

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Cooper T. Smith, Inc.,

Respondent.

OSHRC Docket No. **14-0772**

Appearances:

Josh Bernstein, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Secretary

Ronald Signorino, President, The Blueocean Company, Inc., Basking Ridge, New Jersey
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Cooper T. Smith, Inc., (CTS) provides maritime cargo services. On November 18, 2013, a CTS employee was killed when she was crushed by shifting cargo in the hold of a barge CTS was loading on the Mississippi River in Darrow, Louisiana. Compliance Safety and Health Officer (CSHO) James Nevers conducted an inspection of the site for the Occupational Safety and Health Administration (OSHA) on November 18 and 19, 2013.

Based upon CSHO Nevers's inspection, the Secretary of Labor issued a one-item Citation and Notification of Penalty to CTS on April 8, 2014. Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1918.24(e)(1) for failing to provide a ladder or equivalent safe access to and from the cargo hold of the barge. The Secretary proposes a penalty of \$7,000.00 for Item 1.

CTS timely contested the Citation. The Court held a hearing in this matter on December 22, 2014, in Baton Rouge, Louisiana. The parties stipulate the Commission has jurisdiction and that CTS is a covered employer (Tr. 11). Based on the record and the stipulations, the Court

finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and CTS is a covered employer under § 3(5) of the Act. The parties filed simultaneous post-hearing briefs on March 13, 2015. CTS contends the Secretary failed to establish it had knowledge of the violative condition. CTS also asserts the affirmative defense of unpreventable employee misconduct.¹

For the reasons discussed below, the Court affirms Item 1 of the Citation and assesses a penalty of \$7,000.00.

Background

CTS provides various maritime services, including offloading and loading cargo. On the morning of November 18, 2013, a Monday, a CTS crew was preparing to continue offloading cargo from a ship, the *Yangtze Xing Jin*, to a barge on the Mississippi River in Darrow, Louisiana (Tr. 100). The cargo comprised numerous sacks (also referred to as bags), each weighing “anywhere from a ton to two tons.” (Tr. 33.)² The barge was approximately 100 feet long and 24 feet wide (Tr. 82-83). The hold of the barge was 12 to 14 feet deep (Tr. 108).

A CTS crew had begun offloading the cargo from the *Yangtze Xing Jin* over the weekend.³ Offloading a ship “can typically last from five to ten days, depending on the amount of cargo, the weather . . . , and other variables.” (Tr. 102.) When the Monday morning shift began at 8:00 a.m., the hold (also referred to as the hopper) of the barge was partially filled with six rows of sacks. The first row of sacks was stacked six high, the second row was stacked five high, and so on, in stair-step fashion to the sixth row, which was a single sack high (Exh. C-3, p. 3; Tr. 249, 254).

The CTS employees present at the start of the shift were the Shift Supervisor, the Barge Foreman, the Crane Operator, and two laborers, Employee A and Employee B. The Shift

¹To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

²None of the witnesses who testified identified the contents of the sacks in his testimony. The Crane Operator stated, “[W]hat was in the sacks, I don’t know.” (Tr. 34.) In his Inspection Report, CSHO Nevers identified the contents of the sacks as *Cenospheres*, “hollow ceramic microspheres used as a filler in cement to produce concrete.” (Exh. C-2, p. 7.)

³The Barge Foreman had not worked on the barge at issue the previous day and had not participated in the partial loading of the barge (Tr. 46). The Crane Operator and Employee A, but not Employee B, had worked on the barge the previous day (Tr. 29, 82).

Supervisor supervised the overall offloading operation for CTS (Tr. 126-127). The Barge Foreman reported to the Shift Supervisor and directly supervised Employees A and B (Tr. 42, 103). The Shift Supervisor was on the deck of the *Yangtze Xing Jin*, which was 30 to 40 feet higher than the barge. From that position, the Shift Supervisor could observe “a large portion of the barge that’s on the off side of the derrick rig.” (Tr. 128.) The Crane Operator was on the barge, operating the crane (Tr. 129).

The crew who worked the previous shift had placed hatch covers (lightweight fiberglass covers used to protect cargo from the elements) over the stacked sacks in the barge hold because it had been raining (Tr. 25-26). The first task the Barge Foreman assigned Employee A and Employee B the morning of November 18 was to hook hatch covers so the Crane Operator could remove them from the cargo in the hold (Tr. 26). The CTS employees worked at this task until “a little after 10:00.” (Tr. 44.) At some point, Employee B entered the hold of the barge by climbing down the stacked sacks, using them as stairs (Tr. 27). After Employee B used the stacked sacks to enter the hold, Employee A did the same. Employee B described the tragic event that followed:

I see her climb into the barge and she starts to walk down the sacks to get to the bottom. In the process of her walking down the sacks she steps on the 3rd row from the bottom and the sacks shifted. When they shifted she regained her footing and then she sat down on it. She [slid] off the sack and was standing but the sack she was sitting on kept sliding down and came down on top of and pinned her in a hole between the floor and the sack.

* * *

I hollered for anybody. I went to see if she was breathing but she wasn’t responding so I climbed the sacks to get out of the barge. I got the attention of a guy on the ship; he got the attention of the crane operator. Then guys working on the deck of the dock came on the barge and we started moving sacks from around her so we could get to her. After I removed the sacks from around her I got out of the barge. I don’t know how long it took the ambulance to get there and I wasn’t there when they removed her from the barge.

(Exh. C-14, pp. 3-5.) Employee A was fifty-six years old. She had started working for CTS in February 2013, approximately nine months before her death (Exhs. C-2, p.6; R-10).

CSHO Nevers arrived at the site later that day. He held an opening conference with Byron Borne, CTS’s Regional Loss Control Director (Exh. C-2, pp. 2, 17). CSHO interviewed

employees and took photographs of the hold of the barge. Upon his recommendation, the Secretary issued the instant Citation on April 8, 2014.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Serious Violation of § 1918.24(e)(1)

Alleged Violation Description

The Citation alleges:

Ladders or steps of adequate strength were not furnished when it was necessary to obtain access to or from a stowed deckload or other cargo, and no other safe means of access were available.

a) River Marker Mile 175; On or about 11/18/13, the employer failed to ensure employees used a ladder to access the barge. Employees accessed the barge by climbing down 1000 pound sacks of bulk concrete additive stacked on top of each other in the barge. The 1000 pound sacks were stacked up to six high which exposed employee(s) to the hazard of being crushed in the event the bags shifted and struck an employee.

