



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

SECRETARY OF LABOR,

Complainant,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

OSHRC Docket No. 15-1069

ON BRIEFS:

Joseph G. Gilliland, Attorney; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Steven R. McCown, Esq.; Ryan D. Freeman, Esq.; Littler Mendelson, P.C., Dallas, TX
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

Healy Tibbitts Builders, Inc., is a marine construction company based in Aiea, Hawaii. Healy was performing work for the U.S. Navy in Pearl Harbor when a large buoy—which had been suspended by a crane being operated from a barge—fell and struck four Healy employees who were working on an adjacent barge. Following this incident, the Occupational Safety and Health Administration conducted an inspection and issued Healy a five-item, serious citation. The only item at issue on review is an alleged violation of the Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1), which the Secretary claims is based on the exposure of

Healy's employees "to a struck-by hazard when [they] worked under a load that was suspended by a crane"¹

Following a hearing, Administrative Law Judge Patrick B. Augustine affirmed this item. Because we conclude that the general duty clause is preempted here by a provision of OSHA's Cranes and Derricks in Construction standard, we reverse the judge and vacate this item.

BACKGROUND

Healy's work in Pearl Harbor was to maintain "mooring legs" that anchor Navy vessels. The mooring leg at issue here consisted of a "riser chain" that connected to a large, concrete "sinker block" on the seabed, ascended through the water, passed vertically through the middle of a buoy at the water's surface, and attached to a Navy vessel. Secured to the top of the 12,000-pound buoy was a slotted "capture plate," which interlocked with one of the riser chain's links, fastening the chain to the buoy.

On December 10, 2014, a seven-man Healy crew—consisting of a leadman and six other employees—was on a "working barge" moored alongside a barge equipped with a crane. The crew's work involved attaching additional concrete sinker blocks to the riser chain of the mooring leg. Several members of the crew took a skiff from the working barge to the buoy to inspect it by, among other things, hitting the top of the buoy with hammers to determine whether it was structurally sound. The employees on the buoy then attached the hook of the crane to the last link of the riser chain and attached a wire rope sling to the sides of the buoy as a backup measure, in case the capture plate failed and separated from the buoy. The Healy employees then took the skiff back to the working barge.

At this point, the crane operator working from the other barge lifted the buoy and the upper portion of the riser chain out from the water. From their position on the working barge, the Healy crew pressure-washed the chain so that a Navy representative could determine which links would be used to attach the new sinker blocks. The crane operator then swung the load alongside the working barge, where the new sinker blocks were located, and two Healy employees moved directly underneath the buoy to cleat the riser chain to the working barge. The crane operator then swung the buoy 20-30 feet laterally away from the working barge, so that the buoy was no longer

¹ As to the other four citation items, the Secretary withdrew one, and two were vacated. The Secretary did not seek review of the two vacated items. Although Healy sought review of the two affirmed items, the Commission requested briefing on only one (Serious Citation 1, Item 2).

suspended directly above the Healy employees; rather, the portion of the riser chain below the buoy (which was, at this point, 75 feet in the air) angled diagonally down to the deck of the working barge.

While standing on and around the sinker blocks on the working barge deck, five members of the Healy crew began the process of connecting the riser chain to the new sinker blocks. Soon thereafter, the capture plate failed and separated from the buoy; the wire rope sling then broke and the buoy fell, traveling down along the path of the riser chain and stopping only when it hit the sinker blocks. Two of the Healy crew members were killed and two were seriously injured.

DISCUSSION

On review, Healy contends that the judge erred in rejecting the company's argument that application of the general duty clause is preempted by a provision of the crane standard.² "The Commission has held that an applicable standard preempts application of the general duty clause" where the standard is "addressed to the particular hazard for which the employer has been cited."³ *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1073 (No. 76-2777, 1980), *aff'd*, 636 F.2d 1207 (3d Cir. 1980).

² Healy alternatively argues that if the Commission disagrees and finds the general duty clause was properly cited here, the judge erred in concluding that the Secretary established the company's recognition of the cited hazard. *See Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) (to establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard). The majority finds it unnecessary to reach this issue in light of its conclusion regarding preemption. We note, though, that we would otherwise agree with Commissioner Attwood's conclusion in her concurrence that the Secretary failed to show Healy recognized the hazard.

³ "Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer." *Spirit AeroSys., Inc.*, 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014) (citations omitted). Healy's answer does not include a preemption defense. Nevertheless, the company raised its preemption claim before the judge in a motion for summary judgment, as well as in its post-hearing brief, and it raises the claim again in its opening and reply briefs on review. At no point in these proceedings has the Secretary objected to the defense being raised—in fact, the Secretary addressed the merits of Healy's argument in his opposition to the summary judgment motion and in his post-hearing brief to the judge, and he does so again in his brief on review. Healy's preemption defense was thus tried by implied consent, and it is properly before us. *See Bill C. Carroll Co.*, 7 BNA OSHC 1806, 1810 (No. 76-2748, 1979) ("Unpleaded affirmative defenses . . . may be tried by the express or implied consent of the parties and treated as if actually raised by the pleadings.").

Our inquiry begins—and, as we explain below, ultimately ends—with 29 C.F.R. § 1926.1425(b), which provides that employees are generally prohibited from being in the fall zone of a load suspended by a crane:

While the operator is not moving a suspended load, no employee must be within the fall zone, except for employees:

- (1) Engaged in hooking, unhooking or guiding a load;
- (2) Engaged in the initial attachment of the load to a component or structure; or
- (3) Operating a concrete hopper or concrete bucket.

Another provision of the crane standard—29 C.F.R. § 1926.1437—creates an exception to this prohibition for “floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation.” 29 C.F.R. § 1926.1437(a), (d) (“*Keeping clear of the load.* Section 1926.1425 does not apply.”). Healy argues that this particular exception applies to the hazard alleged here, that the company’s employees were therefore not prohibited under § 1926.1425(b) from working in the fall zone of the suspended buoy, and that the general duty clause thus cannot be cited.⁴ The judge rejected this argument, finding that § 1926.1437(d) does not apply because the work performed by Healy’s crew did not occur on the barge equipped with the crane but rather on the adjacent working barge. For the following reasons, we agree with the judge.

To determine the applicability of § 1926.1437(d), we look first to its text and structure. *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993) (“[T]he test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned.”). The crane standard as a whole “applies to power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load.” 29 C.F.R. § 1926.1400(a). Section 1926.1437 sets forth “supplemental requirements for floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation,” and with respect to applicability, provides that the entire crane standard applies to this list of equipment “unless specified otherwise.” 29 C.F.R. § 1926.1437(a). There is no question that these supplemental provisions—which include the exception found in paragraph

⁴ Healy does not rely on the exceptions enumerated in § 1926.1425(b)(1)-(3). As the company stated in its summary judgment motion, “[a]lthough [its] employees were arguably engaged in hooking a load when they were connecting the sinker blocks to the anchor chain,” see 29 C.F.R. § 1926.1425(b)(1), “that issue does not need to be decided because [§] 1926.1437(d) . . . establishes that none of the [§ 1926.1425] provisions . . . appl[y].”

(d)—are applicable to working conditions on a crane barge. We find, however, there is an ambiguity as to whether these provisions, and specifically paragraph (d)’s exception, apply more broadly, as Healy asserts, wherever the fall zone of a load suspended by a floating crane may be, including areas on a separate barge without a crane on it. *See Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991) (“[I]n situations in which the meaning of [regulatory] language is not free from doubt,” the provision is considered ambiguous.).

Where “the language of the standard is susceptible of different meanings, the preamble is the best and most authoritative statement of the Secretary’s legislative intent.” *Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444 (No. 80-3203, 1983), *aff’d*, 725 F.2d 1237 (9th Cir. 1984); *see also U.S. Postal Serv.*, 21 BNA OSHC 1767, 1770 (No. 04-0316, 2006) (“When the language of a standard fails to provide an unambiguous meaning, we look to the standard’s legislative history.”). With respect to paragraph (d), the preamble to the final rule states:

Paragraph (d) of this section states that the requirements of § 1926.1425, *Keeping clear of the load*, do not apply to the equipment covered by § 1926.1437. Due to the limited space available for equipment on worksites covered by this section (*i.e.*, the decks of barges and other vessels), the requirements of § 1926.1425 are infeasible under these worksite conditions, in the experience of C–DAC [Cranes and Derricks Negotiated Rulemaking Advisory Committee]

Cranes and Derricks in Construction, 75 Fed. Reg. 47,906, 48,065 (Aug. 9, 2010) (final rule). According to Healy, the “preamble does not state that the exception applies [only] to the single barge on which the crane is mounted,” but “expressly recognizes ‘other vessels,’ such as a separate working barge.”

