United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. TRUSTON TECHNOLOGIES, INC., Respondent.	OSHRC Docket No. 15-1023

Appearances:

Susan Brinkerhoff, Esq. and Cheryl Adams, Esq., Department of Labor, Office of Solicitor, Seattle, Washington
For Complainant

Elena A. Pecoraro, Esq., Pecoraro Law, LLC, Lafayette, Louisiana
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Approximately three years ago, the United States Navy hired Respondent, Truston Technologies, to perform maintenance on mooring systems in the Middle Loch of Pearl Harbor, Honolulu, Hawaii. (Stip. No. 3). Truston,[1] in turn, hired Healy Tibbitts Builders to carry out certain aspects of the maintenance operation. (Stip. No. 4). Part of the maintenance operation involved lifting an 11,500-pound buoy approximately 75 feet above the deck of the barge where Truston's and Healy Tibbitts' employees were stationed. (Tr. 97, 171). Tragically, during the

1. Typically the Court would refer to all parties as either "Complainant" or "Respondent"; however, because this trial involved two respondents, the Court shall refer to them by their shortened, proper name to clarify any confusion that may result from using the generic "Respondent".

course of one such lift, the buoy detached from the crane hook and fell to the deck of the barge, seriously injuring two Healy Tibbitts employees and killing two others. (Stip. No. 25). In response, Complainant conducted an inspection, and cited Truston for three violations of the Occupational Safety and Health Act.[2]

I. Procedural History

As noted above, Complainant cited Truston for three violations of the Act and proposed a total penalty of $15,400. In response, Respondent filed a *Notice of Contest*, arguing Complainant could not prove a violation with respect to any of the citation items. By filing the *Notice of Contest*, Truston brought this case before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c).[3]

In addition to citing Truston, Complainant also cited Healy Tibbitts for multiple violations of the Act. Because the facts and some of the alleged violations overlapped, Truston, Healy Tibbitts, and Complainant agreed to consolidate the cases for the purposes of trial only. Although the discussion of facts, and certain conclusions of law, will inevitably involve the actions of both Truston and Healy Tibbitts, this decision only addresses the citations issued to Truston. As previously noted, Complainant issued three separate citation items, but only two were addressed at trial—Citation 1, Item 1 was withdrawn by Complainant at the beginning of the trial. (Tr. 16).

The trial took place on October 24–27, 2016, in Honolulu, Hawaii. The following witnesses testified: (1) Compliance Safety and Health Officer (CSHO) Rajkumar Sundram; (2) Edward DeLach, Safety and Occupational Health Manager for OSHA Region 10; (3) Roger

2. The Court shall refer to the foregoing as "the Act".
3. The Court shall refer to the Occupational Safety and Health Review Commission as "the Commission".

Forstner, Area Director for the Honolulu OSHA Area Office; (4) Daniel T. Crane, OSHA Lead Physical Scientist at Salt Lake City Technical Center; (5) Richard E. Cabral, Jr., Superintendent for Healy Tibbitts; (6) Cristian Caicedo, Project Manager for Healy Tibbitts; (7) Richard Heltzel, President of Healy Tibbitts; (8) Richard Vonderhaar, Marine Construction Supervisor for Truston; (9) Ricky K. Cabral, an operator for Healy Tibbitts; (10) Robert Pittman, Navy contracting officer; (11) Gustav Ruetenik, Chief Engineer for P.C.C.I., Inc.; and (12) Erick Knezek, Co-Owner of Truston.[4] Both parties timely submitted post-trial briefs.

II. Stipulations & Jurisdiction

The parties stipulated to a number of facts, both substantive and jurisdictional. Those stipulations were submitted by the parties as Joint Exhibit 1.[5] Based on the parties' stipulations, the Court finds the Commission has jurisdiction over the action pursuant to Section 10(c) of the Act. Further, the Court finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

III. Factual Background

In May 2009, the United States Navy's Naval Engineering and Expeditionary Warfare Center entered into a contract with Truston to provide ocean facilities engineering support services to the Navy's Inactive Ships Yard, located in the Middle Loch of Pearl Harbor. (Stip. No. 2). The contract was subsequently modified in August 2014 to include attaching sinker blocks to existing mooring legs, which were installed in 1997. (*Id.*). Pursuant to the contact,

4. The testimony of Ricky K. Cabral, Robert Pittman, and Gustav Ruetenik was read into the record through the use of deposition testimony. Unfortunately, Ricky K. Cabral passed away during the pendency of these proceedings, though such was not the result of injuries suffered in the accident.

5. Subsequent references to the parties' Joint Stipulations will indicate the source and specific stipulation, e.g., "Stip. No. ___". Due to the joint nature of the trial, references to exhibits submitted by Truston will be labeled as "T-_" and those submitted by Healy Tibbitts will be labeled as "HT-__".

Truston hired Healy Tibbitts to provide labor and equipment for the mooring upgrades. (Stip. No. 4).

According to Truston and Gustave Ruetenik, another contractor for the Navy, the Navy dictates the parameters of the contract, including specifications, guidelines, and safety. (Tr. 536, 585–86). In this case, Truston and representatives from the Navy participated in pre-planning meetings to discuss how the mooring upgrades would be accomplished, how previous operations have been carried out, and how safety would be handled. (Tr. 53, 573–74). The procedures and plans developed during this meeting were then reduced to a Project Execution Plan. (Tr. 484; Ex. T-52). Bob Pittman and Steve Cohen, both Navy representatives, reviewed the plan and gave it their approval. (Tr. 484).