Section 1918.24(e)(1)

Section 1918.24(e)(1) provides:

Where access to or from a stowed deckload or other cargo is needed and no other safe means is available, ladders or steps of adequate strength shall be furnished and positively secured or held against shifting or slipping while in use. Steps formed by the cargo itself are acceptable when the employer demonstrates that the nature of the cargo and the type of stowage provides equivalent safe access.

Applicability of the Cited Standard

Part 1918 of 29 C.F.R. addresses “Safety Health Regulations for Longshoring.” Section 1918.1(a) provides, “The regulations of this part apply to longshoring operations and related employments aboard vessels.” Section 1918.2 specifies *vessel* “includes every description of watercraft or other artificial contrivance used or capable of being used for transportation on water, including special purpose floating structures not primarily designed for or used for transportation on water.” The standard defines *barge* as “an unpowered, flatbottomed, shallow draft vessel including river barges, scows, carfloats, and lighters.”

The parties stipulate § 1918.24(e)(1) applies to the cited conditions in this proceeding (Tr. 11). Based upon the record, the parties’ stipulation, and above-cited standards, the Court finds § 1918.24(e)(1) applies to the cited conditions.

Failure to Comply with the Terms of the Standard

Where access to or from a stowed deckload or other cargo is needed and no other safe means is available, § 1918.24(e)(1) requires an employer to furnish ladders or steps of adequate strength. The employer must positively secure or hold the ladder or steps against shifting or slipping while in use. The standard considers steps formed by the cargo itself acceptable “when the employer demonstrates that the nature of the cargo and the type of stowage provides equivalent safe access.”

CTS does not dispute it failed to furnish a ladder for access to the barge hold. CTS furnished steps formed by the cargo, but it is undisputed its supervisors failed to demonstrate that these steps provided equivalent safe access to the barge hold.

CTS Failed to Furnish a Ladder

There were two ladders onsite: a 20-foot extension ladder that CTS usually set up for access to the barge hold and a fixed ladder on the bow of the barge (Exh. C-14, p. 7). There is no evidence the fixed ladder provided access to the barge hold.⁴

⁴ In its post-hearing brief, CTS states, “It is important to remember that there is always a fixed or connected ladder that provides access to the hold, so there is another way to enter the hold without using cargo as steps.” (CTS’s brief, p. 19.) This reference to the fixed ladder is apparently an afterthought on the part of CTS. It did not argue at the hearing that the fixed ladder was the means of access provided to reach the hold. CTS’s expert witness John Faulk, who never observed the barge at issue (Tr. 239), made a passing reference to fixed ladders in general: “Quite often, fixed ladders on each end of the barge [are] blocked out with cargo, very common.” (Tr. 246.) No fixed ladder is visible in the only photographs in the record (Exhs. C-3, R-7). Furthermore, in his witness statement, Employee B

The Shift Supervisor had overall responsibility for CTS employees working to load the cargo into the barge on November 18, 2013. He testified he generally stays on the ship from which the cargo is being offloaded and does not board the barge. The Shift Supervisor stated that, from the ship's vantage point, "I can see quite a bit of their work area [on the barge]. So I know what the deck of the rig looks like, if there's good housekeeping, if there are certain hazards on the deck." (Tr. 128.) With regard to the ladder required for access to the hold, the Shift Supervisor testified,

Depending on where the ladder is, I can usually see it. The barge actually moves up and down the side of the crane, which is also on the barge, but sometimes that will block your view of part of the barge. . . . But I can generally see the ladder from the deck of a ship and that will be part of my inspection, so to speak. . . . If I don't see one, I will ask the operator if I'm not seeing it and it's there or if someone is not using it.

(Tr. 129.)

The Shift Supervisor initially would not provide a straightforward answer to whether CTS furnished the ladder required by § 1918.24(e)(1) the morning of November 18, 2013, to access the hold.

Q. On the morning of November 18, 2013, when [Employee A] was crushed by the cargo, was a ladder present in the hopper?

Shift Supervisor: There was a ladder present on the rig. At that moment I don't recall -- I wasn't out there to see whether or not it was present in the barge when she went into the barge.

* * *

Q. Whose job is it to ensure that the barge foreman timely sets up a ladder for the longshoremen's use?

Shift Supervisor: Mine.

* * *

Shift Supervisor: Generally speaking, as part of my inspection when I walk past a barge, walk past a crane, that is something that I look for. That particular day, I don't remember taking issue with anything, which causes me to assume that had there not been a ladder, I would have addressed it with the barge foreman and/or

said, "There is a ladder on the bow of the barge connected to the barge. I climbed down that ladder *and then climbed down the cargo.*" (Exh. C-14, p. 7). Employee B's statement indicates the fixed ladder does not provide access to the hold of the barge.

the crane operator. So based on that assumption, I would say a ladder was probably being used that morning. However, I can tell you I have corrected many a barge foreman, many a crane operator for not having a ladder in the barge while people were working. So could it have happened that day? Sure. But as I recall, it didn't happen on that day on that crane. That tells me that they were probably using a ladder that morning.

(Tr. 129, 131, 134.)

It was not until the Secretary's counsel informed him the Barge Foreman admitted earlier in the hearing (the witnesses were sequestered) that he had not set up the ladder in the barge hold that the Shift Supervisor finally acknowledged he knew no ladder was in the barge hold at the time of Employee A's death. "[I]n the weeks following this incident, I do recall [the Barge Foreman] saying that after shifting covers, he had not yet had a chance to put the ladder into the barge." (Tr. 136.)

It is unclear why, in his testimony, the Shift Supervisor engaged at length in the pretense he was unaware the Barge Foreman had failed to set up the ladder at the time of Employee A's death.⁵ The Shift Supervisor had overall authority over the CTS crew's operations that morning. One of the four employees he was supervising died during the shift as she used the stacked cargo to access the hold of the barge. It beggars belief the Shift Supervisor would not be cognizant of the details of the conditions at the time of Employee A's death, including the Barge Foreman's failure to set up the ladder.⁶

The Barge Foreman has worked for CTS for approximately 20 years and has held the position of barge foreman for the last ten years (Tr. 41). He testified that on the morning of November 18, 2013, he was working outside of the barge, Employee A was on the deck of the barge, and Employee B was "on the inside toward the stern." (Tr. 42.) The Barge Foreman related, unprompted, his version of the events that morning:

And as we were restacking the covers, I went along and then come to find out, the young lady, she jumped in the barge without me knowing, without me setting up

⁵At the hearing, the Shift Supervisor's evasions and feigned ignorance with regard to the Barge Foreman's failure to set up the ladder are much more extensive than the selections quoted above. See Tr. 128-136.