This reading ignores the context in which the reference to “other vessels” appears. *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1580-81 (No. 94-1979, 2009) (interpreting cited provision in context of entire standard and its overall purpose). The preamble language preceding the “other vessels” reference—namely, “the limited space available for equipment on worksites covered by this section”—refers only to the crane and its ancillary equipment. As such, the “unique worksites covered by this section,” 75 Fed. Reg. at 48,065, are those with “limited space” such that it is infeasible for employees to stay out of the fall zone of a suspended load—in other words, only those barges and other means of flotation upon which the crane is actually mounted.⁵

⁵ We note that if Healy were correct that the exception in § 1926.1437(d) applies whenever a barge crane is used, it would also be applicable to barge cranes suspending loads over worksites on land,

See id. (noting “the practicalities of the worksite”). The phrase “other vessels” is clearly used as an abbreviated reference to the means of flotation for a crane listed in the final rule—that is, other *types* of vessels, such as “barges, pontoons, vessels or other means of flotation (i.e., vessel/flotation device).”⁶ 29 C.F.R. § 1926.1437(a); 75 Fed. Reg. at 48,065. The preamble therefore establishes that the Secretary intended the exception in paragraph (d) to apply only to the vessel/flotation device upon which a crane is mounted. Accordingly, we find that § 1926.1437(d) applies only to fall zones on floating cranes and crane barges—thus, it does not preempt application of the general duty clause with respect to the work being performed by Healy’s employees on the working barge.

The preemption analysis, however, does not end there—§ 1926.1425(b), the general prohibition against working in the fall zone of a suspended load, remains at issue. The judge acknowledged that “it would seem appropriate § 1926.1425 would be the default measure in the event that § 1926.1437 did not apply,” but he nonetheless declined to rule on the question based on his finding that “Healy did not assert the applicability of § 1926.1425.” This was error. Section 1926.1437 is not relevant unless § 1926.1425 is first at issue. In other words, § 1926.1437(d) is nothing more than an exception to § 1926.1425(b)—indeed, the entire text of § 1926.1437(d) is “Section 1926.1425 does not apply.” As such, Healy is necessarily arguing that § 1926.1425(b) otherwise applies here and thus preempts application of the general duty clause. In short, Healy cannot possibly argue that the exception—§ 1926.1437(d)—applies without also arguing that the rule—§ 1926.1425(b)—applies in the first place.⁷ *Cf. Gen. Motors Corp., Delco Chassis Div.*, 17

which are not “unique” worksites and do not inherently give rise to the feasibility concerns expressed in the preamble. *See* 75 Fed. Reg. at 48,065.

⁶ Several provisions in § 1926.1437 confirm that the only type of vessel being addressed here is a floating crane or vessel that supports a land crane. *See, e.g.*, 29 C.F.R. § 1926.1437(h) (inspection requirements for both cranes and “the barge, pontoons, vessel or other means of flotation used to support a floating crane/derrick or land crane/derrick . . .”); 29 C.F.R. § 1926.1437(m) (provisions addressing the structural integrity of “barges, pontoons, vessels or other means of flotation,” and making clear that this phrase refers specifically to those equipped with cranes); 29 C.F.R. § 1926.1437(n) (provisions concerning the physical attachment or securing of land cranes/derricks to the barges, pontoons, vessels, or other means of flotation used to keep the crane afloat).

⁷ Contrary to the judge’s finding, Healy has expressly relied on the interplay between these two provisions, explaining in its summary judgment motion that “to understand [the company’s preemption argument] it is necessary to review the [entire] cited standard[.]” Healy then argued in its post-hearing brief that “there is no way to synthesize the Secretary’s position[.] that neither § 1926.1425 nor . . . § 1926.1437(d) appl[ies].” These same points are reiterated by the company

BNA OSHC 1217, 1220 n.7 (No. 91-2973, 1995) (consolidated) (“[T]he Secretary must show that the standard applies before the exceptions become relevant.”), *aff’d*, 89 F.3d 313 (6th Cir. 1996).

As to the merits of its claim, we agree with Healy that § 1926.1425(b) applies here and therefore preempts the Secretary’s application of the general duty clause. The crane mounted on the barge plainly falls within the scope of the crane standard, given that it was power-operated, it hoisted the buoy out of the water, and it horizontally moved the buoy both toward and away from the working barge. 29 C.F.R. § 1926.1400(a) (crane standard applies to “power-operated equipment . . . that can hoist, lower and horizontally move a suspended load”). More specifically, § 1926.1425(b) by its terms applies “[w]hile the [crane] operator is not moving a suspended load,” as was the case here, given that the buoy was suspended in place when the Healy employees were attaching the additional concrete sinker blocks to the riser chain. Finally, this provision is aimed at the hazard of being struck by a suspended load, given its reference to “the fall zone.” 29 C.F.R. § 1926.1425(b). As such, the very hazard the Secretary seeks to address here is directly covered by § 1926.1425(b), making resort to the general duty clause inappropriate. *See Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981) (“The general duty clause applies when there are no specific standards.”).

The Secretary would have us find that § 1926.1425 cannot apply here because “[n]either [§ 1926.1425 nor § 1926.1437] is meant to address a situation in which it is unnecessary to suspend the load to complete the work,” and so “where a feasible means exists to protect employees independent of [§] 1926.1425, an employer retains its duty under section 5(a)(1) to utilize those protective measures.”⁸ According to the Secretary, that is exactly the case here—it was not

on review—in its opening brief, Healy states that § 1926.1425 “could suggest that [the company’s] actions were prohibited,” and the company elaborates in its reply brief that “there is no daylight between what [§] 1926.1425(b) restricts and what the Secretary seeks to sanction via the General Duty Clause,” because “*all of [the Secretary’s] claims are directed to the exact same danger that is encompassed by [§] 1926.1425(b): the danger of being crushed by a falling load.*” (Emphasis added.) At no point throughout these proceedings has the Secretary objected to these claims or otherwise argued that Healy has waived this issue. Therefore, we find the company has invoked preemption by § 1926.1425(b).

⁸ The general duty clause may be cited only when a standard does not cover the particular hazard at issue. *See, e.g., Integra Health Mgmt., Inc.*, 27 BNA OSHC 1838, 1851 (No. 13-1124, 2019) (affirming general duty clause citation alleging workplace violence hazard not covered by OSHA standard); *A.H. Sturgill Roofing, Inc.*, 27 BNA OSHC 1809, 1810-20 (No. 13-0224, 2019) (vacating general duty clause citation alleging excessive heat hazard not covered by OSHA

necessary for Healy to suspend the load because “placing the buoy on the barge deck . . . would have eliminated the hazard altogether.”⁹ The Secretary may be correct about where Healy decided to place the buoy, but the language of § 1926.1425(b) does not support the premise of his argument. By its terms, § 1926.1425(b) does not apply only when suspending a load is necessary; it applies, without condition, “[w]hile the operator is not moving a suspended load,” and the Secretary gives us no reason to ignore this plain language. *See Dravo Eng’rs & Constructors*, 11 BNA OSHC 2010, 2012 (No. 81-0748, 1984) (“The Secretary would read into the standard the additional duty to enforce [hazard] instructions. We decline to rewrite the standard to impose a duty not otherwise required.”).

In short, to address the hazard he alleges here, the Secretary should have cited § 1926.1425(b), with the compliance issue to be litigated being whether Healy’s employees were “within the fall zone” of the suspended buoy, not whether any other potential abatement was feasible. *Cf. Bunkoff Constr. Co.*, 9 BNA OSHC 1043, 1044 n.4 (No. 76-2760, 1980) (“Respondent is engaged in construction and therefore § 1926.28(a) occupies the field for the purpose of determining what, if any, personal protective equipment must be worn by its employees.”). Accordingly, we conclude that the Secretary’s application of the general duty clause is preempted by § 1926.1425(b), and we therefore vacate Serious Citation 1, Item 2.

SO ORDERED.

/s/ _____
James J. Sullivan, Jr.
Chairman

/s/ _____
Amanda Wood Laihow
Commissioner

Dated: September 30, 2020

standard). In this case, we conclude that there is a standard that applies to this particular hazard, and thus the general duty clause may not be cited.

⁹ We note that the Secretary’s argument in this regard shows his understanding of the interplay between § 1926.1425(b) and § 1926.1437(d). Indeed, the Secretary states that he “has never argued that [Healy] should have complied with [§] 1926.1425”—in other words, he assessed whether § 1926.1425(b) applies and argues on review that it does not.