Pittman was the designated onsite representative for the Navy. However, according to Healy Tibbitts' Contract Proposal[6] and Truston's Site-Specific Accident Prevention Plan, Truston assumed responsibility for supervision of subcontractor personnel and over all safety-related matters. (Ex. C-5, C-12). The Accident Prevention Plan specifically states, "We will provide and enforce safety rules to protect employees, subcontractor, clients and the public." (Ex. C-12 at 3). The testimony of Richard E. Cabral, Jr. and Ricky Cabral confirmed those assumed responsibilities were carried out on a day-to-day basis by Truston's onsite supervisors, Robert Vonderhaar and Chris Pacheco. (Tr. 313, 398, 403). While Pittman participated in a portion of the work—identifying the link on the riser chain to which the sinker blocks would be attached—Truston was still responsible for carrying out the mooring maintenance in accordance with the plan approved by the Navy. (Tr. 439–41; Ex. C-5, C-12). This is reflected in the Project

6. Although the actual contract between the parties was not introduced into evidence, neither Truston nor Healy Tibbitts disputed that Truston, in fact, assumed responsibility for supervising the work described in the proposal. (Ex. C-12).

Organizational chart, which was supplied by Truston in its Project Execution Plan. (Ex. T-52 at 4).

The Navy-approved plan called for repairs to the D-8 and D-11 moorings. (Ex. C-5, T-52). The D-8 mooring secured three retired ships, the USS Tarawa, an LHA-1 class amphibious assault ship, as well as two FFG class frigates. (Ex. T-52 at 18). The D-8 mooring consisted of eight legs, which were used to secure the previously mentioned vessels. (Tr. 55; Ex. C-1 at 3). The project called for attaching two 15-ton concrete sinker blocks to each of the D-8 mooring legs, which secure the buoy and, in turn, the vessels, to the seabed. (Ex. T-52 at 19).

Each mooring leg consisted of a buoy, a riser chain, and a series sinkers and/or anchors placed at predetermined locations along the riser chain. (Tr. 52; Ex. C-2; T-52). The D-8-H mooring leg, which is the subject of this proceeding, consisted of a hawsepipe buoy, a riser chain, and sinkers. A hawsepipe buoy contains a section of vertical, hollow pipe that runs through the center. (Tr. 52; Ex. C-2 at 1). The riser chain travels through the pipe and connects the vessel above water to the sinker blocks below. (*Id.*). The chain is held in place by a capture plate, which locks the buoy onto a specific position on the chain. (Tr. 478–79; Ex. C-1 at 2, C-15 at 5). The capture plate, in turn, is welded onto a flange ring, which is then screwed to the top of the hawse pipe. (Tr. 481–82).

Prior to lifting the mooring out of the water, Respondent had to place the sinker blocks on the bow of a working barge. (Tr. 324). In order to affix the sinker blocks, the D-8-H mooring was disconnected from the Tarawa and attached to the hook of a crane, which was mounted on a separate barge. (Tr. 326). Before the crane was connected, however, Healy Tibbitts' crew, supervised by Richard E. Cabral, Jr., jumped onto the buoy and inspected the surface, including hitting it with hammers, to ensure it was sound to lift. (Tr. 326). The hook was then attached to

the last link in the riser chain before it entered the hawsepipe section of the buoy. (Tr. 326; Ex. C-11). The crane operator, Ricky Cabral, began lifting the buoy, but only enough to make the connection taut and stabilize the surface of the buoy. (Tr. 326). At that point, the crew on the buoy attached the back-up cable,[7] a 3/4-inch wire sling, by looping it through the highest link available on the riser chain and attaching it to the pad eyes on the side of the buoy. (*Id.*). Even though the crew utilized the highest link available in the riser chain, the back-up sling retained a fair amount of slack; it was not used to lift the buoy. Once the buoy was ready to lift, the crew returned to the barge. (Tr. 326).

The initial stages of the lift are a delicate dance. The crane operator must slowly lift the mooring leg to account for the anchors being sunk into the seabed and the location of the load. (Tr. 327). As the load is being lifted, the barge operator has to back up the barge to align the load directly underneath the crane. (Tr. 328). Once properly aligned, the buoy and chain are lifted straight up out of the water, and the chain is "dogged off" to a cleat on the side of the barge, which holds the chain in place. (Tr. 328). From there, the chain is washed down with a high-pressure hose to remove years of marine growth, which allowed Pittman to count the chain links and determine where the sinker blocks should be located. (Tr. 169, 328). After the chain is washed, the load is moved over to the working barge, where the chain is cleated and the first of two anchors/sinker blocks is held static at the water line. (Tr. 328–29). This process is repeated for the remaining anchor(s). (*Id.*).

The accident occurred when the crew was attaching the first sinker block. (Tr. 331). After the riser chain was cleated, as described above, the buoy was lifted 75 feet into the air. The crew was positioned below the buoy on the deck of the working barge. (Tr. 97; Ex. C-6).

7. During his testimony, Richard E. Cabral, Jr. referred to the back-up cable as the "safety" cable. (Tr. 326).

Though they were not standing directly below the buoy, the crew was standing along the path of the riser chain, and some had already taken positions atop the concrete sinker blocks in order to affix them to the chain. (Tr. 344–45; Ex. C-6). While the buoy was suspended, the flange plate came loose, and the buoy fell down the path of the riser chain and crashed onto the deck of the barge, killing two Healy Tibbitts employees and seriously injuring two others. (Tr. 45; Stip. No. 25).