⁶CTS incorporates *Fatality Response Procedures* in its written safety program. Procedure no. 5 states, "**NOTE IN WRITING ALL OF THE PARTICULARS OF THE ACCIDENT: WHO, WHAT, WHEN, WHERE, WHY, ETC.** Photographs (Video), sketches should be made of the accident scene including all angles of the deceased. The *Safety Director* will take notes and investigate, along with taking pictures and making sketches." (Exh. C-9, p. 4, emphasis in original.)

the ladder and stuff so she could proceed to go down the ladder the correct way. So I mean, as I was coming along, I didn't see her, you know, jump in the barge because I was walking on the off side. But if I would have saw her, I would have stopped her, you know. But no one told her to jump into the barge, to go down that way, because you know, I worked with her in that area once before and I never had a problem with her about doing it that way. So all of a sudden, she just done it on her own and not even was following directions to be told something like that. You know, I don't know why she done it, but she done it, and that was it.

(Tr. 42-43.)

The Barge Foreman conceded it was his responsibility to set up a ladder for access to the cargo hold that morning and that he had not fulfilled this responsibility at the time of Employee A's fatal accident. Immediately after conceding it was his responsibility to set up the ladder, however, the Barge Foreman reverted to blaming Employee A for her accident.

I have a little objection to how you're saying it, you know, about I'm not fulfilling my obligation. See, it's a process that no one is supposed to do anything before the barge foreman let them know what to do. You know, that was my job as the barge foreman to let them know how to proceed. So until I finish all of my operations step-by-step, and then they will proceed to go into the area of work. But at this time, this young lady, she wasn't told or asked to do anything but stay on the rig. That was her position, to stay on the rig, not to even enter in that work area until I, as the barge foreman, let her know that it was safe for her to get in the areas to go to work. And it wasn't even told by me; much less let her do that, but she overrided on her own thinking ability to get up on the ladder, to get in the working area on her own without even being authorized to be in that area. So I mean, she should know after I worked with her that she should have waited at that time till I got all my proper work set up to proceed in this area. And then I would have let her know that everything is safe to go in the area to work. But at that present time, she didn't give me the opportunity to fulfill my obligation as being the barge foreman, and I know my responsibilities.

(Tr. 48-49.)

The Barge Foreman initially stated he was waiting until the barge was upriver to set up the ladder and that he was outside the barge and Employee B was inside the barge, near the stern, when Employee A climbed down the steps formed by the cargo ("I was going to go and set the ladder further upriver." (Tr. 47.); "At that moment, I wasn't going to even allow those workers to get in that area without—they were going to be upriver." (Tr. 53.)). But the Barge Foreman abruptly changed his story when asked if he was in the process of getting the ladder when the

accident occurred. He stated that he “was proceeding to go get” the ladder with the help of Employee B at the time Employee A climbed down the cargo. “The young lady, she’s not handy with the ladder. Me and [Employee B] we two men, we proceed to hook the ladder up, you know, and we carry it up and she had to reach up the ladder.” (Tr. 88-89.) The Court sought to clarify his testimony.

JUDGE JOYS: [T]he last answers that you gave to Mr. Signorino confused me. Did you say -- what did you say you were doing right before you came to the area where [Employee A] was when she had her accident? What were you doing right before that?

Barge Foreman: Right before that, we were stacking the barge.

JUDGE JOYS: No, you personally.

Barge Foreman: Personally, I was on the off side of the barge.

JUDGE JOYS: Doing what?

Barge Foreman: You know, stacking the covers. [Employee A], this young lady, she was on the deck of the barge.

JUDGE JOYS: When she had her accident?

Barge Foreman: Yes. Right. Yes, ma’am.

JUDGE JOYS: And where was this ladder? You said something about the ladder being right there.

Barge Foreman: Right there. It was right there on the deck of the barge where the covers would be at, you know, where the barge would be set up at. They also have a ladder where you can exit the barge on the rig, you know. And the young lady, she’ll readjust the ladder. It may lack a foot or two. You standing up on the high barge and she -- you know, the competent man was there as well to help her. She wasn’t passing all this by herself. You know, they’ll help the young lady, you know, because longshoremen, we pretty much work together. You know, and they’ll reach out and reach the ladder.

JUDGE JOYS: I was confused because I thought you said you were in the process of going to get the ladder but the ladder was actually there where she was?

Barge Foreman: On the rig, yes, ma’am. Yes, ma’am.

(Tr. 91-92.) Despite the Barge Foreman's obfuscations regarding when he was "proceeding to go get" the ladder and the locations where the ladders were kept (as opposed to set up for actual use), the record is clear that he had not yet set up a ladder to provide access to and from the barge hold at the time of Employee A's death (Q. "So that morning, you had not yet fulfilled your responsibility of putting a ladder in the barge, is that correct?"; Barge Foreman: "Correct." (Tr. 48.)). The Crane Operator also stated there was no ladder placed for access to the hold at the time of Employee's death (Tr. 27).

The Secretary has established CTS failed to furnish a ladder where access to or from a stowed deckload is needed.

CTS Failed to Demonstrate the Steps Formed by the Cargo Provided Safe Access

The Barge Foreman initially testified CTS has a rigid work rule prohibiting employees from using cargo as steps to access a barge hold.

Q. Did Cooper have a work rule last November that employees must always use a ladder to access the barge and that it's prohibited to climb on cargo?

Barge Foreman: Definitely. It's very strictly enforced that we install all ladders at all times for safety, no matter what. Ever since I've been working bags, the ladders was always properly used, never once climbed in the barge. If they did so, I didn't see them. I didn't authorize them to do it. I mean, some things, you know, the guys out there do, you know, they do it and I don't have no knowledge of it. But at that present time, I didn't authorize anyone to climb on cargo at that time.

(Tr. 54.)

The Barge Foreman almost immediately amended his response, stating CTS allows climbing on the cargo to access the hold on occasion.

Q. Sir, my question was: are you aware of any written work rule that Cooper has that says you must use a ladder to climb into a barge?