ATTWOOD, concurring:

I concur with my colleagues that Citation 1, Item 2, should be vacated but reach that conclusion on different grounds. For the reasons expressed by the majority, I agree that 29 C.F.R. § 1926.1437(d) does not apply and thus does not preempt the alleged general duty clause violation. Nevertheless, I disagree that Healy raised preemption by 29 C.F.R. § 1926.1425(b) and therefore decline to decide this case on that ground. I thus find it necessary to assess whether the Secretary established a general duty clause violation. Because I find that the Secretary failed to show Healy recognized the cited hazard, I would conclude that the Secretary failed to prove a section 5(a)(1) violation.

I. Preemption

As the majority states, preemption of the general duty clause by a specific standard is an affirmative defense that must be pled in an answer. *Spirit AeroSystems, Inc.*, 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014); Commission Rule 34(b)(3)-(4), 29 C.F.R. § 2200.34(b)(3)-(4). *See also Coleco Indus.*, 14 BNA OSHC 1961, 1966-67 (No. 84-0546, 1991) (treating employer's argument that general duty clause is preempted by standard as affirmative defense). While Healy did not plead the defense in its answer, I agree with my colleagues that preemption by § 1926.1437(d) is properly before us, as it was subsequently raised by Healy and tried by the parties' consent. *See Bill C. Carroll Co.*, 7 BNA OSHC 1806, 1810 (No. 76-2748, 1979) ("Unpleaded affirmative defenses . . . may be tried by the express or implied consent of the parties and treated as if actually raised by the pleadings."). I disagree with my colleagues, however, that preemption by § 1926.1425(b) is also properly before us, because Healy never raised this issue before the judge or on review.

My analysis begins with the judge's decision. For reasons similar to those articulated by the majority and with which I agree, the judge found that while Healy argued in its summary judgment motion that § 1926.1437(d) "applied in lieu of the general duty clause," that provision does not apply in the circumstances of this case and therefore does not preempt application of section 5(a)(1). As for § 1926.1425(b), the judge expressly found:

Healy Tibbitts did not assert the applicability of § 1926.1425; indeed, Healy Tibbitts explicitly argued that it did not apply by operation of § 1926.1437. Although it would seem appropriate that § 1926.1425 would be the default measure in the event that § 1926.1437 did not apply, the Commission has held that raising a non-jurisdictional, affirmative defense on the Court's own motion is improper

Likewise, Complainant is under no obligation to disprove the applicability of every possible specific standard that could potentially apply.

(Emphasis added.) The majority concludes that this was error for the following reasons:

Section 1926.1437 is not relevant unless § 1926.1425 is first at issue. In other words, § 1926.1437(d) is nothing more than an exception to § 1926.1425(b)—indeed, the entire text of § 1926.1437(d) is “Section 1926.1425 does not apply.” As such, Healy is necessarily arguing that § 1926.1425(b) otherwise applies here and thus preempts application of the general duty clause. In short, Healy cannot possibly argue that the exception—§ 1926.1437(d)—applies without also arguing that the rule—§ 1926.1425(b)—applies in the first place.

But as I detail below, Healy has only and always argued that § 1926.1437(d) applies and therefore *permitted* the employees’ work within the fall zone of the suspended buoy, and that the general duty clause cannot be invoked to prohibit activity which that section specifically permits.

As the judge correctly notes, Healy first argued that § 1926.1437(d) preempts the general duty clause in its motion for summary judgment:

[Section 1926.1425] generally provides a number of specific descriptions of when employees should attempt to stay out from under suspended loads and when they must be out from under such loads [S]ection 1926.1437(d) of the Floating cranes/derricks and land cranes/derricks on barges Standard establishes that none of the provisions regarding Keeping Clear of the Load [§ 1926.1425] applies.

* * *

Simply stated, the more specific standard [§ 1926.1437] does not prohibit the conduct cited by the Secretary and the citation must be vacated.

The Secretary responded that § 1926.1437(d) does not apply in the circumstances of this case and made no argument regarding the preemptive effect of § 1926.1425(b).

And despite the judge’s explicit observation that “it would seem appropriate that § 1926.1425 would be the default measure in the event that § 1926.1437 did not apply,” Healy did not pick up that thread on review and simply repeats the same arguments it made before the judge. Moreover, it is evident from the Secretary’s brief on review that he understood Healy’s argument as focusing solely on § 1926.1437(d). Indeed, the heading of the Secretary’s first argument in his brief is “29 C.F.R. Section 1926.1437(d) Does Not Preempt [Healy’s] Duties Under the General Duty Clause . . . ,” and his subsequent arguments all focus on that provision.

Only in its reply brief on review does Healy finally make an argument that at first blush appears to assert that § 1926.1425(d) preempts the general duty clause:

[T]here is nothing clearly distinct about the workplace condition the Secretary seeks to sanction here, relative to what is covered by the exempted section 1926.1425.

That section requires employers to keep workers clear of suspended loads to prevent them from being crushed by a falling load, while the Secretary's General Duty Clause citation accuses Respondent of not keeping workers clear of a suspended load and thereby creating a risk of their being crushed by it. . . . [T]here is no daylight between what section 1926.1425(b) restricts and what the Secretary seeks to sanction via the General Duty Clause: risk to employees from being crushed by suspended loads.

* * *

[A]ll of these claims are directed to the exact same danger that is encompassed by section 1926.1425(b): the danger of being crushed by a falling load.

In fact, though, this argument is made in service of Healy's overarching argument that § 1926.1437(d) is applicable and that the general duty clause violation is preempted by § 1926.1437(d):

Those [claims] all may be useful for analyzing a citation under section 1926.1425(b), but as previously mentioned, Respondent was expressly exempt from that standard due to section 1926.1437(d). The simple phrasing of that exemption ("Keeping clear of the load. Section 1926.1425 does not apply.") does not permit enforcement actions regarding keeping employees out of fall zones. Thus, the Secretary cannot achieve by the General Duty Clause something that *a specific regulatory exemption forbids him from doing*

(Emphasis added.)

The majority's position that Healy must have been arguing first that § 1926.1425(b) itself applies, second that § 1926.1437(d) applies, and third that § 1926.1425(b) therefore does not apply, is belied by Healy's own words. Moreover, Healy could very well have made an *alternative* argument that if the judge or the Commission held that § 1926.1437(d) was inapplicable, then § 1926.1425(b) applied and preempted the general duty clause violation. But it did not do so. In short, Healy never argued that § 1926.1425(b), by its own terms, is applicable and preempts the general duty clause in the circumstances of this case. For this reason, I decline to address § 1926.1425(b)'s preemptive effect and therefore reach the general duty clause question. *See L&L Painting Co.*, 23 BNA OSHC 1986, 1996 (No. 05-0055, 2012) (affirmative defense waived where employer "failed to raise [it] in its answer" and there was "no support for [the] claim that the defense was tried by consent").

II. General Duty Clause

To prove a general duty clause violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a

feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The judge found that all four elements were established and therefore affirmed the violation. The Commission requested briefing on only the issues raised in Healy’s petition for discretionary review, which was limited to a challenge of the judge’s ruling on the hazard recognition element.¹ For the following reasons, I conclude that the Secretary has failed to establish recognition of the hazard here.

A hazard is considered “recognized” when “the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry.” *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997). “[P]roof of an employer’s actual knowledge of a hazard is sufficient to prove that the hazard was ‘recognized.’” *Magma Copper Co. v. Marshall*, 608 F.2d 373, 376 (9th Cir. 1979). Here, the citation alleges “a struck-by hazard when employees worked *under a load* that was suspended by a crane while . . . installing a concrete sinker block to the riser chain.” (Emphasis added.) The judge characterized the hazard as one “associated with standing in the *fall zone* of a 12,000-pound buoy,” and he found that Healy recognized the hazard based on the company’s actions taken prior to lifting the buoy.² Specifically, the judge found that Superintendent Richard Cabral was aware of the “bad” condition of the buoys in the harbor, which prompted crew members to (1) conduct a pre-lift inspection of each buoy by climbing on top of the buoy and hitting it with hammers “to make sure . . . that it’s all sound,” and (2) attach a wire rope sling to the buoy’s pad eyes as a backup safety measure before lifting it from the water. According to the judge, “[t]he simple fact that [the company] had concerns about the stability of the capture plate assembly’s connection to the buoy—which is how the buoy was connected to the riser chain—and took actions to mitigate the hazards stemming from its condition indicates [Healy] recognized the hazard.”

¹ The Secretary must also prove the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the hazardous condition at the worksite. *Burford’s Trees, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff’d*, 413 F. App’x 222 (11th Cir. 2011) (unpublished). Healy’s petition for discretionary review was limited to the hazard recognition element, though it is similar to the issue of knowledge in this particular case.