Subsequent analysis of the buoy components, which was performed by Daniel Crane of the Salt Lake City Technical Center, showed only 2 or 3 of the 16 screws that affixed the flange plate to the buoy were structurally sound. (Ex. C-15 at 15). The remaining screws had corroded to the point they were no longer fastened to the buoy. (*Id.*). When the lift occurred, only two screws were securing the flange plate, and hence the capture plate and riser chain, in place. According to Crane, most of the corrosion was covered over with layers of paint and some sort of foam application, which obscured the problem from the visual observation performed by the Healy Tibbitts crew. (Ex. C-15 at 8, 16).

The back-up sling did not catch the buoy. Though there was some indication the flange plate, once detached from the buoy, had hit the sling during the fall, Crane determined the failure of the sling was the result of a shock load, or tensile failure. (Tr. 264–77; Ex. C-15). Crane illustrated how this occurred by pointing out the sling had been stretched an additional ten inches, and the breaks along the individual wire strands appeared consistent with a tensile failure. (Tr. 281; Ex. C-15 at 2–4). According to Crane, depending on which link the back-up sling was looped through, it was subject to a downward force of at least 91,275 pounds and potentially more than a million pounds. (Tr. 277, 630–632; Ex. C-15 at 51, C-32). This was far in excess of the sling's rated capacity, which was 56,000 pounds. (Tr. 270). Due to the overwhelming

amount of force, the sling did very little, if anything, to arrest the fall of the buoy down the riser chain.

After the incident, OSHA was notified and sent CSHO Rajkumar Sundram to perform an investigation. (Tr. 57). As a result of his investigation, CSHO Sundram recommended Truston be cited for three violations of the Act. Complainant withdrew one of the violations at trial, leaving the Court with two alleged violations, which are addressed below.

IV. Discussion

A. Truston Was a Controlling Employer

At trial, Truston pursued a line of argument suggesting it was not a controlling employer and, hence, not responsible for the Healy Tibbitts employees were exposed to the hazardous condition. In its brief, Truston appears to have abandoned that argument, save for suggesting the Navy was ultimately responsible for the deteriorated condition of the buoy. To the extent Truston argues it should not be held liable as a controlling employer, the Court disagrees.

An employer will be held liable as a controlling employer if it could reasonably be expected to prevent or detect and abate a violation by reason of its supervisory capacity and control over the worksite. *See IBP, Inc.*, 17 BNA OSHC 2073, 2074 (No. 93-3059, 1997); *see also Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) (finding controlling employer where record shows company "maintained significant control over the worksite in general and over the cited condition in particular"); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1975) (finding general contractor "well-situated to obtain abatement of hazards" and thus "reasonable to expect the general contractor to assure compliance with the standards insofar as *all employees* on the site are affected") (emphasis added).

The evidence regarding Truston's control over the worksite was substantial. Healy Tibbitts' contract proposal indicated "[a]ll work shall be under the direct supervision of [Truston's] designated superintendent." (Ex. C-12 at 4). The lift plan, which was developed by Truston, identified two of its own employees—Chris Pacheco and Richard Vonderhaar—to serve as the on-site construction supervisors. (Ex. C-13 at 2). The Project Execution Plan also reiterated Truston's supervisors would be directing operations. (Ex. T-25). Finally, Truston's Accident Prevention Plan specifically states, "Truston has *ultimate responsibility* for the safety of the project and ensuring that all employees, subcontractor and vendors have a clear understanding of and adhere to any safety instructions." (Ex. C-5 at 4) (emphasis added). These documents indicate Truston specifically assumed the responsibilities of a controlling employer.

Further, the testimony of the various witnesses established Truston's position as a controlling employer. Richard E. Cabral, Jr., Healy Tibbitts' superintendent, testified Truston was in charge of the worksite, and if he had any questions he would ask either Chris Pacheco or Richard Vonderhaar, Truston's construction supervisors. (Tr. 314). Healy Tibbitts' project manager, Christian Caicedo, testified Truston's project manager would provide the schedule, instructions, and equipment lists. (Tr. 350–51). In that regard, he also testified Healy Tibbitts had no control over scheduling or sequencing; instead, Truston's on-site management managed the workflow and provided direct instruction to the Healy Tibbitts workers that were at the worksite. (Tr. 352–53).

Truston developed the lift and execution plans, developed a site-specific accident prevention plan, assumed responsibility for health and safety at the worksite, and supervised the work of Healy Tibbitts' employees. Given its supervisory capacity and control over the worksite

in general, including the manner in which the mooring legs were to be lifted and replaced, the Court finds Respondent was a controlling employer.

B. Law Applicable to Alleged Violations

To establish a violation of an OSHA standard pursuant to section 5(a)(2), Complainant must establish: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

1. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

29 CFR 1926.251(c)(11): Shock loading is prohibited:

a. On December 10, 2014, on the barge, a 3/4-inch wire rope sling was used on a hawsepipe buoy that was subject to a shock load when the capture plate separated from the hawsepipe buoy, exposing employees to a struck-by hazard.