Barge Foreman: Well, like I say, if it's step-by-step when we're working in the barge, we will. If they stacked real neat like step ways, you know, like steps -- like going up layer by layer where they're stacked real neat, then we'll proceed going down. And if they're a certain height, you know, we just use them as steps going down to the floor.

Q. Are you telling the Court that at some point it is okay for employees to climb down the cargo like steps?

Barge Foreman: I mean, if they right there -- if they right here, if the bag is stacked right there and they right there and they right behind us and more will be coming in and if it be right there, you know -- they won't be way up here. [Indicating] They'll be right there. You know, a bag will come in and they'll stand behind the bag. The bags will come in front of them and they'll just continue going like that. Yeah.

Q. I'm not sure I understood your answer . . . Is it your understanding as the barge foreman that once cargo is stacked sufficiently high in a step formation, that it is permissible for employees to climb up and down the cargo like steps?

Barge Foreman: If they stack real neat, they can go step-by step till it gets to the point to where it's not safe for them to be way up[.]

(Tr. 61-62.) A little later in his testimony, the Barge Foreman finally acknowledged not only is it permissible for employees to step on the bags, it is “a necessary part of the employees’ job duties.” “I mean, if you’re stacking bags, I mean, quite naturally, I mean, you don’t have an elevator or somebody to pick you up and make you unhook the bag. I mean, yeah, they have to get up on the bags to unhook the straps.” (Tr. 70.)

In contrast, the Shift Supervisor readily acknowledged that there are times “when the cargo is stacked sufficiently high that the cargo can be used as steps” to access the hold. He stated he had personally used steps formed by cargo to access the hold and had observed other employees doing the same (Tr. 109). In fact, the Shift Supervisor testified, “Every day we work a bag ship, I’m aware that a majority of employees will be walking on cargo at some point that day.” (Tr. 139.)

When asked how he knows when it is safe to use cargo as steps to access the hold, the Shift Supervisor replied it was a judgment call for each employee, not a determination made by a supervisor prior to employees’ use of the cargo steps (Tr. 110). “[Y]our judgment comes into play when you look at that cargo and decide whether or not you could climb down these bags or, you know, which bags you could safely climb down.” (Tr. 111.)

Over the Secretary's objection, the Court qualified CTS's witness John Faulk as an expert in marine cargo handling (Tr. 243).⁷ Faulk stated it is "very common" for employees to use stepped cargo to access barge holds (Tr. 246). "I've seen it hundreds of times done safely on various types of cargo. And it's a practice that's been recognized by management and labor and OSHA since 1971." (Tr. 246.)

The Crane Operator has worked for CTS for 10 to 12 years (Tr. 23). His testimony (in contrast to that of the Shift Supervisor and the Barge Foreman) was straightforward, responsive to the questions asked, and without artifice. The Court finds him a credible witness whose testimony is given great weight. The Crane Operator stated CTS has a 20-foot ladder that it usually sets up to access the hold of the barge. He estimated employees use the ladder to access the hold 80 to 90 percent of the time, but he also observed employees routinely climb the cargo stacked in the hold, "using it like a stepladder." (Tr. 24.) He typically stacks cargo in a stair step manner for employees to use as access (Tr. 34).

The Crane Operator matter-of-factly stated Employee B entered the hold by climbing down the stacked sacks because the ladder had not been set up. Section 1918.24(e)(1) requires the employer to furnish a ladder or equivalent safe access "[w]here access to or from a stowed deckload or other cargo is needed." The Crane Operator's testimony establishes such access was needed in order for the laborers to perform their assigned tasks.

Crane Operator: According to how we stack covers, [Employee B] gets in the barge, and he walks down the sacks. And [Employee A], before I went to the ship, she was on the outside of the barge.

Q. How did [Employee B] get into the barge that morning?

Crane Operator: He -- if I'm not mistaken, he climbed on top of the cargo because the stepladder was inside the tractor. I know that much.

Q. So was there a ladder that was in the barge for him to use to climb down on?

⁷The Secretary objected to Mr. Faulk's testimony at the hearing and again noted in its brief CTS "failed to timely designate Mr. Faulk as a testifying expert witness and failed to timely produce a CV or report from Mr. Faulk." (Secretary's brief, p. 3.) The Court overruled Secretary's objection (Tr. 243). The Secretary suggested in its brief CTS made misrepresentations regarding its relationship with Mr. Faulk at the hearing. Given CTS's minimal reliance on Mr. Faulk's testimony as well as the Court's assessment it does not support CTS's defense, the Court finds the Secretary was not prejudiced by the admission of Mr. Faulk's testimony and will not revisit the Secretary's objection to it.

Crane Operator: No, they hadn't put it in by then.

Q. Okay. And you observed him climb into the barge by climbing down the cargo?

Crane Operator: I seen him climb in the barge. I assume that's the way he went in.

Q. Okay. Had you seen employees of Cooper climb down into the barge before?

Crane Operator: Yes.

(Tr. 27.)

When the Barge Foreman was asked if he had made "any independent determination of the stability" of the steps formed by the cargo, the Barge Foreman replied, "No. No. No, sir." (Tr. 46.) The Barge Foreman was asked whose responsibility it was to determine whether the steps formed by the cargo were safe to use to access the hold. He first responded, "Well, no one was told to go in the barge, period, you know, because I was going to go and set the ladder further upriver. So I mean, I didn't give the instructions for no one to get in the barge." (Tr. 47.) When pressed to answer the question posed, the Barge Foreman stated, "Well, when I come on, that probably would have been my responsibility, you know, but what I was going to do is I was going to put the ladder in and we was going to start on the floor." (Tr. 47.)

Had he gotten around to making a determination of whether the cargo was safe to use as steps, the Barge Foreman testified he would have made it "[b]y looking at it at the present time, you know. I would have made my determination of what to move and what not to move, and whether to even be in that area or not. I would have avoided that area, period, till it was corrected." (Tr. 54.) He stated he had made such determinations before.

Q. Have you ever, as a foreman, made a determination that the steps formed by cargo by and of themselves provided a safe means of access into the barge?

Barge foreman: Yes, sir. Yep. If I see something unsafe, I will correct it.

Q. So there have been times when you as a foreman looked at the steps formed by the cargo itself and said, "Yes, they provide a safe means of access to get into the barge"?

Barge Foreman: Yes, sir.