² The Secretary presented no evidence of industry recognition. In addressing hazard recognition for another alleged general duty clause violation (Item 1) not at issue here, the judge determined that the Secretary had “failed to identify what ‘industry’ Healy Tibbitts was in,” and thus did not make a finding as to whether Healy’s industry recognized the hazard. Under these circumstances, the Secretary can only establish hazard recognition by proving that Healy itself had actual knowledge of the cited hazard. *See Magma Copper*, 608 F.2d at 376.

On review, Healy addresses hazard recognition as if the hazard were defined not simply as the risk that a buoy could fall and strike workers “under a load” (the phrase used in the citation), but that a deteriorated buoy could fall along the diagonal path of the riser chain to the adjacent barge and strike employees working there. Specifically, the company disputes the judge’s findings that it knew about the extent of the deterioration of the particular buoy that was suspended on the day of the accident, and that it knew the buoy would travel diagonally down the riser chain to the working barge if the capture plate failed. The Secretary appears to accept Healy’s framing of hazard recognition as being comprised of these two issues, both of which must be proven to meet his burden of proof.³ Indeed, the Secretary claims that Healy actually recognized the “specific hazard posed by the failure of the capture plate on a hoisted hawsepipe buoy” through Superintendent Cabral, who the Secretary alleges observed a suspended buoy fall along the riser chain on a previous project in 1997.

For the following reasons, I find that although Healy was aware of the buoy’s poor condition, the company did not recognize that the buoy would travel diagonally down the riser chain.

Recognition of risk of buoy falling

Based on its work practices on this project in combination with other evidence discussed below, Healy knew that the buoy could fall due to deterioration. *See Pepperidge Farm*, 17 BNA OSHC at 2007 (finding hazard recognition based on employer’s voluntary safety efforts in addition to other independent evidence, such as memoranda showing awareness of prior injuries and warnings from experts and insurance carriers). As the judge found, Healy’s pre-lift inspection and

³ I note that the first of Healy’s issues—whether the company recognized that the buoy’s flange and/or capture plate was likely to fail due to deterioration—arguably describes too narrowly the hazard that must be recognized. The hazard as defined in the citation is “work[ing] under a load that was suspended by a crane while employees were installing a concrete sinker block to the riser chain”—and more specifically, working under a “suspended . . . hawsepipe buoy.” Healy could have recognized this hazard without having known that this particular buoy was “likely” to fall because it had in fact deteriorated. *See Arcadian Corp.*, 20 BNA OSHC at 2008 (“[T]he Commission has held that it is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard.”); *see also Beverly Enters.*, 19 BNA OSHC 1161, 1171 (No. 91-3144, 2000) (consolidated) (“[T]he level of risk does not have to be established to the point of mathematical predictability.”) (citing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 655, 656-67 (1980)).

attachment of the wire rope sling to the buoy as a back-up measure shows that the company recognized that the deteriorated condition of the buoy posed a hazard. Additionally, after lifting the buoy from the water and cleating the riser chain to the working barge (a two-minute process that required employees to be directly under the buoy), the crane operator swung the buoy approximately 20 feet to the side of the working barge so that employees were no longer directly underneath the load, further evidencing Healy's awareness that the buoy could fall.⁴

Healy argues that the Commission should not rely on the company's voluntary safety measures to establish recognition. But voluntary measures may be considered when there is other, independent evidence of recognition. *See Pepperidge Farm*, 17 BNA OSHC at 2007. Here, the record contains such other evidence. The CO testified that Superintendent Cabral stated during the inspection that he was concerned about the capture plate failing and the buoy falling. Additionally, photographs show it was obvious that the D-8-H buoy had deteriorated. Although the crane operator testified that the buoy "was just painted so it looked good,"⁵ photographs taken after the accident show that much of the top (face-up) side of the flange (i.e., what was visible to Healy) was not covered in paint and was visibly corroded. Healy maintains that, as Navy representative Robert Pittman testified, there was no way for the company to determine the condition of the bolts inside the buoy that secured the flange to the capture plate, but as the Secretary points out, the deteriorated condition of the flange itself was plainly visible.

⁴ Superintendent Cabral testified that "[t]he only time we are directly under [the buoy] is when we're cleating it off. That's the only time we go under that buoy, and there's only two people that go[] under there." The two employees "put a shackle on it and they put it around the cleat *and they get out of there.*" (Emphasis added.) After the riser chain is cleated, the crane operator swings the load over—"swinging till the thing is away from us." In my view Cabral's testimony shows that Healy sought to limit the time employees spent working directly under the load, which demonstrates the company's understanding that the buoys on the D-8 mooring system could fall.

⁵ The crane operator made this statement when asked if, instead of using two wire ropes as had been done on the previous buoy, he was "comfortable" with the decision of Richard Vonderhaar, the marine construction supervisor for Truston Technologies (the general contractor on this job), to use one wire rope on D-8-H. But he also said in response to this question that "[Vonderhaar] said one is good enough. It's way over the capacity. We don't need it." Put simply, it appears that the crane operator understood from Truston that one wire rope was sufficient as a back-up measure for D-8-H because it was in better shape than the previous buoy, but that is not inconsistent with Healy also believing that there nonetheless was a significant risk of D-8-H failing.

Most of the other buoys had significant corrosion as well. Specifically, prior to lifting any of the buoys on the D-8 mooring system, Pittman and representatives from general contractor Truston Technologies conducted a visual inspection of all the buoys. Pittman testified that all but two of them (those were new) were in “bad condition” and “had been neglected for a considerable amount of time.” Superintendent Cabral acknowledged that the buoy Healy upgraded just before working on D-8-H was in “bad” condition. In short, the visible corrosion of D-8-H’s flange, coupled with Healy’s knowledge that all but two of the other buoys had significant corrosion, establishes that Healy must have known there was a significant risk of the D-8-H buoy failing.⁶ *See Dana Container, Inc.*, 25 BNA OSHC 1776, 1789-90 (No. 09-1184, 2015 (finding actual knowledge of condition that violated confined space standard where manager, who had reviewed entry permits, “must have known” of deficiencies “evident on the face of the permits”), *aff’d*, 847 F.3d 495 (7th Cir. 2017).

For these reasons, I find the Secretary established that the company recognized that there was a significant risk of the buoy falling.

Recognition of buoy’s fall path along riser chain

The judge found that Healy recognized that the buoy could fall diagonally along the riser chain towards its employees on the sinker blocks because “there was literally no other place for the buoy to fall.” This was the basis for the judge “simply . . . not believ[ing] Healy Tibbitts was unaware the suspended buoy would travel down the path of the riser chain.” Healy argues that this was error because: (1) “there is no evidence that any individual present at the site . . . recognized this potential trajectory”; and (2) the judge disregarded “one obvious alternative direction” that the buoy could fall: straight down. The company maintains that “[w]hether by severing the chain that had more than 5.5 tons of weight put on it at once, or by the

⁶ Given my conclusion, it is unnecessary to address the Secretary’s claim that recognition can also be based on Superintendent Cabral having purportedly observed a buoy fail on a previous project in 1997 involving another mooring system (an argument the judge appears to have disregarded in finding hazard recognition). Specifically, the Secretary relies on deposition testimony from Gustav Ruetenik, chief engineer for PCCI, a private contractor. Ruetenik stated that in 1997, he and Cabral participated in a project to install a hawsepiped buoy in Pearl Harbor when the buoy’s capture plate failed while the buoy was suspended (via its riser chain) by a crane, just as the buoy was about to be lowered into the water. Ruetenik recalled that Cabral was the crane operator and barge superintendent on that project. However, Cabral testified that he did not remember that incident; he recalled working on a mooring leg installation project in Pearl Harbor in 1997 but did not recall any buoy failure.

intense friction of sliding even slightly down the chain, it was quite logical to assume that a[n] 11,300 pound buoy, if the flange or capture plate failed and gravity took full hold of the buoy, would continue to do so virtually uninterrupted.” The Secretary asserts that “it defies logic that [Healy] did not recognize the buoy [if dislodged] would travel toward the employees.”

After reviewing the record, I find that both of Healy’s contentions have merit. Regarding Healy’s first point, there is no evidence that any of its supervisors at the worksite realized the buoy could fall along the riser chain toward the employees.⁷ Superintendent Cabral, through whom the Secretary seeks to impute hazard recognition, testified that prior to the accident, he had neither considered nor discussed with anyone the prospect that the buoy would follow the path of the riser chain if the capture plate failed.⁸ Although Cabral testified that the hazards associated with working *under* a suspended load were discussed at daily safety meetings between Healy, Truston, and the Navy, the crew was not working under a suspended load after initially cleating off the riser chain, and there is no evidence that Healy recognized the same hazards would apply to a load suspended 20 feet to the side of the workers. Pittman corroborated this testimony, stating that only *after* the accident did he and Superintendent Cabral realize the buoy would travel down the riser chain if the capture plate failed. With respect to Ruetenik’s testimony regarding the capture plate failure he witnessed in 1997 (*see supra* footnote 6), the record is silent on whether that riser chain was angled down to the water, as in the instant case, or was vertical. However, as that buoy was about to be lowered into the water, it seems logical that the riser chain would have been vertical.