See Citation and Notification of Penalty at 7.

a. The Standard Does Not Apply

The cited standard applies to "slings used in conjunction with other material handling equipment for the movement of material by hoisting." 29 C.F.R. § 1926.251(a)(5). The buoy lift was accomplished by attaching the crane hook to a riser chain, which ran through the center of the buoy and was held in place by a capture plate. (Tr. 52). In addition to the crane hook, however, Truston loosely attached a sling to the buoy and looped it through one of the links in the riser chain. Truston contends, and Complainant concedes, the sling was used as a back-up to the crane hook, which performed the lift. Even though the parties agree it was a back-up, Complainant cited Respondent for improperly rigging the sling. Should the rigging in construction standards apply to a sling that the parties agree was used solely for back-up?

i. Plain Language Does not Support Complainant's Interpretation

While the parties have many disagreements—controlling employer, how the wire rope broke, etc.—they agree on the one fact fundamental to the question of whether the standard applies: the sling was a back-up to the principal hoisting mechanism. Insofar as the parties agree on that fact, the only question is whether the standard applies.

Complainant contends the language of the scope and application paragraph clearly indicates the cited standard applies to the back-up sling because (1) it was a sling, and (2) it was used in conjunction with other material handling equipment to hoist the buoy. *Compl't Br.* at 16. Truston, on the other hand, argues the standard does not apply to a back-up sling because it was not used—nor was it intended to be used—to hoist or otherwise move the buoy; rather, it was a "can't hurt, might help" proposition that should not subject them to liability under the Act. (Tr. 383). The Court agrees with Respondent. Although Complainant's reading of the scope and application paragraph appears to be premised on plain language, his application of the standard

to the facts of this case improperly broadens its scope and, in so doing, imposes liability where no obligation existed in the first place.

Because the parties dispute the import of the scope and application paragraph, the Court first looks to its text and structure. *Gen. Motors. Corp.*, 17 BNA OSHC 1217 (No. 91-2973 *et. al.*, 1995). "When the statute speaks with clarity, in all but the most extraordinary circumstances, judicial inquiry is ended." *Id.* (citing *Estate of Cowart v. Nicklos Drilling Co.,* 112 S.Ct. 2589, 2594 (1992)). If the meaning of a standard cannot be gleaned from a plain language analysis, the next step is to review contemporaneous legislative histories of the standard. *Id.* If the question still remains unsettled, the Court will defer to Complainant's interpretation of the standard insofar as it is reasonable. *Id.* (citing *Kiewit Western Co.*, 16 BNA OSHC 1689, 1693 (No. 91–2578, 1994)).

The scope and application paragraph states: "This section applies to slings used in conjunction with other material handling equipment for the movement of material by hoisting." 29 C.F.R. § 1926.251(a)(5). To clarify, the Court reviewed the definition of "sling" in the parallel, general industry standard found at 29 C.F.R. § 1910.184, which is defined as "[a]n assembly which *connects* the load to the material handling equipment." 29 C.F.R. § 1910.184(b) (emphasis added). *See* 29 C.F.R. § 1910.184(b). Based on their location in the C.F.R., section 1910.184 and section 1926.251 are applicable to different employments; however, the history of section 1926.251 illustrates that the standards found at section 1910.184 were not only identified as applicable to construction, but were eventually adopted, in significant part, into the Part 1926 standards.[8] *See* Identification of General Industry Safety and Health Standards (29 CFR Part

8. Compare 29 C.F.R. § 1910.184(a) ("This section applies to slings used in conjunction with other material handling equipment for the movement of material by hoisting, in employments covered by this part.") to 29 C.F.R. § 1926.251(a)(5) ("This section applies to slings used in conjunction with other material handling equipment for the

1910) Applicable to Construction Work, 44 Fed. Reg. 8577, 8577–8578, 8605 (1979). Although the definitions were not incorporated into the Part 1926 standards, the respective (and identical) scope and application paragraphs illustrate that they apply to identical subject matter, albeit on different worksites. *See* note 8, *infra*. This is further confirmed by nearly identical language used throughout the two standards. *See generally* 29 C.F.R §§ 1910.184, 1926.251.

What appears to be confusing the issue in this case is the intervening clause "in conjunction with other material handling equipment", which is found in the scope and application paragraph of both the construction and general industry standards. *See id.* If that phrase is removed, the paragraph states, "This section applies to slings used . . . for the movement of material by hoisting." *Id.* The intervening clause merely serves to indicate the circumstances under which slings themselves will be governed by the standards found in section 1926.251 (or section 1910.184). Those circumstances are when the sling is used in conjunction with other material handling equipment for the movement of material by hoisting. Presumably this distinction is necessary to distinguish slings not used in that manner.

If the section 1910.184 definition of 'sling' is read in conjunction with section 1926.251(a)(5), the scope of the rigging standard becomes clear and its application to the present case less certain. A sling is "an assembly *which connects the load* to the material handling equipment." 29 C.F.R. § 1910.184(b) (emphasis added). The wire rope at issue here was a sling, so defined, and the crane and hook should be considered the "material handling equipment." As such, Complainant argues that because the sling was attached to the buoy (load/material) and was looped through the riser chain, it thereby "connected" the load to the material handling equipment. This reading, as applied to the facts of this case, is overly broad for the purposes of

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movement of material by hoisting, in employments covered by this part."). The two sections mirror each other in most respects, save for the employment practices to which they apply.

the standard. While the sling was connected to the material handling equipment and to the load, it was only "connected" in the loosest sense. It did not facilitate the connection between the material handling equipment and the load; rather, the connection between material handling equipment (crane) and load (buoy) was accomplished through a direct connection to the riser chain, which was part of the buoy.