Q. Okay. That's not uncommon, is it?

Barge Foreman: No, sir.

(Tr. 85.)

The Barge Foreman acknowledged the steps formed from the cargo were not safe in the configuration existing when Employees A and B used them to access the barge hold. "Well, first of all, this employee, it's unfortunate that she lost her life from entering into an area that wasn't safe for her to enter. And that's the reason why it's very important that the ladder be set up for you to enter the barge properly. She did it enter it, but it was improperly done." (Tr. 51.)

Elsewhere in his testimony, the Barge Foreman conceded Employee B had accessed the barge hold before Employee A. When asked how Employee B accessed the hold, he stated,

How [Employee B] got in the barge, they had steps that he *might* have climbed down, you know, *in the center that it was safe for him to go down*. But at the same time, it's another unproper procedure that I wasn't told, you know, that he was doing it. When I looked, he was already in there, you know. I didn't see [Employee B] enter the barge. I'm back up -- *I'm going to stick to what I'm going to say* and that I didn't have anyone authorized to go in the barge, period.

(Tr. 55; emphasis added.) Although the Barge Foreman insisted he did not give the laborers permission to enter the hold and he did not see Employee B climb down the cargo steps, he acknowledged Employee B *may* have used the cargo steps, somehow intuiting Employee B climbed down in the center, where it was safe.

The Barge Foreman acknowledged it was his responsibility to demonstrate the steps formed by the cargo provided safe access to the hold. He conceded he had not done so at the time of Employee A's death (Tr. 47). The Secretary has established CTS failed to demonstrate the cargo steps provided safe access to the hold of the barge.

The Court determines CTS failed to comply with the terms of § 1918.24(e)(1).

Employee Access to the Violative Condition

Employee A and Employee B both used the stacked sacks to access the barge hold. After one of the sacks shifted and crushed Employee A as she descended the makeshift steps, several other CTS employees and rescue personnel rushed to her aid, using the same unsafe cargo steps (Exh. C-2, pp. 3-5; Tr. 159).

The Secretary has established CTS's employees had access to the unsafe steps formed by the cargo.

Employer Knowledge

In its post-hearing brief, CTS argues the Secretary failed to establish only the knowledge element of his burden of proof. CTS contends the Secretary failed to establish knowledge on two fronts: first, the Secretary failed to prove CTS "knew or should have known that its employees would even enter the barge hold at all considering they had not been given permission to do so by the barge foreman." Second, "[e]ven if the Secretary could prove this, he failed to prove [CTS] knew or should have known that when the employees entered the barge hold they would do so by using cargo as steps, something that they had never done before." (CTS's brief, p. 2.) The Court finds no merit to either of these contentions.

Permission to Enter the Barge Hold

CTS claims it has a work rule prohibiting employees from entering the hold of a barge until the barge foreman gives them permission (Tr. 48-50). This purported work rule is not written.⁸ Assuming CTS had established and communicated this work rule to its employees, Court would still conclude there is no credible evidence the Barge Foreman had not given Employees A and B permission to enter the barge hold at the time of Employee A's death.

CTS had five employees engaged in the cargo operations at issue on November 18, 2013. The Shift Supervisor and the Crane Operator did not testify one way or the other regarding whether the Barge Foreman gave permission to the laborers to enter the barge hold. Employee A is deceased and Employee B's written statement is silent on this issue. Thus, the only evidence in the record indicating the Barge Foreman had not yet given permission to Employees A and B to enter the hold is the testimony of the Barge Foreman. The Court, having closely observed the Barge Foreman's demeanor and listened to his sworn testimony, finds his manner was evasive and defensive, and his testimony self-serving. His testimony is replete with contradictory

⁸ CTS has a written rule prohibiting employees from entering the hold of a *ship* without their supervisor's permission, which is part of a document titled *WORKING ABOARD THE SHIP* (Exh. C-5, p. 9). This document does not address work on *vessels*, a more inclusive term which is defined as "every description of watercraft." § 1918.24(e)(1). CTS has a separate set of rules addressing work on barges, titled *COVERSTACKING AND WALKING ON BARGES* (Exh. C-5, p. 7). This document does not have an equivalent rule prohibiting employees from entering the hold of a barge without the barge foreman's permission.

statements and implausible scenarios. The Court quoted some of his self-contradictory testimony above regarding CTS's supposed prohibition against stepping on the cargo and his muddled account of when he was planning to set up the ladder. The Barge Foreman showed himself to be a fabulist, tailoring his answers to continually shift blame to Employee A, regardless of the disparities these answers created with his previous statements.

The Barge Foreman admitted it was his responsibility to set up the ladder accessing the barge hold and to determine whether the stacked cargo was safe to use as steps, and he did neither. He stated he had worked with Employee A three days previous to her death and “[s]he complied with every last one of my commands, you know, with the ‘do’s and with the ‘don’ts.’” (Tr. 84.) The Court determines the Barge Foreman is not a credible witness on the issue of whether he gave the laborers permission to enter the hold. The Court views his self-serving testimony as an attempt to divert responsibility for the unsafe conditions in the barge hold to Employee A. The Barge Foreman’s repeated statements that he had not given the laborers permission to enter the barge hold are accorded no weight.⁹

Employees’ Use of the Cargo as Steps

CTS argues “there was no reason to suspect the employees would use cargo as steps to enter the hold” and, therefore, CTS had no knowledge of the violation (CTS’s Brief, p. 18). CTS’s focus is misplaced. The violative conduct here is not the entry of the employees into the hold—it is the failure of the Barge Foreman to “demonstrate[] that the nature of the cargo and the type of stowage provides equivalent safe access.” The Barge Foreman was aware he had failed to place the ladder for access to the barge hold and to demonstrate the stacked cargo provided safe access to the barge hold. He had knowledge of his own violative conduct.

⁹ CTS devotes a section of its brief to attacking the credibility of Employee B’s written statements, admitted as Exhibit C-14. Employee B was served with a subpoena issued by the Court (Tr. 195). Employee B failed to appear at the hearing. In lieu of his testimony, the Secretary offered Employee B’s witness statements, taken by CSHO Nevers on November 19, 2013, and January 19, 2014 (Tr. 195, 201). The Court admitted the statements over CTS’s objection (Tr. 204). Although the Court disagrees with CTS’s assessment that the statements “have no indicia of reliability,” (CTS’s brief, p. 14) the Court agrees some of Employee B’s answers are ambiguous and should be subject to cross-examination. The Court therefore does not rely on the statements admitted as Exhibit C-14, other than to quote from Employee B’s explanation of how he entered the hold and his eyewitness account of his co-worker’s death.