Healy’s second point addresses the judge’s apparent reasoning that it was clearly obvious that if the capture plate failed, the buoy would follow the riser chain to the adjacent barge. Indeed, the Commission has held that “[r]ecognition of the hazard can be inferred from the obvious nature of the hazard.” *Litton Sys., Inc.*, 10 BNA OSHC 1179, 1182 (No. 76-0900, 1981) (finding obvious the hazard of a large vehicle moving with obstructed vision through areas used as walkways by employees). Likewise, courts have found that where a hazard is “ ‘obvious and glaring,’ the

⁷ There is evidence that non-supervisory Healy employees had this concern, as the CO testified that during his employee interviews, such employees “stated that a wire rope was necessary to be attached across the pad[-]eyes of the buoy because of their concern that the capture plate might fail and the buoy may travel down the riser chain ending up on the concrete sinker block.” There is no evidence, though, that these concerns were ever communicated to a Healy supervisor.

⁸ Although the judge stated that he did not believe that Healy was unaware that the buoy could slide down the chain, he did not make any credibility determination with respect to Superintendent Cabral’s testimony. Cabral’s testimony on this point was un rebutted.

Commission may determine that the hazard was recognized without reference to industry practice or safety expert testimony.” *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) (citing *Tri-State Roofing v. OSHRC*, 685 F.2d 878, 880 (4th Cir. 1982) (no protective equipment for unguarded platform 40 feet above concrete floor); *Donovan v. Mo. Farmers Ass’n*, 674 F.2d 690, 691 (8th Cir. 1982) (employees lowered into unventilated grain elevator pit emitting strong odor of decomposing grain without wearing safety belt and lifeline attachment held to be exposed to obvious and recognized hazard)). Compare *S. Ohio Bldg. Sys., Inc. v. OSHRC*, 649 F.2d 456, 459-60 (6th Cir. 1981) (presence of wind gusts, without proof of velocity, insufficient to show obvious fall hazard to workers on roof); *W.G Fairfield Co. v. OSHRC*, 285 F.3d 499, 508 (6th Cir. 2002) (Commission did not act arbitrarily or capriciously in finding hazard of crossing active roadways not so obvious as to eliminate employer’s duty to train employees).

The obviousness of the fall-path along the riser chain does not turn on whether, as Healy alleges, the buoy could, alternatively, have fallen straight down. To establish recognition, the Secretary does not have to prove that there was no fall-path other than along the riser chain; he just has to establish that it was obvious that there was a significant risk that if it fell, it could fall along the chain. See *Gen. Motors Corp., Cent. Foundry Div.*, 10 BNA OSHC 1958, 1960 (No. 77-3790, 1982) (“In this case, most of the evidence and arguments about recognition of the hazard concern the foreseeability of the particular incident as it occurred The Commission has held, however, that it is the hazard, not the specific incident resulting in injury, that is the relevant consideration in determining the existence of a recognized hazard.”). But as noted above, neither Pittman nor Superintendent Cabral, both of whom had extensive experience in the field, recognized until after the accident that the buoy could slide along the riser chain.

I am concerned that the judge, who lived with the case and had the opportunity to evaluate the truthfulness of the witnesses, did not believe that Healy was unaware that the buoy could travel down the riser chain. However, his failure to explain *why* he did not believe Healy, beyond his finding that there was no other place for the buoy to fall, undermines the weight that might otherwise be given to his skepticism. In light of the extensive work experience of both Pittman and Cabral, I find the evidence is insufficient to establish that it was obvious to Healy that there was a risk that the buoy, if it failed, would fall along the chain to the workers. See *W.G Fairfield Co.*, 285 F.3d at 508 (deceased employee’s work experience and history of sound judgment considered in determining the obviousness of hazards presented by crossing an active roadway).

In sum, although Healy's precautionary measures in combination with the obviousness of the deteriorated condition of the buoy establishes that it was aware there was a significant risk of the buoy falling, there is insufficient evidence to establish that Healy recognized at the time that if the buoy fell, it could follow the path of the riser chain towards the employees. Therefore, I conclude the Secretary failed to establish the hazard recognition element of the general duty clause violation. Accordingly, I concur with the majority's decision to vacate Citation 1, Item 2.

/s/

Cynthia L. Attwood
Commissioner

Dated: September 30, 2020

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

OSHRC Docket No. 15-1069

Appearances:

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

For Complainant

Thomas Benjamin Huggett, Littler Mendelson, P.C., Philadelphia, Pennsylvania

For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Approximately three years ago, the United States Navy hired Truston Technologies to perform maintenance on mooring systems in the Middle Loch of Pearl Harbor, Honolulu, Hawaii. (Stip. No. 3). Truston,¹⁸ 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 course of one such lift, the buoy

¹⁸. 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".

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 Healy Tibbitts for five violations of the Occupational Safety and Health Act.¹⁹

I. Procedural History

As noted above, Complainant cited Healy Tibbitts for five violations of the Act and proposed a total penalty of \$30,600. In response, Healy Tibbitts 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*, Healy Tibbitts 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).²⁰

In addition to citing Healy Tibbitts, Complainant also cited Truston 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 Healy Tibbitts. Of the five originally cited items, only four were addressed at trial—Citation 1, Item 3 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 Forstner, Area Director for the Honolulu OSHA Area Office; (4) Daniel T. Crane, OSHA Lead

¹⁹. The Court shall refer to the foregoing as “the Act”.

²⁰. The Court shall refer to the Occupational Safety and Health Review Commission as “the Commission”.

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.²¹ 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 1.²² Based on the parties' stipulations, the Court finds the Commission has jurisdiction over this action pursuant to section 10(c) of the Act. Further, the Court finds Healy Tibbitts 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 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, Truston hired Healy Tibbitts to provide labor and equipment for the mooring upgrades. (Stip. No. 4).

²¹ 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.

²² 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-___".

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 had 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 Proposal²³ 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 and Healy Tibbitts were 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 Organizational chart, which was supplied by Truston in its Project Execution Plan. (Ex. T-52 at 4).

²³. 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).

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 of 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,²⁴ 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). 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

²⁴. During his testimony, Richard E. Cabral, Jr. referred to the back-up cable as the “safety” cable. (Tr. 326).

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 Healy

Tibbitts be cited for five violations of the Act. Complainant withdrew one of the violations at trial, leaving the Court with four alleged violations, which are addressed below.

IV. Discussion

A. Law Applicable to Alleged Violations

To establish a *prima facie* violation of section 5(a)(1) of the Act, also known as the general duty clause, Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996). The evidence must also show that the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204 (No. 03-1344, 2007).

To establish a *prima facie* violation of an OSHA standard pursuant to section 5(a)(2) of the Act, 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 1

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

OSH ACT of 1970 Section (5)(a)(1): the employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to an impalement hazard while working above unguarded lifeline stanchion brackets that were protruding from the barge:

- a. On December 10, 2014, on a barge, employees were working above and within close proximity to the lifeline stanchion brackets, exposing themselves to an impalement hazard.

Among other methods, recognized and feasible means of abatement to correct these hazards include but are not limited to: placing a cover over the lifeline stanchion bracket and/or installing the concrete sinker block at allocation on the barge, that is further away from the protruding lifeline stanchion brackets.

Citation and Notification of Penalty at 6.

At the edge of the working barge, which was adjacent to the concrete sinker blocks, there were a series of stanchion brackets that supported a lifeline. (Tr. 72–73; Ex. C-4, C-5). During the lift, the lifeline had to be removed to accommodate the buoy and riser chain, which left the stanchion brackets exposed, so to speak. (Tr. 319–20). According to CSHO Sundram's measurements, the brackets, which were roughly 3.5 feet away from the concrete sinkers, were one-half inch wide and approximately 7.5-inches tall. (Tr. 77–78, 87). The half-inch wide surface at the top of the bracket was approximately 2–3 inches across and sloped downward to a 6-inch base. (Tr. 138; Ex. C-4, C-5). According to Richard E. Cabral, Jr., the surface of the brackets were rounded off. (Tr. 320; Ex. C-4, C-5).