When read as a whole, the purpose of the standard is to regulate the integrity of an *active* connection between material handling equipment and its load to ensure safe lifting. *See* 29 C.F.R. § 1910.184(b) ("which connects the load" is in the present tense and connotes an active, rather than potential, connection between load and crane). The sling at issue did not actively connect anything. This concept of an active connection clarifies the scope of section 1926.251 and the meaning of "in conjunction with other material handling equipment." If we use the definition of slings in place of the actual term, then the scope and application paragraph reads like this: "This section applies to assembl[ies] which connect[] the load to the material handling equipment . . . for the movement of material by hoisting." 29 C.F.R. § 1926.251(a)(5). By applying the definition of a sling to the scope and application paragraph, the meaning of the intervening clause becomes apparent: "[I]n conjunction with other material handling equipment" is another way of saying "connects the load to the material handling equipment".[9]

The sling in this case was not used, nor was it intended to be used, for the movement of material by hoisting; the parties stipulated, and the testimony supported, the sling was purely a back-up measure.[10] To be sure, the sling was connected to the load and to the crane, but it did not establish the connection between the load and the crane in order to move the material (buoy).

9. The Court removed the intervening clause in this construction because it proves to be redundant in its reference to "material handling equipment", but such a construction does not interfere with the plain meaning.

10. There was some dispute as to when the sling would serve as an effective back-up—Respondent contended it was only for when the initial lift out of the water occurred—but that does not change the purpose behind the sling's use.

Instead, this was accomplished through a direct connection between the riser chain and the crane hook, which was then "used . . . for the movement of material by hoisting." The sling did not move nor hoist anything in this case. The sling may have been used in conjunction with other material handling equipment, but that only meets half of the requirements for the scope and application paragraph. It must also be used in conjunction with the material handling equipment (crane) to move a load by hoisting. The sling did not move anything; rather, it moved with the load. This is not sufficient to meet the requirements of the standard.

ii. **Complainant's Interpretation is not Reasonable**

In addition to the plain language analysis, there are sound reasons for not imposing liability in the manner suggested by Complainant. According to CSHO Sundram, Respondent would not have been cited under the rigging standards if the back-up wire sling was not attached to the crane/load. (Tr. 149). While this is certainly attributable to the fact that no shock load would have occurred, it also says something about the nature of the violation itself. Other than the shock load violation, Respondent was not cited for any other issue related to the rigging of the buoy.[11] There was a hazard associated with the lift, to be sure, but Complainant did not identify a hazard associated with the principal lifting mechanism; instead, Complainant identified hazards associated with the failure of the back-up sling. This is problematic for a number of reasons.

First, not only did the CSHO testify Respondent would not have been cited if the sling was not attached, but Crane's analysis of the shock load illustrates the accident/hazard would have been the same regardless of whether the sling was used or not. What this suggests is the hazard identified in the citation was merely ancillary to the principal hazard posed by the buoy

11. Respondent was cited for another rigging violation, but that Citation item was withdrawn by the Secretary.

itself. Normally, a shock load is dangerous because it places an instantaneous and exponentially greater amount of force upon the sling than if the load were slowly lifted/hoisted. (Tr. 272–73). As illustrated by Crane, a difference of a few inches can magnify the downward force of load by a factor of 10 times. (Ex. C-32). The primary concern under the shock loading standard—29 C.F.R. § 1926.251(c)(11)—is that the sling and/or the crane would not be able to handle the additional downward force caused by the shock, which would lead to failure of the sling, the crane, or both.[12]

Here, the shock load would not have occurred but for the failure of the principal lifting mechanism, which was not cited as a violation by Complainant. The actual hazard to which Respondent's employees were exposed did not come from the potential for a shock load. Instead, the hazard was the result of the manner in which the buoy was lifted, the state of the flange plate screws, and the location of the employees on the deck of the barge. If the sling was removed, no shock load would have occurred, but Respondent's employees would nonetheless have been exposed to the hazard imposed by the primary, yet unstable, load connection. This distinction is slight, but important: Employees were exposed to a hazard, but that hazard was not the result of a potential shock load. The existence of a shock load hazard was not the result of the lift or the movement of the load, but rather the failure of the principal hoist mechanism. In other words, it is a second-order hazard the existence of which is contingent upon yet another hazard coming to fruition. The hazard to the employees was the same irrespective of whether the sling was attached to the buoy or not.

Second, and somewhat relatedly, is the issue of abatement. According to the CSHO, if Respondent had not used the sling, then it would not have been cited. This is tantamount to

12. The shock loading standard is also found in 1910.184. *See* 29 C.F.R. § 1910.184(c)(11).

saying removal of the sling constituted proper abatement of the violation. While that might remove the hazard associated with shock loading, it does not address the hazard to which Respondent's employees were actually exposed. Indeed, the abatement suggested by Complainant does not address the problem of shock loading; rather, it addresses the manner in which the load and principal hoisting mechanism are handled. Complainant's suggested abatement, such as the manner in which the buoy is lifted, how long or how high it is aloft, and whether it is placed on the deck only address the principal hazard of a falling load. (Tr. 317, 466). If the flange plate does not fail, then the shock load does not occur.