Employees A and B had access to the barge hold via the stacked sacks for 1 to 3½ hours (Tr. 44-45).¹⁰ The Barge Foreman acknowledged the employees would have to step on the stacked cargo at some point in order to perform their duties (Tr. 70). The Shift Supervisor testified “Every day we work a bag ship, I’m aware that a majority of employees will be walking on cargo at some point that day.” (Tr. 139.) The phrasing of the Crane Operator indicates it was routine and expected that employees would climb down the cargo when hooking the hatch covers, the specific task the Barge Foreman assigned the laborers to perform that morning: “*According to how we stack covers, [Employee B] gets in the barge, and he walks down the sacks.*” (Tr. 27.)¹¹

The Barge Foreman was aware he had not set up the ladder to access the barge hold because he planned to place it upriver. Therefore, he was aware the only method available to the employees to access the barge hold was to climb down the steps formed by the cargo. The fact that the sacks were stacked in stair-step fashion suggests CTS intended the cargo to be used as steps; otherwise, CTS could have stacked each of the rows of sacks six high. The Barge Foreman was also aware he had not determined the stacked cargo provided safe access to the hold. He stated the cargo was not safe to step on at the time of Employee A’s death (Tr. 54). Based on the record, the Court rejects CTS’s contention it had no reason to suspect its employees would use the cargo as steps to access the hold. On the contrary, the record establishes the

¹⁰ CSHO Nevers’s Investigation Report lists 11:30 a.m. as the time of the accident (Exh. C-2, p. 4). The Barge Foreman was the only witness who was asked when the accident occurred. His estimate was uncertain.

Q. And, approximately, what time did [Employee A] get killed?

Barge Foreman: If I’m not mistaken, it might -- I’m not totally correct with the time. It might have been a little bit after 10:00. I’m not sure. You know, my recollection don’t remember right the time, but I know it was before lunchtime.

Q. Closer to the beginning of the shift?

Barge Foreman: No. Somewhere up in there, 9:00 to 10:30, a quarter to 10:30. I’m not sure. I’m not precise with what time.

(Tr. 44-45.)

¹¹ An experienced longshoreman not involved in the accident (called to testify by CTS) also stated he has used cargo to access barges (Tr. 214).

employees' use of the cargo as steps was routine and expected, especially given the Barge Foreman had not placed the ladder for access to the hold.¹²

Constructive Knowledge

The Barge Foreman admitted he had actual knowledge he had not placed the ladder for access to the barge hold and he had not demonstrated the stacked cargo provided safe access to the barge hold at the time of Employee A's death (Tr. 46, 48). The record also establishes the Shift Supervisor should have known, with the exercise of reasonable diligence, of the violative conditions. "Reasonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.' *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981)." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-0692, 1992).

The Shift Supervisor testified it was his responsibility to enforce the safety rules during the shift he oversaw on November 18, 2013 (Tr. 105). CTS's written safety program includes a page titled *Inspections*, which states in pertinent part:

Continuous inspections of cargo handling operations are required to assure the standards, duties, and policies of the Company are followed. A primary duty of superintendents is to inspect the work area for unsafe practices, gear and other hazards and make necessary corrections.

No one is in a better position to perform an inspection of a work area or operation than the superintendent in charge. The superintendent should know the

¹² John Faulk, CTS's expert in marine cargo handling, appeared to ignore the employer's obligation to demonstrate the cargo steps provide safe access as required by § 1918.24(e)(1). He stated, "[L]ooking at the cargo [in photographic Exhibit C-3] the way it's stowed here, I wouldn't have a problem with it if these bags were in place on the left side of the barge like they probably were before it fell." (Tr. 252.) When asked if § 1918.24(e)(1) requires the employer to demonstrate the cargo steps are safe prior to use, Faulk stated, "I think it's demonstrated the way it's stowed here." (Tr. 254.) When the Court pointed out he had not answered the question ("[W]hat does the regulation require the employer to demonstrate?" (Tr. 254)), Faulk replied, "Your Honor, the way a cargo is stowed, it's stowed under the direction of the superintendent in charge of the operation. The way it's stowed, I think demonstrates that it's step-down and it's stowed in a manner than it can be used for access to the barge." (Tr. 254.) The preamble to Part 1918 clarifies § 1918.24(e)(1) allows the use of cargo as access to the hold only "where the employer *can show* that employees can safely use the cargo itself to climb in and out of the hold (often called 'safe cargo steps')[.]" *Longshoring and Marine Terminals*, 62 Fed. Reg. 40142, 40156 (July 25, 1997) (emphasis added). Section 1918.24(e)(1) imposes an obligation on the employer beyond safely stacking the cargo; the employer, (through supervisory personnel) must affirmatively show the stepped cargo is safe prior to permitting an employee to use it as access the hold. In its brief, CTS does not dispute it failed to comply with the second sentence of § 1918.24(e)(1).

workplace, equipment, operations, and personnel under their direction. The use of inspection checklists tailored to specific operations is required.

(Exh. C-9, p.1.)

The Shift Supervisor stated he was aware “there was a rule in place that a ladder was always to be present for safe access” to the barge hold (Tr. 107). He testified, “I can generally see the ladder from the deck of the ship and that will be part of my inspection, so to speak. . . . If I don’t see one, I will ask the operator if I’m not seeing it and it’s there or if someone is not using it.” (Tr. 129.) When asked, “Whose job is it to ensure that the barge foreman timely sets up a ladder for the longshoreman’s use?,” the Shift Superintendent replied, “Mine.” (Tr. 131.)

As noted above, the Shift Supervisor spent much of the time during his examination attempting to parry counsel for the Secretary’s questions regarding the ladder. Initially he stated the ladder could not be set up at the start of the shift because the hatch covers were still in place. He stated, “[T]he accident happened right after we shifted covers.” (Tr. 132). Immediately thereafter, however, the Shift Supervisor stated, “That being said, I was not there watching the covers be shifted, so I couldn’t tell you if the ladder was already in the barge or on its way to the barge or laying next to the barge when she actually went over the coaming.” (Tr. 132-133). He then stated, “I’m pretty sure when I walked by that morning, when the covers were in their original arrangement, there had been a ladder used.” (Tr. 133). CTS now acknowledges a ladder was never in place for access to the hold the morning of November 18, 2013.