Complainant contends the stanchion brackets were an impalement hazard that both Healy Tibbitts and those in the marine construction industry recognized. Specifically, Complainant

argues the Healy Tibbitts employees stationed atop the sinker blocks were exposed to potential impalement from the stanchion brackets, which were 4.5 feet below the surface of the sinker blocks. Healy Tibbitts argues Complainant failed to prove the brackets were a hazard in the first instance or that Healy Tibbitts or its industry recognized them as such. As discussed below, the Court finds Complainant failed to put forth either sufficient or competent evidence to substantiate a violation of the general duty clause.

a. Complainant Failed to Establish the Existence of a Hazard

“[H]azards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control.” *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1986). As such, hazards are not defined in terms of their abatement; rather, they are defined “in terms of the physical agents that could injure employees.” *Chevron Oil Co.*, 11 BNA OSHC 1329, 1331 n.6 (No. 10799, 1983). So defined, Complainant will meet his burden if he can show that “the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances.” *Waldon Health Care Ctr.*, 16 BNA OSHC 1052 (No. 89-28047, 1993) (citing *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n. 33 (D.C. Cir. 1973)).

Complainant’s brief comes fairly close to suggesting the hazard posed by the exposed stanchion bracket was self-evident. Citing to an ALJ decision, which addressed fall protection, Complainant concluded that “[a] fall from that distance onto the stanchion bracket would have injured a worker who fell from an upright position.” *Compl’t Br.* at 13 (citing *Welltech, Inc.*, 12 BNA OSHC 1333 (No. 82-388, 1986) (ALJ Blythe)). This conclusion, though not fully explained in the brief, appears to be premised on two pieces of evidence: a YouTube video and the coroner’s report for one of the deceased employees. (Ex. C-7, C-8).

The YouTube video introduced by Complainant shows a sandbag being lifted 7.5 feet into the air and dropped onto a piece of rebar that was bent to form an inverted “J”. (Ex. C-7). The sandbag was punctured by the bent rebar, which Complainant argues is evidence that an employee falling a similar distance from a sinker block onto a lifeline stanchion would suffer an impalement injury. The Court disagrees. There was no testimony to suggest that bent rebar and the lifeline stanchions were similar in orientation or size such that the video would be an adequate representation of the hazard posed by the stanchions. Indeed, CSHO Sundram testified that he was unfamiliar with the video producer’s methodology. (Tr. 133). Nor, for that matter, was there competent, scientific testimony to explain why the sandbag test was a good approximation of the conditions on board the working barge. Further illustrating this point, Healy Tibbitts introduced the entire video, of which the clip introduced by Complainant was only a part. (Tr. 130–35; Ex. C-7, HT-4). The longer video shows that a sandbag being dropped onto plain plywood from a height of 10 feet would result in a tear or puncture. (Tr. 133; Ex. HT-4). Healy Tibbitts also notes the same bag is repeatedly used throughout the process, only to be “bandaged” up again to perform different tests. (Ex. HT-4).

The Court finds the video shows nothing more than what would happen if a sandbag was dropped onto bent rebar. Complainant failed to introduce any evidence or argument to suggest the two purported impalement hazards were similar other than to perhaps imply that the width of the stanchion was similar to that of the rebar. Complainant failed to proffer competent testimony on impalement hazards as a general proposition or why the conditions of the experiment laid out in the video are similar to those presented by the stanchions on the barge. Based on its review of the photographic evidence, the Court finds the stanchion brackets are not of similar shape, size, or orientation to justify the analogy Complainant asserts here.

Further, the Court also rejects Complainant’s attempt to use the coroner’s report of one of the deceased employees to illustrate the existence of an impalement hazard. Without going into graphic detail, the deceased employee suffered multiple puncture wounds and lacerations to his heart, lungs, and liver. (Ex. C-8 at 4). The stanchion, according to CSHO Sundram, had blood at the base, which he inferred as the cause of the puncture wounds. (Tr. 69). There are multiple problems with this argument. First, CSHO Sundram is not a board-certified coroner; instead, he merely identified puncture wounds and lacerations that *might* have been caused by the stanchion. (Tr. 86). Second, the size of the puncture wounds and lacerations identified by CSHO Sundram do not correspond with the dimensions of the stanchions, calling into question whether the stanchions were responsible for the injuries. (Tr. 86–87; Ex. C-8). Third, even if the stanchions caused the puncture wounds and lacerations—a conclusion the Court cannot affirm or deny—the Court finds the wounds were more than likely due to the falling buoy. The buoy that fell onto the deceased weighed roughly 12,000 pounds. The sheer force of that weight, dropped from a height of 75 feet, is likely to transform anything between the employee and the deck of the barge into an impalement hazard. When viewed in this light, the Court finds that Complainant has failed to establish that the hazardous incident could have occurred “under other than a freakish or utterly implausible concurrence of circumstances.” *Waldon Health Care Ctr.*, 16 BNA OSHC 1052.

b. Complainant Failed to Establish the Alleged Hazard was Recognized

Even if the Court were to find Complainant established the existence of a hazard, Complainant failed to prove that either Respondent or its industry recognized the stanchions as an impalement hazard. To illustrate recognition, Complainant points to two pieces of evidence: (1) the YouTube sandbag/rebar video; and (2) Healy Tibbitts’ Daily Safety brief.

As discussed above, the YouTube video is of dubious value. Not only was there a lack of competent testimony to properly analogize the conditions shown in the video to those aboard the working barge, but there was absolutely no attempt to establish the video represented the state of the marine construction industry's knowledge of impalement hazards. *See R.L. Sanders Roofing Co. v. OSHRC*, 620 F.2d 97 (5th Cir. 1980) (holding Commission erred in looking to construction industry rather than roofing industry). In fact, Complainant failed to identify what "industry" Healy Tibbitts was in such that the industry's knowledge of this particular hazard could be explored. At best, the video illustrates the hazards imposed by bent rebar on land-based construction sites. This is insufficient to establish industry recognition of the hazard.

The Daily Safety Brief is no more convincing. Complainant contends the Daily Safety Brief indicates Healy Tibbitts recognized the impalement hazard posed by the stanchion brackets. Here is the Daily Safety Brief's discussion of impalement hazards in its entirety:

➤ Impalement hazards

(Ex. C-5 at 23). Not one Healy Tibbitts, Truston, or Navy employee testified—or told CSHO Sundram during an interview—the stanchions were identified or recognized as an impalement hazard during the morning safety briefings. In fact, Richard E. Cabral, Jr. did not consider the stanchions to be a hazard, nor did he recall anyone else identifying them as such. (Tr. 320–21). Bob Pittman, the Navy representative who has extensive experience in this area, also testified he did not consider the stanchions to be an impalement hazard. (Tr. 445–46).

Complainant essentially asks the Court to find Healy Tibbitts or its industry recognized the hazard posed by the stanchion brackets based on nothing more than: (1) a YouTube video with no connection (expressed or implied) to the marine construction industry; and (2) a Daily Safety Briefing document which only references impalement hazards as a general matter, not as they

relate to any particular implement on the barge. Without some indication the marine construction industry recognized the stanchions as hazards—or that *any* person who was present on the barge recognized those specific stanchions as hazardous—Complainant cannot establish this element of its *prima facie* case. It does not matter the stanchions were open and obvious, as argued by Complainant, unless their hazardous nature was so obvious as to render inquiry into industry or employer recognition unnecessary. *See, e.g., Eddy's Bakeries Co.*, 9 BNA OSHC 2147 (No. 77–1084, 1981). There was not one shred of documentary evidence, nor line of testimony, identifying these specific stanchions as an impalement hazard.

The Court finds Complainant failed to prove a violation of the general duty clause as alleged in Citation 1, Item 1. Accordingly, Citation 1, Item 1 shall be VACATED.

2. Citation 1, Item 2

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

OSH ACT of 1970 Section (5)(a)(1): the employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a struck-by hazard when employees worked under a load that was suspended by a crane while employees were installing a concrete sinker block to the riser chain:

- a. On December 10, 2014, a crane mounted on a barge suspended a hawsepole buoy above the employees located on an adjacent barge that were installing a concrete sinker block to the riser chain, exposing employees to a struck-by hazard.

Among other methods, recognized and feasible means of abatement to correct these hazards include but are not limited to: following the written Navy procedures and place the buoy on the deck of the barge before attaching the concrete sinker block.

Citation and Notification of Penalty at 7.