What seems to be the case here is that a tragic accident occurred, and Complainant could not (or simply did not) identify an appropriate standard for the purposes of citing Respondent. While Truston *may* have been at fault for the accident, it is the Court's obligation to ensure it is being held at fault according to an appropriate standard. To suggest Respondent be held responsible for a shock loading violation when that violation was not the reason employees were exposed to a hazard is like trying to fit a square peg into a round hole. The fact that not doing something would constitute sufficient abatement only reinforces the absurdity of holding Respondent liable for something they were not required to do in the first instance.

Finally, though there is no case law directly on point in this case, the Commission and Circuit Courts of Appeal have grappled with the issue of an employer taking additional precautions over and above what is legally required. In *Diebold v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), the Sixth Circuit was confronted with the question of whether point of operation guarding was required on press brakes. Evidence was presented that showed Diebold's engineers had begun seeking out workable point of operation guards for the company's press brakes. *Diebold*, 585 F.2d at 1338. The Secretary contended that such attempts illustrated

Diebold's awareness of the point of operation guarding requirement. The Sixth Circuit disagreed, stating:

> Considered simply in terms of probative value, an employer's attempts to render machinery or working premises more safe, without anything more, cannot reasonably support an inference that the attempts were made because the employer believed them to be legally required. Further, the drawing of such an inference would be repugnant to the purposes of the Act. Congress expected that safety in the nation's workplaces would be achieved as much by the voluntary efforts of employers as by the enforcement programs of the government.

Id. (citing *Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1292 (6th Cir. 1976)). In other words, there is an important distinction between taking additional steps to increase safety and recognizing that those steps are required by law. The Sixth Circuit found conflating those two principles would have a chilling effect on safety as a general proposition: "If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so without concern that their efforts will later provide the sole evidentiary basis for an adverse finding of the sort urged here." *Id.* (citing *Cape and Vineyard Div'n of New Bedford Gas Co. v. OSHRC*, 512 F.2d 1148, 1154 (1st Cir., 1975)).

The man in charge of the lift, Richard Vonderhaar, stated, without contradiction, the sling was used as a "can't hurt, might help" precaution. (Tr. 383). Characterized as such, and armed with the foregoing analysis of the scope and application paragraph's plain meaning, the back-up sling was an "attempt[] to render machinery or working premises more safe" and was in no way legally required. *Id.* To hold Respondent liable on that basis alone would, in the words of the Sixth Circuit, be repugnant to the purposes of the Act and would dissuade similarly situated employers from making any additional attempts at safety when such was not required by regulation.

The hazard associated with the cited standard was merely ancillary to the principal hazard imposed by the faulty screws and flange plate. The fact that the hazard associated with shock

loading could be removed by simply not taking the extra precaution—but that the principal hazard would remain—illustrates the concerns of the Sixth Circuit to a "T". Complainant's interpretation is unreasonable because it targets extra precautions taken by the employer, though they are not required, and turns them into obligations.

Based on the foregoing, the Court finds that Complainant failed to establish a violation of 29 C.F.R. § 1926.251(c)(11). Accordingly, Citation 1, Item 2 shall be VACATED.

2. Citation 1, Item 3

> Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows: 29 CFR 1926.1051(a): Stairway(s) or ladder(s) were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more.
>
> a. On December 10, 2014, on the barge, a 4-foot 6-inch high concrete sinker block was accessed using a saw horse that was 2-foot 3-inch [sic] high, exposing employees to a fall hazard.

See Citation and Notification of Penalty at 7.

The cited standard provides:

> A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

29 C.F.R. § 1926.1051(a).

Employees needed to access the tops of the sinker blocks to attach them to the riser chain. In order to access the top of the blocks, which stood 4.5 feet tall, employees were using sawhorses to step up onto the top of the block. (Tr. 120; Ex. C-14 at 1–2). Complainant cited Truston because it failed to provide ladders or stairways at the point where Healy Tibbitts' employees were accessing the tops of the concrete sinker blocks. Amongst other arguments, Truston contends the standard requires Respondent to merely *provide* ladders, not that

employees should be required to use them. *See Truston Br.* at 33–34 (citing *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118 (10th Cir. 1977)).

a. The Standard Applies

The cited standard applies to all personnel points of access where there is a break in elevation of 19 inches or more, and there is no ramp, runway, slope, or hoist provided. A 'point of access' is defined as "all areas used by employees for work-related passage from one area or level to another. Such open areas include doorways, passageways, stairway openings, studded walls, and various other permanent or temporary openings used for such travel." 29 C.F.R. § 1926.1050(b); *see also* Safety Standards for Stairways and Ladders Used in the Construction Industry, 55 Fed. Reg. 47660, 47763 ("The term is used in § 1926.1051(a) of this subpart to indicate *where* a stairway or ladder *must be provided* when there is a break in elevation, and *includes permanent and temporary travel ways* . . . . It is intended to state clearly what OSHA meant when it proposed § 1926.1051(a).") (emphasis added).

In order to access the top of the sinker blocks, which were 4.5 feet tall, employees used a sawhorse as a makeshift step. A sawhorse is neither a ramp, nor runway, nor hoist, nor did it reduce the break in elevation to less than 19 inches. (Tr. 121). Because the break in elevation was more than 19 inches at the point of access, the standard applies.

b. The Standard Was Violated

The terms of the standard are unequivocal—"a stairway or ladder *shall* be provided *at all personnel points of access* where there is a break in elevation of 19 inches or more." 29 C.FR. § 1926.1051(a) (emphasis added).[13] Truston did not provide a stairway or ladder at the point

13. When determining the meaning of a standard, the Commission first looks to its text and structure. *Superior Masonry Builders, Inc*., 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685

where the 4.5-foot tall sinker blocks were accessed. Nevertheless, Truston contends a ladder was available aboard the working barge and its obligation extended no further than ensuring a ladder was available for use.

