be training documents, each of Shoreline managers provided conflicting testimony as to whether they were provided with *confined space training*." (Emphasis added.) (*Id.*, p. 8.) This argument does *not* however, support the Secretary's assertion that Shoreline had constructive knowledge of the alleged violation, which is not a confines space violation, but rather, relates to whether Shoreline failed to ensure that a Personal Floatation Device was worn.

Nonetheless, the Secretary argues that there is still a dispute on the accuracy of the safety manual since the manual clearly states that Carlos Varela was the responsible safety officer but that in his deposition, Varela denied that was a fact and also testified that he did not perform the functions required of the responsible safety officer outlined in the manual. (McGee Dep., p. 61; Varela Dep., pp. 51-59; Ex. 9, p. 4, § 5). Since the evidence of the Secretary is to be believed, and all justifiable inferences are to be drawn in his favor, the Court agrees with the Secretary that there is a genuine dispute as to material facts related to the knowledge element of Citations 1, Item 4 and therefore Shoreline is not entitled to a judgment as a matter of law on Citations 1, Item 4. Accordingly,

IT IS HEREBY ORDERED THAT Shoreline's Motion for Summary Judgment is **DENIED**.[7]

SO ORDERED THIS 15th day of **September,** 2014.

/s/
JOHN B GATTO, Judge
U.S. Occupational Safety And
Health Review Commission

[7] **IT IS FURTHER ORDERED THAT** no further responses or reply briefs shall be accepted and exceptions, if any, to this Order or any previous rulings shall be argued orally at the commencement of the trial on September 16, 2014.