Prior to trial in this matter, Healy Tibbitts filed a motion for summary judgment, which argued that a specific standard applied in lieu of the general duty clause. In its *Order*, the Court

found 29 C.F.R. § 1926.1437, which applies to floating cranes and derricks, did not apply to the conditions aboard the working barge. The Court stated:

Although compelling, the Court finds that Complainant’s argument makes this issue more complicated than necessary. In addition to the foregoing passage, the preamble also clarifies that “the requirements of § 1926.1425 . . . do not apply to *the equipment* covered by § 1926.1437.” 75 Fed. Reg. at 48065. (emphasis added). The “equipment” covered by § 1926.1437 includes floating cranes/derricks and land cranes/derricks on barges or other flotation devices. A review of the remaining subsections of § 1926.1437 bears this out—they are designed to ensure the safety of individuals working on floating vessels that house cranes or derricks. *See* 29 C.F.R. § 1926.1437 *et seq.* The working barge did not have a crane on it and, therefore, did not have the attendant safety or feasibility issues associated with operating a crane on a barge.

Order Denying Respondent’s (Healy Tibbitts) Motion for Summary Judgment at 10.

Nevertheless, Healy Tibbitts has reasserted this “affirmative defense” in its post-trial brief.²⁵ The Court will not readdress this issue because Healy Tibbitts has not raised any new information, nor did it seek reconsideration of the Court’s ruling. As such, it is now the law of the case. *Arizona v. California*, 460 U.S. 605 (1983) (law of the case doctrine requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the matter). The Court will, however, address one ancillary issue arising out of this discussion.

Healy Tibbitts argued for the application of 29 C.F.R. § 1926.1437 because it exempts floating cranes and derricks from the prohibition against standing under a suspended load, which is found in 29 C.F.R. § 1926.1425. *See* 29 C.F.R. § 1926.1437(d). In other words, Healy Tibbitts sought the application of a standard which would exempt it from the behavior it was cited for. The reason the Court mentions this issue is that even though it determined that § 1926.1437 does not

²⁵. The Court places the term affirmative defense in quotations because Healy Tibbitts did not assert this defense in its *Answer*, nor in response to the *Order Denying Summary Judgment* did Healy Tibbitts move to amend its *Answer*. 29 C.F.R. § 1910.5(c)(1); *see* Commission Rules 34(b)(3) and(4), 29 C.F.R. § 2200.34(b)(3) and (4); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *Vicon Corp.*, 10 BNA OSHC 1153, 1157 (No. 78-2923,1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense).

apply, it left open the question as to whether § 1926.1425 did. Healy Tibbitts did not assert the applicability of § 1926.1425; indeed, Healy Tibbitts explicitly argued that it did not apply by operation of § 1926.1437. Although it would seem appropriate that § 1926.1425 would be the default measure in the event that § 1926.1437 did not apply, the Commission has held that raising a non-jurisdictional, affirmative defense on the Court's own motion is improper. *See Concrete Constr. Corp.*, 4 BNA OSHC 1133 (No. 2490, 1976) (citing *Consol. Pine, Inc.*, 3 BNA OSHC 1178 (No. 5543, 1975)). Likewise, Complainant is under no obligation to disprove the applicability of every possible specific standard that could potentially apply. Thus, the Court is left with Complainant's original allegation of a violation of the general duty clause.

a. Healy Tibbitts' Employees Were Exposed to a Hazard

Complainant alleges Healy Tibbitts' employees were exposed to a hazard while they were working in the fall zone of the suspended hawsepipe buoy. The Court agrees. Irrespective of whether the employees were positioned directly under the suspended buoy, they certainly occupied the fall zone of the buoy from its suspended position. *See* 29 C.F.R. § 1926.1401 ("*Fall zone* means the area (including but not limited to the area directly beneath the load) in which it is reasonably foreseeable that partially or completely suspended materials could fall in the event of an accident."). The hawsepipe buoy was, in essence, clamped to the riser chain, which ran through the pipe in the center of the buoy. (Ex. C-1, C-2). In the event the "clamp" (capture plate) failed, as it did in this case, there was only one direction for the buoy to fall; namely, along the path of the chain to which it was clamped. Because Respondent's employees were standing on concrete sinkers, past which the chain travelled down to the seabed, they occupied the fall zone of the buoy. Thus, they were exposed to the hazard as alleged. Furthermore, the OSHA standards also indicate that standing in the fall zone of a suspended load is hazardous. *See* 29 C.F.R. § 1926.1425.

b. The Hazard Was Recognized

Notwithstanding the seemingly apparent hazard associated with standing in the fall zone of a 12,000-pound buoy, Healy Tibbitts contends that the hazard was not a recognized one. The Court disagrees.

Healy Tibbitts' principal arguments against a finding of hazard recognition appear to be premised on an argument that is often proffered before the Commission: an accident like this has not happened before, so we (respondent) had no reason to believe the work practice was hazardous. This argument is routinely rejected because it is inconsistent with the purposes of the Act, one of which, the Commission has stated, is to prevent the first accident, "not to serve as a source of consolation for the first victim or his survivors." *Mineral Indus. & Heavy Constr. Grp., Brown & Root, Inc. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981). Even though Healy Tibbitts may not have experienced an event like this before, the Court finds its actions on the day of the accident are a strong indication that it recognized a hazard with the lift.

Prior to working on the D-8-H buoy, representatives from Truston and the Navy performed visual examinations on each of the buoys in the D-8 mooring series. According to Bob Pittman, it was clear that most of the buoys in the D-8 series were heavily corroded and were in "questionable" shape. (Tr. 462–64). In response to the "bad" condition of the buoys, Richard E. Cabral, Jr. testified that Healy Tibbitts began placing back-up wires on all of the D-8 buoys; in fact, on all buoys prior to D-8-H, Healy Tibbitts looped two back-up wires to the riser chain. (Tr. 315). In addition, as part of the pre-lift process, Healy Tibbitts employees, under the direction of Richard E. Cabral, Jr., got onto the buoy and repeatedly hit the surface with hammers. (Tr. 326). According to Cabral, "They make sure, you know, that it's all sound and they hit it with hammers and visually look at it." (Tr. 326).

The foregoing leads to one simple question: If Healy Tibbitts was truly taken by surprise when the buoy fell in the manner that it did, then why were the pre-lift precautions described above even necessary? Representatives from the Navy and Healy Tibbitts testified the buoys were in visibly “questionable” or “bad” condition before the maintenance process began, and precautions were taken to mitigate the hazard posed by the corroded buoy.

(Tr. 315, 462). In response, Healy Tibbitts makes the following argument:

Respondent’s employees knew that they did not know the full condition of the capture plate assembly connection and simply took an extra precautionary step. This does not establish they knew that the buoy would fail or that it would present a hazard to employees who were not under but rather working on the riser chain.

Resp’t Br. at 24. What Healy Tibbitts fails to recognize is it is irrelevant whether it knew that the buoy would fail. The simple fact that Healy Tibbitts had concerns about the stability of the capture plate assembly’s connection to the buoy—which is how the buoy was connected to the riser chain—and took actions to mitigate the hazards stemming from its condition indicates Healy Tibbitts recognized the hazard.²⁶ Further, the Court simply does not believe Healy Tibbitts was unaware the suspended buoy would travel down the path of the riser chain—there was literally no other place for the buoy to fall. The chain ran from the crane hook, through the middle of the buoy, and down to the seabed. Healy Tibbitts employees were stationed on the sinker blocks, which were adjacent to the path of the chain. (Tr. 45; Ex. C-6). In other words, they were directly in the “fall zone” of the buoy. *See* 29 C.F.R. § 1926.1401, *supra*. Based on the actions taken by Healy Tibbitts prior to the lift, the Court finds it recognized the hazard imposed by working in the fall zone of the suspended buoy.

²⁶ The Court would like to distinguish its findings here regarding recognition of the hazard, and its discussion with respect to Citation 1, Item 4 that the use of additional precautionary measures does not constitute awareness that such measures are required. With respect to Citation 1, Item 2, Healy Tibbitts was taking action to mitigate a known hazard, which indicates knowledge of that hazard. With respect to Citation 1, Item 4, the back-up sling was used to address a known hazard; however, its implementation did not indicate Healy Tibbitts was aware that the back-up sling was required to comply with the cited standard.

c. The Hazard Was Likely to Cause Serious Injury

The hazard in this case was a 12,000-pound buoy suspended 75 feet above an area where Healy Tibbitts employees were working. In the event of a fall, as occurred in this case, it is reasonably predictable that serious injuries, up to and including death, would result from being struck by the buoy and/or falling riser chain. Unfortunately, that is exactly what happened in this case. The Court finds the hazard was likely to, and did, cause serious injury.

d. There Were Feasible Means to Abate the Hazard

Multiple witnesses discussed alternatives to the manner in which the buoy lift was performed in this case. Notably, some of the witnesses who testified regarding feasible alternatives were employees of Truston and Healy Tibbitts, who had experience utilizing such methods in the past. The Court shall address two of the methods discussed at trial.