CSHO Sundram testified he did not see ladders on board the working barge, and he believed the closest available ladder was on the adjacent crane barge. (Tr. 122–23). Instead, the evidence showed employees were climbing atop the sinker blocks by using sawhorses as makeshift stepstools, which Truston contends were sturdier than ladders and made it easier for tools to be passed to the top of the blocks. (Tr. 324). Further, both Richard E. Cabral, Jr. and Richard Vonderhaar testified a ladder was on the deck of the working barge and was available to employees for use at their discretion. (Tr. 323–24, 387). Photographs were introduced to support this assertion. (Ex. C-10). Thus, it is reasonable to conclude a ladder was present on the working barge; however, that fact alone is not sufficient to establish compliance with the standard.

Truston makes two principal arguments to suggest it was in compliance with, or at the very least did not violate, the standard. First, it contends ladders were not the safest means of accessing the sinker blocks. In other words, Truston contends ladders imposed a greater hazard than the sawhorses. In support of this argument, Truston points to the testimony of Richard E. Cabral, Jr. Mr. Cabral said that the sawhorse was sturdier and made it easier to pass tools and equipment to the top of the sinker blocks. (Tr. 323–24). Truston also notes CSHO Sundram agreed an employee carrying equipment in his hands would not be able to maintain three points of contact with the ladder. (Tr. 153).

(No. 04-1091, 2006) (consolidated) (citing *Unarco Commercial Prods*., 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993)), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008). The Court finds the meaning of the regulation cited is sufficiently clear as to what was required of Respondent.

In order to establish the defense of greater hazard, Truston must show: "(1) the hazards created by complying with the standard are greater than those of noncompliance; (2) other methods of protecting its employees from the hazards are not available; and (3) a variance is not available or that application for a variance is inappropriate." *Spancrete Ne., Inc.*, 15 BNA OSHC 1020 (No. 86-521, 1991) (citing *Walker Towing Corp.*, 14 BNA OSHC 2072, 2078 (No. 87-1359. 1991)). Truston has failed to prove this defense. Not only is there is distinct lack of persuasive evidence to suggest that ladders are more hazardous than sawhorses—the Court is not clear as to how the handling of equipment or tools is made any easier by the sawhorse, which suffers from the same problem of maintaining three points of contact as the ladder—but Richard E. Cabral, Jr. testified that ladders were actually used during the placement of the sinker blocks on the working barge prior to the lift. (Tr. 321). Further, there is no evidence whatsoever to suggest Truston sought a variance or made an informed judgment that such an application would be futile. *See Spancrete Ne., Inc.*, 15 BNA OSHC 1020 (No. 86-521, 1991) (rejecting greater hazard defense when employer failed to seek variance and noting this element has been recognized and endorsed by several courts of appeal); *see also Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989); *RSR Corp. v. Donovan*, 747 F.2d 294, 303 (5th Cir. 1984); *Diebold v. Marshall*, 585 F.2d 1327, 1339 (6th Cir. 1978). Truston's "greater hazard" defense is rejected.

Second, Truston cites to *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977), to suggest that the phrase "shall be provided" merely connotes that such equipment shall be "furnished or made available." In *Kennecott*, the Tenth Circuit was confronted with the question of the proper scope of the scaffolding standard found at 29 C.F.R. § 1910.28(a)(12), which provides, "An access ladder or equivalent safe access shall be provided." The Tenth

Circuit reversed the Commission, which held that "shall be provided" was equivalent to "shall require use"—because the ordinary meaning of the term "to provide" means to "furnish, supply, or make available." *Kennecott*, 577 F.2d at 1118–19.

The problem[14] with Truston's argument is the standards at issue are drastically different. Whereas the standard in *Kennecott* simply states that ladders "shall be provided", 29 C.F.R. § 1926.1051(a) specifies exactly where and under what conditions ladders shall be provided; namely, at the point of access when there is a break of 19 inches or more. *Compare* 29 C.F.R. § 1910.28(a)(12) *with* 29 C.F.R. § 1926.1051(a). Further, the preamble to section 1926.1051(a) clarifies the import of its mandate: "The term [point of access] is used in § 1926.1051(a) of this subpart to indicate *where* a stairway or ladder *must be provided* when there is a break in elevation, and *includes permanent and temporary travel ways* . . . . It is intended to state clearly what OSHA meant when it proposed § 1926.1051(a)." 55 Fed. Reg. at 47763 (emphasis added). Thus, with respect to the cited standard, Respondent cannot fulfill its obligations merely by having a ladder anywhere on the worksite available for use; it must be located where the break in elevation occurs. Although there may have been a ladder on board the working barge, there is no dispute the ladder in question was not provided at the point of access to the sinker blocks. Thus, the terms of the standard were violated.

c. Respondent's Employees Were Exposed to a Hazard

According to the Commission, a controlling employer's duty under section 5(a)(2) of the Act flows to both its own employees and subcontractor employees engaged in a common undertaking. *See Summit Contractors, Inc. ("Summit IV")*, 23 BNA OSHC 1196 (No. 05-0839,

14. A secondary problem for Respondent is that this case occurred in the Ninth Circuit. *Kennecott* was decided by the Tenth Circuit and, as such, only has value as persuasive precedent. For the reasons mentioned in this Decision, the Court finds that *Kennecott* has little value as applied to the facts of this case.

2010) (citing *U.S. v. Pitt-Des Moines*, 168 F.3d 976 (7th Cir. 1999); *Brennan v. Underhill Constr. Corp.*, 513 F.2d 1032 (2d Cir. 1975); *Anning-Johnson Co.*, 4 BNA OSHC 1193 (No. 3694 *et al.*, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976)). As a controlling employer, Truston was responsible for its own employees, as well as those of Healy Tibbitts.

As discussed above, Richard E. Cabral, Jr. testified Healy Tibbitts' employees used the sawhorse to access the tops of the sinker blocks. In so doing, the employees were exposed to a potential fall hazard of up to 4.5 feet. Accordingly, the Court finds Respondent's employees were exposed to the hazard.

d. Respondent Was Aware of the Hazard

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.* "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate." *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155, 158 (10th Cir. 1980).

Richard Vonderhaar, Truston's on-site supervisor and site safety and health officer, was present on the day of the accident and was on-site to observe the process of attaching the sinker blocks to the riser chain. (Tr. 381–82). Vonderhaar testified a ladder was available on the deck

of the working barge on the day of the accident; however, there was no testimony to suggest the ladder was ever used. (Tr. 386–87). Instead, the overwhelming weight of the testimony was that Healy Tibbitts employees were openly using the sawhorses, which were located directly adjacent to the concrete sinker blocks. (Tr. 120). As illustrated by the photographs of both Bob Pittman and CSHO Sundram, this condition was in plain view for anyone, especially the site safety supervisor, to see. (Ex. C-14 at 1). Accordingly, the Court finds that Truston, through its designated site supervisor, Vonderhaar, was actually and constructively aware of the violative condition.

e. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

According to Roger Forstner, Area Director for OSHA's Honolulu Area Office, falls from ladders are the second-leading cause of death in the construction industry and ten percent of those fatal falls are from heights less than six feet. (Tr. 242). This conclusion was echoed by CSHO Sundram, who determined a fall from the sinker blocks could result in permanent injury or death. (Tr. 123). Given the dangers associated with the fall hazard, and the fact these conclusions went undisputed by Truston, the Court finds that the violation was serious.

The Court finds Complainant established a violation of 29 C.F.R. § 1926.1051(a). Accordingly, Citation 1, Item 3 shall be AFFIRMED as a serious violation of the Act.[15]

V. Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business; (2) the gravity of the violation; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 No. 931-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

Complainant proposed a penalty of $4,620 for Citation 1, Item 3. Unfortunately, the basis for this penalty was not clearly explained by Complainant. AD Forstner testified it is OSHA's policy to review probability, severity, employer size, good faith, and history. (Tr. 246–47). With respect to Truston, he stated, "We looked at both of [the citations] and all information was adequate and correct to support it." (Tr. 247). The only other point of clarification was that Truston received a larger discount than Healy Tibbitts because Truston has fewer employees, though no testimony or documentary evidence was introduced to establish an actual number. (Tr.

15. Truston asserted two "affirmative defenses" with respect to the ladder: (1) A ladder was available at all personnel points of access; and (2) A ladder was available on-site at all times. Neither of these arguments is an affirmative defense, which negates a finding that the Complainant proved his *prima facie* case. Rather, these "defenses" are nothing more than facts that are relevant to the question of whether the standard was violated in the first instance. As addressed above, the Court rejects these "defenses".

247). Further, Complainant did not discuss any specific facts relevant to its assessments of severity or probability.

Notwithstanding the foregoing, the Court is empowered to make penalty determinations on a *de novo* basis, focusing in particular on the gravity of the violation, which considers the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. There were at least four employees installing rigging on the sinker blocks. (Stip. No. 25). Based on the testimony, those employees took their positions atop the sinker blocks for only as long as was necessary to install the rigging. Though Truston did not comply with the cited standard, it did make an attempt to bridge the break in elevation through the use of sawhorses. Additionally, though AD Forstner testified fatalities have occurred on ladders at heights of less than 6 feet, Truston's employees were only ever 4 feet, 6 inches off of the ground. At that height, Truston is not even required to provide fall protection. *See* 29 C.F.R. § 1926.501(b)(1). Further, while the evidence indicates fatal falls from less than 6 feet are possible, the percentage of those falls that actually result in fatalities is low. As such, the Court finds that the violation was of medium to low gravity.

Complainant did not present evidence on good faith, history, or the number of employees. While the Court has sufficient evidence to find Truston at least made an attempt at compliance through its use of the sawhorses, there is no evidence regarding its size or history of violations. This constitutes a failure of proof. In the absence of evidence to the contrary, the Court shall credit Respondent with good faith for the attempt and significant reductions related to its size, history, and the foregoing assessment of gravity. Based on those determinations, the Court finds that a penalty of $2,000 is appropriate.

ORDER

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

1. Citation 1, Item 1 is WITHDRAWN.
2. Citation 1, Item 2 is VACATED.
3. Citation 1, Item 3 is AFFIRMED, and a penalty of $2,000.00 is ASSESSED.

SO ORDERED

/s/
Patrick B. Augustine
Judge, OSHRC

Date: September 19, 2017
Denver, Colorado