Reasonable diligence includes the “obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” Here, despite CTS’s written safety program encouraging “[c]ontinuous inspections of cargo handling operations,” the Shift Supervisor failed to inspect the work area of the barge hold for the ladder. Due to his failure to ensure the ladder was in place, he failed to anticipate the logical consequence of its absence, that the employees tasked with working around the cargo would use the stacked sacks to access the hold. His failure to inspect the work area and to anticipate hazards to which employees may be exposed set up his failure to take measures to prevent the occurrence of the hazardous condition, such as instructing the Barge Foreman to set up the ladder or inspect the stacked cargo to see if it was safe to use as steps.

The absence of the ladder and the presence of the stacked cargo were open and obvious conditions. The Shift Supervisor stated he had walked past the barge hold and inspected it the morning of November 18 (Tr. 133).

[T]he conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge.” *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871, 1993-95 CCH OSHD ¶ 31,207, p.43,723 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation. *Hamilton Fixture*, 16 BNA OSHC1073, 1089, 1993-95CCH OSHD ¶ 30,034, p.41,184 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

KS Energy Services, Inc., 22 BNA OSHC 1261, 1265-1266 (No. 06-1416, 2008).

Based upon the readily observable nature of the violative conditions, the proximity of the Shift Supervisor to the violative conditions, and his failure to adequately inspect the work area or to anticipate likely hazards and take preventive measures, the Court determines the Shift Supervisor had constructive knowledge of the Barge Foreman's failure to place the ladder for access to the barge hold and to demonstrate the stacked cargo provided safe access to the barge hold.

The actual knowledge of the Barge Foreman and the constructive knowledge of the Shift Supervisor are imputed to CTS. “[K]nowledge can be imputed to the cited employer through its supervisory employee.” *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999). “Therefore, the Secretary establishes a prima facie showing of knowledge by proving that a supervisory employee was responsible for the violation.” *Aquatek Sys., Inc.*, 21 BNA OSHC 1400, 1401, 2006 CCH OSHD ¶ 32,794, p. 52,442 (No. 03-1351, 2006).” *American Engineering & Development Corporation*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012). The Secretary has established CTS knew of the violative condition.

The Secretary has established CTS committed a violation of § 1918.24(e). He classified the violation as serious. Under § 17(k) of the Act, “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists[.]” Here, Employee A was killed when a sack

weighing at least one ton crushed her as she climbed down the cargo stowed as steps. The violation is properly classified as serious.

Foreseeability

If it were concluded the Shift Supervisor did not have constructive knowledge of the violative condition, then the only supervisory personnel who knew of the violative conduct was the Barge Foreman.¹³ Because the Barge Foreman is himself responsible for the violative conduct, his knowledge of his own misconduct would not be imputed to CTS. This case arose in the Fifth Circuit, which has rejected the Commission's approach of imputing a supervisor's knowledge to the employer when it is knowledge of his own violative conduct involved.¹⁴ Instead, the court has imposed an additional burden on the Secretary to show that the supervisor's violative conduct was foreseeable by the employer.

[A] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. As with each element required to establish a violation, employer knowledge must be established by the Secretary, as an element of § 666(k). *Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir.2000) (citing *Carlisle Equip. Co. v. Sec. of Labor*, 24 F.3d 790, 792-93 (6th Cir.1994) ("Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations."))

W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 608-09 (5th Cir. 2006) (emphasis in original).

Therefore, if the Shift Supervisor's constructive knowledge were discounted, the Secretary would have to show CTS's safety policy, training, and discipline are insufficient and the Barge Foreman's misconduct was foreseeable. The Court determines the Secretary has done so.

¹³CTS did not argue the Secretary failed to establish the foreseeability of the Barge Foreman's misconduct either at the hearing or in its post-hearing brief. It has consistently maintained that it was Employee A, and not the Barge Foreman, who engaged in violative conduct.

¹⁴ "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law." *D.M. Sabia Co.*, 17 BNA OSHC 1413, 1414 (No. 93-3274, 1995), *vacated and remanded on other grounds*, 90 F.3d 854 (3rd Cir. 1996).

CTS's written safety program includes this rule: "To enter or exit a barge hopper or ship hold a ladder must be used." (Exh. R-9, p. 5.) It has no written rule prohibiting the use of cargo as steps to access the hold of a barge or requiring a supervisor to demonstrate the cargo is safe for such access. CTS does have, however, written rules prohibiting employees from stepping or climbing on other surfaces and equipment ("Do not step on manhole covers."; "Never stand on covers being lifted or rolled."; "Employees are not to walk on the coamings of barges at any time."; "Climbing on buckets is prohibited." (Exh. C-5)). As discussed above, employees routinely used the cargo to access barge holds and CTS's supervisors were aware of this use (Tr. 61-62, 70, 109, 139). The Shift Supervisor agreed CTS's rule requiring employees to enter and exit a barge hold using only a ladder "is incomplete." (Tr. 119.) The record establishes CTS's written rule stating a ladder must be used to enter or exit a barge hopper is not absolute and is ignored regularly by management and employees.

CTS failed to train its employees to use only a ladder to access the barge hold. The Crane Operator was unaware whether there was a "mandatory work rule at Cooper which says you must use a ladder and you are prohibited from climbing on cargo." (Tr. 28.) Neither the Barge Foreman nor the Shift Supervisor was aware of a rule prohibiting employees from using cargo as steps (Tr. 60, 109). The Shift Supervisor also testified it was up to the individual employees to "decide whether or not you could climb down these bags, or you know, which bags you could safely climb down." (Tr. 111.)

Although its employees routinely used the cargo as access to the barge hold rather than a ladder, there is no evidence CTS ever disciplined any of its employees for this purported infraction. Exhibit R-12 comprises disciplinary records produced by CTS. None of them was issued for using cargo to access a barge hold or for failing to use a ladder to access a barge hold. According to the Barge Foreman, both Employee A and Employee B violated company policy when they entered the barge hold without his permission. When asked if he disciplined Employee B for his part in the misconduct, the Barge Foreman wove an implausible tale.

Q. Okay. Is it true that you did not discipline [Employee B] in any way for climbing down the sacks like steps on that morning?