Edward DeLach, Richard Vonderhaar, Richard E. Cabral, Jr., Christian Caicedo, Bob Pittman, and Gustave Ruetenik all testified the buoy, instead of being lifted into the air above the deck of the barge, could have been set on the barge itself. (Tr. 173, 317, 358–60, 379–81, 457, 513–15). Although Erick Knezek testified placing the buoy on the deck would expose employees to the danger of the chain running or bouncing along the deck, both DeLach and Ruetenik testified such a hazard could be mitigated or removed by securing the buoy to the deck with tie downs and securing the chain between a chain stopper and a pelican hook. (Tr. 196, 516–17). By doing so, DeLach testified the chain would be “dead”, meaning that it would be incapable of the sort of sudden, uncontrolled movement described by Knezek. (Tr. 623). Once secured in this fashion, the chain and attached sinkers could be brought to the surface in piecemeal fashion, cleating the chain each time a new sinker or section of chain was brought on board the barge. As applied to the hawsepipe buoy, DeLach testified two ends of the riser chain could have been cleated to the deck,

rendering the middle portion “dead”. The dead portion of the chain could then be lifted with a crane, and a sinker block could be attached without raising the buoy. (Tr. 202).

In addition to Knezek’s testimony regarding the possibility of a chain run or jump, Healy Tibbitts argues, without citation to the record, that it was “clearly established” that pulling the riser chain onto the barge would create an unsafe side load on the crane. *Resp’t Br.* at 25. A review of the transcript shows the only discussion regarding side loading occurred during examination of Richard E. Cabral, Jr. In response to questions about being positioned under the load as the riser chain was cleated to the barge, Cabral testified that bringing the chain onboard the deck while cleating it to the barge would cause a side load to the crane. (Tr. 333–34). While that might explain a problem with the initial lift out of the water, it does not address the hazard of the suspended buoy while installing the sinker blocks, which is what Healy Tibbitts was cited for.

Though Cabral’s concerns may be warranted, the Court finds Healy Tibbitts overstated their impact on the feasibility of placing the buoy on the deck. For example, during the colloquy between Cabral and Respondent’s counsel, there was no discussion as to why a side load would have been created under that scenario. (Tr. 333). This was clarified by Ruetenik, who stated the riser chain has to be immediately cleated to the side of the barge before the buoy can be lifted onto the deck. (Tr. 516–17). If the buoy were pulled onto the deck without cleating it, the load imposed by the sinkers and chain would pull in a sideways direction, which can damage the crane boom. (Tr. 516–17). While this may place an employee under a suspended load, it must be remembered that 29 C.F.R. § 1926.1425 allows an employee to under a static load for certain limited purposes, such as “engag[ing] in the initial attachment of a load to a component or structure.” 29 C.F.R. § 1926.1425(b)(2). The implication being that such an operation would be limited in scope and duration. *See Cranes and Derricks in Construction*, 73 Fed. Reg. 59714, 59805 (2008). Healy

Tibbitts, however, was cited for the attachment of sinkers to the suspended buoy, which placed them under the suspended load for a longer duration. As the indicated in the testimony of employees from the Navy, Healy Tibbitts, and Truston, such exposure was unnecessary because the buoy could have been placed on the deck once the chain was secured to the barge and once the section of chain to which the sinker would be attached was rendered “dead”.

Pittman also testified regarding an alternative means of hoisting the buoy. He discussed the use of a cantilever positioned off the side of the barge. (Tr. 467). When the buoy is lifted, the chain is slipped into a set of prongs that holds the chain in place. (Tr. 467). From there, Pittman testified that locking plates secure the chain in place and the buoy can then be safely placed on the deck of the barge. (Tr. 467). Most striking, though, was Pittman’s testimony that on this job one of the D-8 series buoys was actually lifted onto the deck of the barge in order to attach the sinker blocks. (Tr. 457–58).

Ultimately, through the testimony of multiple witnesses, the Court finds Complainant established feasible, alternative means of abatement. The fact that at least one of the D-8 buoys on this project was repaired while placed on the deck of the barge establishes that the process was feasible, and there was no testimony to the contrary. The Court is mindful of the fact that, at least during the initial lift and cleating of the chain, an employee has to be under the suspended load. As noted above, the cranes and derricks standard contemplates limited, short duration exposure under a specific set of circumstances. The Court has not been called upon to address this procedure; rather, the focus was on the attachment of sinker blocks—a more involved process—while working under a suspended load. Based on the foregoing, the Court finds Complainant has shown multiple, feasible abatement alternatives.

e. Respondent Had Knowledge of the Conditions

In addition to the foregoing, the evidence must also show the employer knew or with the exercise of reasonable diligence, should have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204 (No. 03-1344, 2007). “[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer’s safety program.” *Dover Elevator Co.*, 16 BNA OSHC 1281 (No. 91-862, 1993).

Richard E. Cabral, Jr. was the on-site supervisor for a crew of six Healy Tibbitts employees on the date of the accident. (Tr. 312). According to Cabral, they started putting wire ropes on the buoys as back up because previous buoys were “bad”. (Tr. 315). Thus, not only was he in a position to see the condition of the buoys, but actually confirmed they were in questionable shape. Based on his position as a supervisor, and his observation of the condition, the Court finds it is proper to impute Cabral’s knowledge of the hazardous conditions to Healy Tibbitts. Thus, the Court finds Complainant has established a violation of the general duty clause in Citation 1, Item 2

Accordingly, Citation 1, Item 2 shall be AFFIRMED.

3. Citation 1, Item 4

Complainant alleged a serious violation of the Act in Citation 1, Item 4 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 9.

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, Healy Tibbitts loosely attached a sling to the buoy and looped it through one of the links in the riser chain. Healy Tibbitts 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 Healy Tibbitts 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 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. Healy Tibbitts, 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 Healy Tibbitts. 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.²⁷ *See*

²⁷. 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 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.

Identification of General Industry Safety and Health Standards (29 CFR Part 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 10, *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 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”.²⁸

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.²⁹ 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).

²⁸. 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.

²⁹. 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, Healy Tibbitts 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. 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 Healy Tibbitts 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 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.³⁰

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 Healy Tibbitts' 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 Healy Tibbitts' 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 Healy Tibbitts had not used the sling, then it would not have been cited. This is tantamount to 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 Healy Tibbitts' 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

³⁰. The shock loading standard is also found in 1910.184. *See* 29 C.F.R. § 1910.184(c)(11).

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.

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 Healy Tibbitts 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 4 shall be VACATED.

4. Citation 1, Item 5

Complainant alleged a serious violation of the Act in Citation 1, Item 5 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 10.

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 Healy Tibbitts because it failed to provide ladders or stairways at the point where employees were accessing the tops of the concrete sinker blocks. Amongst other arguments, Healy Tibbitts contends the standard requires it to merely *provide* ladders, not that employees should be required to use them. *See Resp't Br.* at 31 (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.F.R. § 1926.1051(a) (emphasis added).³¹ Healy Tibbitts did not provide a stairway or ladder at the point where the 4.5-foot tall sinker blocks were accessed. Nevertheless, Healy Tibbitts 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.

³¹. 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 (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.

Healy Tibbitts 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 problem³² with Healy Tibbitts’ 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, Healy Tibbitts 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

³². 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.

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

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 E. Cabral, Jr., Healy Tibbitts' on-site superintendent, 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. 323–24). Cabral 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. 324). 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 Healy Tibbitts, through its designated site supervisor, Richard E. Cabral, Jr., 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 Healy Tibbitts, 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 5 shall be AFFIRMED as a serious violation of the Act.³³

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 \$5,400 for Citation 1, Item 5. 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

³³. 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".

or documentary evidence was introduced to establish an actual number. (Tr. 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 Healy Tibbitts 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, Healy Tibbitts' employees were only ever 4 feet, 6 inches off of the ground. At that height, Healy Tibbitts 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 Healy Tibbitts 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 for Citation 1, Item 5.

Complainant proposed a penalty of \$6,200 for Citation 1, Item 2. As with Citation 1, Item 5, the Court is without evidence regarding size or history of violations. However, based on the severity of the hazard imposed by a 12,000-pound, suspended buoy, and given that the hazard actually came to fruition in this case, the Court finds the penalty proposed by Complainant 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 VACATED.
2. Citation 1, Item 2 is AFFIRMED as a serious violation and a penalty of \$6,200.00 is ASSESSED.
3. Citation 1, Item 3 is WITHDRAWN.
4. Citation 1, Item 4 is VACATED.
5. Citation 1, Item 5 is AFFIRMED as a serious violation, and a penalty of \$2,000.00 is ASSESSED.

SO ORDERED

/s/

Patrick B. Augustine
Judge, OSHRC

Date: September 14, 2017
Denver, Colorado