Barge Foreman: Yes, sir, I told him, you know, that ain't the proper way to go. "Hey, man, I do this. This is what I've always done." I said, "Hey, that's not the proper way."

Q. But is it true that you did not discipline [Employee B] in any way for climbing down the sacks like steps that morning with you; is that true?

Barge Foreman: Yes. No, we -- like I said, I gave him a lecture. I mean, I don't know, lecture, discipline. I did pass it by him that wasn't the proper way to do it.

* * *

Q. When you saw [Employee B] climb down the sacks like steps on that morning before you had an opportunity to put the ladder in, you did not report or discipline him in any way; is that correct?

Barge Foreman: I didn't get around to it, letting the supervisor know, because everything took place so fast. But yeah, I did let him know personally that that wasn't the correct way to go. . . . When I come around, he come hollering. You know, he was hollering and I come back around and I said, "Man, what's going on?" He said, "The lady, the bags done fell on her." I said, "What you doing down in the barge?" "I climbed in." "You know that ain't the proper way, man. Why you done that?" I mean, that was it. You know, I mean, I didn't see. I didn't see [Employee B] get in the barge or the young lady, you know.

Q. You're telling the Court now that you had a conversation with [Employee B] about how it was improper for him to get in the barge the way he did?

Barge Foreman: Yeah, after I saw him in the barge, yes, sir.

Q. And where was [Employee A] at this time?

Barge Foreman: At the present time, that's when the lady --the bags must have fell on her. When I come along, you know, and I saw all this here, you know, I said, "What's going on?" They climbed in the barge. "Well, she got in the barge and the bags fell on her." You know, I said, "Why? You know, I'm supposed to put the ladder up."

(Tr. 55-60).

The Court is skeptical that anyone would, upon being notified a subordinate employee was lying crushed beneath cargo, choose that moment to upbraid another employee. Employee B's account of the frantic events immediately following Employee A's accident also casts doubt on the Barge Foreman's version ("I hollered for anybody. I went to see if she was breathing but she wasn't responding so I climbed the sacks to get out of the barge. I got the attention of a guy on the ship; he got the attention of the crane operator. Then guys working on the deck of the

dock came on the barge and we started moving sacks from around her so we could get to her.” (Exh. C-14.)).

The Secretary has established CTS did not have safety rules prohibiting its employees from using cargo to enter or exit barge holds or requiring supervisors to demonstrate the cargo was safe to use as access before permitting employees to use it. CTS did not provide safety training requiring its employees to access barge holds using ladders only or prohibiting them from using cargo to access barge holds until a supervisor demonstrated the cargo was safe to use. Despite it being a daily occurrence, CTS never disciplined employees for using cargo to access barge holds. Under these circumstances, it was entirely foreseeable by CTS that the Barge Foreman could violate § 1918.24(e)(1). The Secretary has established foreseeability.

Employee Misconduct Defense

CTS contends that any violation of the cited standard is the result of employee misconduct. “To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule.” *Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006). The Barge Foreman is responsible for the violative conduct and is a supervisory employee. “Where a supervisory employee is involved the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of his employees under his supervision ... A supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax.” *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1076, 1991).

In its post-hearing brief, CTS contends the work rule Employee A violated was entering the barge hold without the Barge Foreman’s permission. As noted above, CTS does not have a written rule requiring a supervisor’s permission before entering a barge hold—that written rule applies only to the hold of a ship. The Shift Supervisor testified, “[A]lthough this is referring to a ship hold, I believe a reasonable person could say that entering a hopper, they would need to wait for a supervisor’s permission.” (Tr. 116.) The Court disagrees that the Shift Supervisor’s conclusion is the obvious one. There are significant differences between a ship and a barge.

Section 1918.2 provides an individual definition for *barge*. One of its defining characteristics is its shallowness, which differentiates the configuration of its hold from that of a ship.

The Court also finds CTS's contention it had a well-communicated policy regarding the need for supervisory permission to enter a barge at odds with the testimony of the Shift Supervisor and the Crane Operator that the determination of whether it was safe to use cargo to access the barge was a judgment call to be made by the employee (Tr. 150-53, 109-11). If such a policy existed, there would be no reason for an exercise of discretion on the part of the employee regarding how or when to enter the barge.

As discussed in the section above addressing *Permission to Enter the Barge Hold*, the only evidence adduced showing the Barge Foreman had not given permission to Employees A and B to enter the hold of the barge was the testimony of the Barge Foreman. For the reasons discussed, the Court does not accord this testimony any weight.

CTS's employee misconduct defense must address the Barge Foreman's misconduct to be effective. CTS must demonstrate it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule. CTS, however, does not have a rule requiring its supervisors to furnish a ladder for access to a barge hold at the beginning of a shift or requiring them to demonstrate cargo provides safe access before permitting subordinate employees to use it. No such rules were communicated to its supervisors and CTS took no steps to discover violations or enforce the requirements of § 1918.24(e)(1).

The Court finds CTS's employee misconduct defense is without merit.

PENALTY DETERMINATION

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The gravity of the violation is high. Up until the time of Employee A's accident, she and Employee B were exposed to the violative condition the morning of November 18. The Shift Supervisor testified that immediately following Employee A's accident, he and other CTS and ship employees, as well as rescue personnel, used the stacked cargo to access the hold in order to help Employee A (Tr. 159). When asked how they accessed the hold of the barge, the Shift Supervisor stated, "Everyone that I saw gained access by climbing down the cargo." (Tr. 159.) The Shift Supervisor testified employees have been previously injured while walking on cargo (Tr. 139). Mr. Faulk testified a passing ship, currents, or high winds could cause cargo to dislodge (Tr. 247-48). Therefore, the likelihood of injuries resulting from use of unsafe cargo to access a barge is high. Potential injuries could be severe, as demonstrated by the accident. The Court concludes a \$7,000.00 gravity based penalty is warranted.

Locally, CTS had approximately 70 employees at the time of the inspection, but nationally it has many more. OSHA had previously cited CTS for safety violations (Tr. 178-179). The Secretary adduced no evidence indicating CTS demonstrated anything less than good faith. Taking these factors into consideration, the Court gives no reductions in the gravity-based penalty.

The Court determines a penalty of \$7,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1918.24(e)(1), is **AFFIRMED**, and a penalty of \$7,000.00 is assessed.

SO ORDERED.

Date: **May 18, 2015**

/s/ Heather Joys
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia