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

SECRETARY OF LABOR, Complainant, v. FIRST MARINE, LLC, Respondent.	OSHRC Docket Nos. 18-1287 & 18-1288

ON BRIEFS:

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For the Complainant

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For the Respondent

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

DECISION

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

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

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

BACKGROUND

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

A. Noncompliance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Characterization and Penalty

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

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

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

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

Intentional/Conscious Disregard

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

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

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

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

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

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

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

Plain Indifference

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

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

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

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

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

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

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

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

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

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

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

Penalty

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

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

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: April 6, 2023

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

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FIRST MARINE, LLC,[1] Respondent.	OSHRC Docket Nos. 18-1287 & 18-1288

DECISION AND ORDER

Attorneys and Law firms

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Tashwanda Pinchback Dixon, Attorney, Balch & Bingham LLP, Atlanta, GA, Ryan A. Hahn, Carl Marshall, Attorneys, The Miller Law Firm, Paducah, KY, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

This case centers on the ill-fated *William E. Strait* (the *William*), an inland river towboat. In 2015, barges pushed by another towboat on the Mississippi River struck the *William* as she pushed barges destined for New Orleans down the Mississippi River, causing the *William* to sink just south of Memphis, Tennessee. Three salvage crews working together raised the *William* on February 7, 2016 and transported her to a shipyard on the Tennessee River in Calvert City, Kentucky, which was owned and operated by the Respondent, First Marine, LLC. First Marine and its subcontractors began repairing and rebuilding the *William*, which was first in dry dock and then moored to the shipyard dock string on the Tennessee River.

[1] The Court issued an order granting the motion of James A. Lang, I, James A. Lang, II, Tyler C. Wedeking, Thomas E. Wilkerson, and Zachery W. Ford to withdraw as intervenors in this action.

On the morning of January 18, 2018, an explosion ripped through the *William*, killing three workers, and seriously injuring several others. The United States Department of Labor, through its Occupational Safety and Health Administration ("OSHA"), investigated the accident, along with the Kentucky State Police and the United States Coast Guard. None of the authorities investigating the explosion, including OSHA, were able to determine definitively the cause of the explosion.[2]

According to signed statements provided to OSHA, most of the surviving workers aboard the *William* that morning reported they had smelled gas when they boarded at approximately 7:00 a.m. Because the work aboard the *William* required the use of propane and propylene, as well as diesel fuel in portable heaters, it was not unusual to smell whiffs of gas, but the odor was noticeably stronger that morning. After a cursory search by several of the workers to find the source of the smell, everyone proceeded with their assigned tasks.

OSHA opened its investigation on January 23, 2018, and Compliance Safety and Health Officers[3] Patrick Whavers and Matthew Amick conducted interviews, took photographs, and examined the wreckage of the *William.* Based on their investigation, they recommended the Complainant Secretary of Labor issue both Health and Safety citations to First Marine for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651- 678 (the Act).

On July 17, 2018, the Secretary issued[4] separate Health and Safety citations to First Marine. In the Safety citations (Docket No. 18-1287), the Secretary alleged 17 violations of the safety standards and one violation of section 5(a)(1) of the Act, commonly known as the "general duty" clause. In the Health citations (Docket No. 18-1288), the Secretary alleged 17 violations of the health standards. First Marine timely contested both the Health and the Safety citations and the

[2] The Secretary's theory is the explosion originated in the deck locker, where propylene flowed through a gas hose allegedly left there overnight (Compl't's Br., p.1). First Marine contends the ignition source of the explosion was a propane-fueled portable heater allegedly being used improperly by a subcontractor's employees in the center potable water tank on the lower deck of the towboat (Resp't's Br., p, 10; *see also* Ex. R-9, pp. 2-3).

[3] A "Compliance Safety and Health Officer" is "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. §1903.22(d).

[4] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order 8-2020, *Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health*, 85 Fed. Reg. 58393 (Sept. 18, 2020), superseding Order No. 1–2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

Secretary subsequently filed formal complaints[5] with the Commission seeking Orders affirming the citations. The two cases were subsequently consolidated for trial and disposition. The parties settled most of the cited items.[6] Remaining at issue from the Safety citations are Citation 1, Items 1, 4, 10, and 11, alleging "serious"[7] violations of the Act. Remaining at issue from the Health citations are Citation 1, Items 4a, 4b, 5, 6, and 7, alleging serious violations of the Act, and Citation 2, Items 1, 2, and 3, alleging "willful" violations of the Act.

The parties stipulate the Commission has jurisdiction over this action, and First Marine is a covered employer under the Act (*Answer,* ¶¶ I & II; *J. Pretrial Order,* ¶ 4; *see also id.* Attach. C ¶¶ 1, 2; Tr. 45). Based on the stipulations and the record evidence, the Court concludes the Commission has jurisdiction over this proceeding under section 10(c) of the Act, and First Marine is a covered employer under section 3(5) of the Act. 29 U.S.C. §§ 659(c), 652(5). The Court held a bench trial in Paducah, Kentucky[8] and the parties subsequently filed post-trial briefs. Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act.[9] 29 U.S.C. § 661(j). For the reasons indicated *infra*, the Court **VACATES** all the remaining items of Safety Citation 1 and **VACATES** all the remaining

[5] Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d). Attached to the complaints and also adopted by reference were the citations, which were "a part thereof for all purposes."

[6] On January 30, 2020, the parties filed a Joint Notification of Partial Settlement and pursuant to Commission Rule 10, 29 C.F.R. § 2200.10, the settled citation items were severed from the original cases and were disposed of in a new case under Docket No. 20-0178.

[7] The Act contemplates various grades of violations of the statute and its attendant regulations—"willful"; "repeated"; "serious"; and those "determined not to be of a serious nature" (the Commission refers to the latter as "other-than-serious"). 29 U.S.C. § 666.

[8] Twenty-five witnesses testified at the trial. Eleven of the witnesses (including carpenters, electricians, welders, and supervisors) were working for First Marine the day of the explosion. Four witnesses had been working for subcontractor Thermal and Fabrication; one witness had been working for subcontractor Rupke's Blasting and Painting; two witnesses had been working for subcontractor Hutco, and one witness had worked for subcontractor Wise Staffing. These nineteen witnesses were either aboard the *William* or nearby on the dock string when the vessel exploded on January 18, 2018. Two management officials from Western Rivers Boat Management Inc. (the owner of the *William*) testified, as did an expert in forensic fire and explosion investigations hired by First Marine. An investigator for the Kentucky State Police testified, as well as the two Compliance Safety and Health Officers that investigated the explosion.

[9] All arguments not expressly addressed have nevertheless been considered and rejected. If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

items of the Health citations except Citation 1, Item 7 and Citation 2, Item 2, which are **AFFIRMED**, with penalty **ASSESSMENTS** of $12,934 and $129,336 respectively.

II. BACKGROUND

Western Rivers Boat Management Inc. (Western Rivers) owns and operates towing vessels. The vessels push barges on the Mississippi River and its tributaries (Tr. 1138, 1143). Western Rivers bought an inland river towboat in 2012 and renamed her the *William E. Strait*. The towboat had three decks and was approximately 200 feet long and 45 feet wide. Two engines provided her with 7,200 horsepower (Tr. 1144). On December 14, 2015, as the *William* was pushing barges down the Mississippi River near Memphis, Tennessee, a barge being pushed by another towboat struck her on the starboard stern. The *William* began to take on water and eventually sank (Tr. 1150).

Western Rivers initiated a salvage operation but suspended it due to the rising river and recommenced salvage on January 25, 2016, after the river dropped. A salvage crew first pumped off approximately 80,000 gallons of diesel fuel that remained aboard (Tr. 1155). Because the *William* was a large towboat, Western Rivers hired three salvage companies to lift her (Tr. 1154). The salvage crews placed a weave of large cables underneath the bow and the stern of the towboat and used five derrick cranes to raise her. In addition to the damage sustained by the vessel during the sinking, the weave of cables further damaged the bow and the stern of the towboat as the cranes lifted her (Tr. 1157).

Western Rivers submitted a transit plan for the *William* to the United States Coast Guard and towed her to First Marine's shipyard on the Tennessee River in Calvert City, Kentucky, where she was placed in dry dock on February 14, 2016 (Tr. 1159-61). After clearing the buildup of sand and sediment that had accumulated in the vessel, workers partially disassembled her by cutting out sections of the vessel, including the hull, to remove the engines and gearboxes. First Marine subsequently removed the *William* from dry dock and moored her to the dock string[10] at First Marine's shipyard in December 2017 (Tr. 1165-67, 1171).

First Marine contracted with several subcontractors to perform work on the *William*: Hutco, a temporary staffing agency, provided welding and cutting workers; Rupke Blasting and Painting

[10] The dock string comprises a series of barges permanently moored on the Tennessee River. Vessels are moored to the dock string and workers access vessels from the individual barges of the dock string. The barges are connected to the riverbed by spuds (long poles) which allow the barges to float up and down with the vessels, but not back and forth (Tr. 616, 658, 1406, 1448).

(Rupke)[11] provided workers to pressure wash and paint water tanks; and Thermal Control and Fabrication (Thermal) provided workers to install insulation. Wise Staffing, a temporary staffing agency, also provided laborers for the project. First Marine itself had two welding and fitting crews on the day shift, supervised by David Byrum and Brandon Carter (Tr. 843-44).

In mid-January of 2018, Calvert City, Kentucky, experienced chilly temperatures, and wintry weather. Snow had fallen the night of January 18, and snow and ice remained on First Marine's dock and the surfaces of the *William* the morning of January 19 (Tr. 241, 461). The upper engine room of the towboat is located on the main deck. It has exterior doorways on the starboard and port sides of the vessel, and three interior doorways leading to the generator room, the control room, and a hallway to the galley. The upper engine room also has several exterior window openings (Ex. R-1). On January 18 and 19, 2018, doors and window glass were not installed in the openings in the upper engine room. Workers had covered the openings with plastic tarps and welder's blankets to contain what heat there was in the room and to prevent wind from blowing in (Tr. 61-63, 98-99, 127, 137, 182).

The lower engine room of the *William* is located on the bottom deck of the vessel. Workers access the lower engine room from the upper engine room by using a stairway located in the middle of the upper engine room floor (Ex. R-1). The two levels are not separated by a door or doors—the stairway is open at its top and bottom. A Thermal employee stated the stairway area is "just open really. You can see pretty good down there" from the upper engine room (Tr. 100).

Rupke, the company hired to provide pressure washing and painting services, had placed a portable forced-air Remington heater (also known as a *salamander*) fueled by propane in the lower engine room of the *William* on January 18 and 19, 2018 (Tr. 243; *see also* Ex. R-12, p. 35). The heater was positioned at the bottom of the stairway and was visible from the upper engine room (Tr. 99, 186-87, 246, 371).

On January 19, 2018, First Marine employees and subcontractor employees were working aboard the *William.* Most of the workers had arrived at the shipyard before 7:00 a.m. and were aboard the towboat by 7:15 a.m. Most of the workers who boarded the towboat immediately noticed a gas odor, and one or two of them attempted to trace its origin (Tr. 66, 102-03, 139). Workers moved the plastic aside from the doorways and window openings to air out the upper

[11] The company's name also appears as *Rupcke* in some exhibits and case documents. The Court uses the spelling that appears in the trial transcript.

engine room and, First Marine electrician Manuel Macario Garcia testified he could feel air movement when the plastic was moved from the openings (Tr. 192-93, 197-98, 211, 282-84, 302, 313-14, 347-49, 368, 373). "Not all of [the upper engine room] was tarped up and you can feel the cold coming through." (Tr. 372.)

Rupke's supervisor directed Rupke employee Zachary Ford to replace the propane tank connected to the portable heater with a new propane tank to determine if the old tank was the source of the gas smell (Tr. 243-45, 249).[12] Ford disconnected the old tank and carried it to his supervisor's truck parked on the dock. He retrieved "a brand-new tank that had a blue plug in the tank" from the truck, reboarded the vessel, and carried it to "the bottom deck of the boat at the bottom of the stairs, and . . . hooked it up and turned it back on and started the heater back up. It was just a process of elimination[.]" (Tr. 246.) At approximately 9:15 a.m., an explosion erupted, killing a First Marine fitter and two Hutco welders, and seriously injuring several other employees (Tr. 813).[13]

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id.* To achieve this purpose, the Act imposes two duties on an employer, a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1), and a specific duty to "comply with occupational safety and

[12] Expert witness Michael Schulz explained that propane and propylene are odorless gasses. Manufacturers add mercaptans to the odorless gases as a "safety strategy . . . so that leaks can be detected. . . . Mercaptans are described as what's called a high odor impact material. . . . [T]hey've often been described by chemists as the stinkiest material liquid, gas or solid in the world. Biggest smell for the smallest amount." (Tr. 1289.)

[13] Several of the injured workers testified at the trial, which began approximately two years after the explosion. Some of them continued to suffer from the effects of the blast and were in noticeable physical discomfort as they testified. One of the workers described his injuries: "Liver, my lungs and my spleen. Broke all my ribs in the front. Broke them all in the back, plus my backbone. Broke my arm. Messed my shoulder up. Broke my leg, my knee right above the kneecap." (Tr. 70.)

health standards promulgated under this Act." *Id.* § 654(a)(2). Thus, each employee must "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." *Id.* § 654(b).

Pursuant to that authority, the standards at issue in this case were promulgated. *See* 29 U.S.C. § 665. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp.*, 499 U.S. at 151.

A. THE SAFETY CITATION (CASE NO. 18-1287)

1. Alleged General Duty Clause Violation

Under the law of the Sixth Circuit where this case arose,[14] for alleged violations of the general duty clause, the Secretary must demonstrate that: "(1) A condition or activity in the workplace presented a hazard to employees; (2) The cited employer or the employer's industry recognized the hazard; (3) The hazard was likely to cause death or serious physical harm; and (4) A feasible means existed to eliminate or materially reduce the hazard." *Nelson Tree Servs., Inc. v. Occupational Safety & Health Review Comm'n*, 60 F.3d 1207, 1209 (6th Cir. 1995).

Citation 1, Item 1

In Citation 1, Item 1, the Secretary alleges on January 18 and 19, 2018, First Marine committed a serious violation of the general duty clause by exposing employees on the *William* to the hazard of asphyxiation, when "a carbon monoxide producing propane forced air heater was used in the lower engine room."[15] (Compl. Ex. A p. 6 of 25.) The Court notes although the citation

[14] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). "[I]n general, '[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.'" *Dana Container, Inc.,* 25 BNA OSHC 1776, 1828 n.10 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017). This case arose in Kentucky, located in the Sixth Circuit, where First Marine also has its principal office. Therefore, the Court applies the precedent of the Sixth Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed.

[15] Whavers recommended the Secretary cite First Marine for "the use of a forced air propane heater in an *enclosed space*." (Tr. 934) (*emphasis added*). However, the Secretary did not include the term "enclosed

alleged the violation occurred on January 18 and 19, 2018, the testimony regarding the location and use of the heater at issue relates almost entirely to the events of January 19, the day of the explosion. The Court concludes the record regarding the location and use of the heater on January 18 is insufficient to establish that its condition presented a hazard. Thus, the Court restricts its analysis to the alleged violation on January 19, 2018.

Did a Workplace Condition or Activity Present a Hazard to Employees?

As evidence of an asphyxiation hazard, the Secretary relies on the heater's *User's Manual & Operating Instructions*, which warns, "Never use the heater in enclosed spaces[.]" (Ex. C-5, p. 1.) The Secretary argues the lower engine room was an "enclosed space" and the use of the heater in it established the presence of an asphyxiation hazard. The maritime standards define the term "enclosed space" as "any space, other than a confined space, which is enclosed by bulkheads and overhead. It includes cargo holds, tanks, quarters, and machinery and boiler spaces." 29 C.F.R. § 1915.4(q). A "confined space" is "a compartment of small size and limited access such as a double bottom tank, cofferdam, or other space which by its small size and confined nature can readily create or aggravate a hazardous exposure." 29 C.F.R. § 1915.4(p).

First Marine does not dispute the cited heater was fueled by propane and was in use in the lower engine room on January 18 and 19, 2018. However, First Marine argues the lower engine room "was not an enclosed space "and therefore, the Secretary failed to establish the use of the heater presented an asphyxiation hazard (*Resp't's Br.,* p. 62). First Marine argues that the definition of an "enclosed space" cannot be expanded to encompass a three-sided compartment with a stairway on the fourth side that opens to a large upper room. Whavers conceded the area where the heater was located had bulkheads (or walls) on three sides, but the stairway leading to the upper engine room was located on the fourth side. The area above the stairway was not enclosed but opened into the larger upper engine room (Tr. 975-76; *see also* Ex. R-2). The record also establishes workers had pushed the plastic tarps aside at the doorways and window openings to

space" in the alleged violative description of the citation, but rather, elected to include it only in the paragraph addressing abatement. A "workplace hazard cannot be defined in terms of a particular abatement method." *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007). First Marine failed to object at trial that the evidence of the enclosed space was not within the issues raised in the pleadings, and at trial the parties litigated the issue of whether the lower engine room was an enclosed space. "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Fed. R. Civ. P. 15. Therefore, the Court concludes the issue of whether the portable heater was used in an "enclosed space" was tried by consent of the parties.

allow outside air to circulate in the engine rooms (Tr. 1181). The Court therefore concludes, as established by the record, that the lower engine room was *not* an enclosed space within the meaning of the maritime standards.[16]

Further, the heater's *User's Manual* allows for an exception to its prohibition on indoor use of the heater: "INDOOR USE PERMITTED ONLY FOR: The temporary heating of adequately ventilated buildings or structures under construction, alteration, or repair!" (Ex. C-5, Bates page 000480.) Whavers agreed that on January 18 and 19, 2018, the *William* was under construction, alteration, or repair (Tr. 970). The Secretary shifted ground at the trial to contend that even if the lower engine room was not an enclosed space, the upper engine room was not adequately ventilated because the door and window openings of that room were covered with plastic to shield against the wind and freezing temperatures. Thus, the Secretary's assertion that "[u]nless fresh air was being pumped into the space (which there is no evidence of), the space is exactly the type of space where the heater should not be used." (Compl't's Br., pp. 60-1, n. 39.) The Court finds no merit in this argument. The record is replete with undisputed testimony that the plastic tarps on the upper engine room door and window openings had been moved aside to air out the upper engine room once workers detected the gas odor (Tr. 192-93, 197-98, 211, 282-84, 302, 313-14, 347-49, 368, 372-73).[17]

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[16] The Secretary claims post-explosion photographs of the area where the heater was located the morning of January 19, 2018, "are the best evidence" that the heater was being used in an enclosed space, which according to the Secretary, is corroborated by Whavers' testimony the heater was being used in a compartment "off to the side of the [lower] engine room," which sits below the water line. (*Compl't's Br.*, p. 60) (*citing* Tr. 971-72; Ex. C-23, Ex. C-24, Ex. C-25). The Court finds no merit in this argument. The Court does not find persuasive and therefore does not credit the testimony of Whavers with respect to the location of the heater prior to the explosion since he observed the location of the heater *after* the explosion. Rupke employee Ford testified the heater was at the bottom of the stairway when he replaced the propane tank connected to it (Tr. 246). Multiple employees also testified they observed the heater at the foot of the stairway before the explosion (Tr. 99, 186-87, 246, 371). The eyewitness testimony is corroborated by the testimony of Michael Schulz, a forensic fire and explosion investigator and analyst called as an expert witness by First Marine. He inspected the *William* on January 22, 2018, three days after the explosion, found the Remington heater at issue and examined it (Tr. 1332-33). Schulz testified he did not find the Remington heater at the base of the stairs where workers testified it had been used, but "closer towards the aft of the vessel." (Tr. 1302.) Schulz opined the dislocation resulted from "the explosion dynamics" that propelled objects "away from the stairs because of the pressure wave coming from" the explosion (Tr. 1302). The Court credits the testimony of Schulz and the eyewitnesses and finds the heater was at the bottom of the stairway before the explosion.

[17] The Secretary also asserts in his post-trial brief that the size of an outside air opening required for adequate ventilation of the 125,000 BTU heater would be 3.6 square feet (*Compl't's Br.*, p. 60, n. 39). However, the Secretary provided no measurement or calculations as to how he concluded 3.6 square feet was required, cited to no evidence in the record establishing the actual size of the outside air openings, and

Since the Secretary relied on the *User's Manual & Operating Instructions* of the cited heater to set the parameters of the heater's safe use, he has failed to establish First Marine permitted the heater to be used improperly, either by operating it in an enclosed space or by operating it without adequate ventilation. The Court therefore concludes the Secretary failed to establish use of the Remington heater presented an asphyxiation hazard in the workplace and Item 1 must be vacated.

2. Alleged Violation of Occupational Safety and Health Standards

To establish a prima facie violation of applicable occupational safety and health standards, the Secretary must show by a preponderance of the evidence that " '(1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence.' " *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 279 (6th Cir. 2016) (internal citation omitted).

Applicability of the Shipyard Employment Standards

Except for the alleged general duty clause violation, all of the remaining citations and items in dispute in both cases involve alleged violations of various standards found in Part 1915—Occupational Safety and Health Standards for Shipyard Employment (Shipyard Standards), 29 C.F.R., Part 1915, which, except where otherwise provided, "shall apply to all ship repairing, shipbuilding and shipbreaking employments and related employments." 29 C.F.R. § 1915.2(a).[18] Since First Marine was in the process of repairing or rebuilding the *William* at the time of the explosion, the Court concludes the specifically cited Shipyard Standard in each citation item applies unless a specific "applicability" provision applies, where the Court will separately address the first prong of the *Mountain States* test as it relates to that specific "applicability" provision.

offered no evidence of how the actual ventilation was inadequate since the plastic tarps on the upper engine room door and window openings had been moved aside to air out the upper engine room once workers detected the gas odor.

[18] "Shipyard employment" means "ship repairing, shipbuilding, shipbreaking and related employments." 29 C.F.R. § 1915.2(i). "Ship repair" and "ship repairing" mean "any repair of a vessel including, but not restricted to, alterations, conversions, installations, cleaning, painting, and maintenance work." 29 C.F.R. § 1915.2(j). "Shipbuilding" means "the construction of a vessel including the installation of machinery and equipment." 29 C.F.R. § 1915.2(k). "Related employment" means "any employment performed as an incident to or in conjunction with ship repairing, shipbuilding or shipbreaking work, including, but not restricted to, inspection, testing, and employment as a watchman." 29 C.F.R. § 1915.2(m).

Citation 1, Item 4

In Citation 1, Item 4 the Secretary alleges First Marine committed a serious violation of § 1915.74(c)(2), a vessel access provision, on January 19, 2018 when a ramp was not provided to access the vessel. More specifically, the Secretary asserts First Marine violated this standard when the "*William* was tied to the dock in a manner that would allow it to float away from the dock creating a space of approximately 2 feet that an employee could fall through between the deck and dock." (Compl. Ex. A p. 10 of 25.) The Shipyard Standards mandate that with respect to access to barges and river towboats, either a ramp or a safe walkway shall be provided "[u]nless employees can step safely to or from the wharf, float, barge, or river towboat[.]" 29 C.F.R. § 1915.74(c)(2).[19] "When a walkway is impracticable, a substantial straight ladder, extending at least 36 inches above the upper landing surface and adequately secured against shifting or slipping, shall be provided." 29 C.F.R. § 1915.74(c)(2). "When conditions are such that neither a walkway nor a straight ladder can be used, a Jacob's ladder . . . may be used." *Id.*

Did First Marine Meet the Requirements of the Standard?

First Marine moors vessels in its shipyard to a dock string, a series of barges tied together to provide a walking and working surface on the river. After First Marine moved the *William* from dry dock and moored her with her starboard side next to the dock string barge, workers could board the towboat either by stepping from the dock string barge to the deck of the towboat or walking down a set of stairs to the main dock (Tr. 406-04, 1449).[20] First Marine did not provide a ramp or walkway for access between the dock string barge and the towboat (Tr. 959). Handrails line the edge of the dock string. Workers accessed the *William* by passing through a gateway in the handrails on the dock string barge to which the vessel was moored (Ex. R-10, Bates page 001538).

[19] A ramp must be provided in conformity with § 1915.74(c)(1), which provides: "Ramps for access of vehicles to or between barges shall be of adequate strength, provided with side boards, well maintained and properly secured." 29 C.F.R. § 1915.74(c)(1). A walkway must be provided in conformity with § 1915.74(a)(7), which mandates that "[i]f the foot of the gangway is more than one foot away from the edge of the apron, the space between them shall be bridged by a firm walkway equipped with railings, with a minimum height of approximately 33 inches with midrails on both sides." 29 C.F.R. § 1915.74(a)(7). A Jacob's ladder must "be of the double rung or flat tread type … shall be well maintained and properly secured[,]" and "shall either hang without slack from its lashings or be pulled up entirely." 29 C.F.R. § 1915.74(d).

[20] First Marine electrician Victor Pineda explained the stairs lead to "the carpenter shop, and you can take a right and you can get on the boat that way, too." (Tr. 407.)

Hutco supervisor Gregory Voss fabricated a metal step and attached it to the edge of the towboat next to the gate on the dock string barge so workers could step on it as they boarded the vessel (Tr. 658-59; *see also* Ex. C-11, Ex. C-12). Voss fabricated the step in response to the inclement weather. "Normally, we wouldn't use a step on a sunshiny day, but it was snowing. It had been snowing, icing up, and . . . because the boat was tilted in the water, it was actually real slippery, and so we put the step there and leveled it off, so you weren't stepping onto something that was slick." (Tr. 661.)

As indicated *supra*, the cited standard requires the employer to provide a ramp or safe walkway "[u]nless employees can step safely to or from the . . . river towboat." The Secretary contends the fabricated step was insufficient to allow employees to step safely between the dock and the towboat. Thus, the Secretary asserts in the citation that access to and from the towboat was not safe because the way the towboat was secured to the dock string "would allow it to float away from the dock creating a space of approximately 2 feet that an employee could fall through between the deck and the dock." No evidence in the record supports this claim that workers were exposed to a gap between the *William* and the dock string as wide as 2 feet.

Welder B.K. had worked for First Marine for "a couple of years" at the time of the explosion (Tr. 459). He stated the towboat generally was drawn in "tight" to the dock string unless another boat passed, creating a wake. In that event, he would "[w]ait a second or jump across. . . . If it was a problem, you could go to your manager and they would tighten the line." (Tr. 514.) He estimated he had seen the towboat drift 12 or 13 inches from the dock string (Tr. 534). Deron Conaway, First Marine's safety director, testified in a deposition that he had observed the towboat drift "as much as 18 inches or more" from the dock string (Tr. 897).

James A. Lang I of Thermal testified he remembered the towboat was "snugged up to the dock" the day of the explosion (Tr. 80). His son, James A. Lang II estimated any gap between the dock string and the towboat was "six or seven inches probably" (Tr. 107.) Tyler Wedeking, also of Thermal, stated the towboat "was pulled up tight against the . . . dock string. There [were] always gaps, but you just stepped across." (Tr. 199.) First Marine carpenter Matthew McCoy and First Marine electrician Manuel Macario Garcia stated they had no trouble stepping over the gap, and it caused them no safety concerns (Tr. 330, 374). Hutco supervisor Gregory Voss, who fabricated the step for the towboat, testified he had seen gaps "maybe up to about six inches." (Tr. 661.)

Whavers recommended the Secretary cite First Marine for a violation because "depending on the action on the river due to vessel traffic or wind, the *William* would move away from the dock." (Tr. 944.) He experienced this condition himself as he boarded the towboat during his inspection. "[W]hen I stepped onto the vessel it was a gap of about 10 inches. There was no handhold when you stepped down to the [fabricated step]. . . . So, when you step down, you step directly onto the top of the platform, and we had nothing to hold onto." (Tr. 944.) Whavers described the hazard created by the absence of a ramp or walkway. "The hazard is that if there is a wake while you're stepping from the dock to the vessel, you can receive a knee or ankle injury. If the gap is such that it's large enough for a person to pass, you could actually fall between the barge and the dock to water. And that's a potential crushing or drowning hazard." (Tr. 945.) However, Whavers admitted that none of the employees he spoke with during his inspection told him they encountered difficulty boarding or disembarking from the towboat (Tr. 944).

Jason Strait, one of the managers of the family-owned Western Rivers, testified that he believed Whavers's perception of access to the *William* was skewed based on his observations of the towboat following the explosion.

> [W]e had to move the boat after the explosion. It was tied off. It was in a good spot. We had a breakaway [of barges] from a fleet that's unrelated to our facility upriver and some barges had come down the river. Well, there's multiple tugs running back and forth grabbing these barges, moving things around. It was just an unusual amount of traffic which made that boat come a little looser to its moorings. And when Mr. Whavers got there that's how he [saw] it. Any normal operation is not that way and we would have pulled it tight.

(Tr. 1450.) Strait testified that workers could support themselves on the handrails and swinging gate as they stepped from the dock string barge to the *William.* "[T]he handrails that you see [in photographic Exhibit R-10, Bates page 001538,] that are running vertical along the side are there, but also the gate itself is used as a handrail. . . . It swings both ways, and when it swings it actually stops at a 90-degree angle. That way you can hang on to it, lean on it when you're accessing that point." (Tr. 1409-10.)

First Marine focuses on the conditional clause that opens the cited standard: "*Unless* employees can step safely to or from the wharf, float, barge, or river towboat," then a ramp or walkway is required. First Marine argues guidance for determining whether employees can step safely to or from the towboat is provided by § 1915.74(a)(7), which is referred to in the cited standard. The Court agrees.

> The well-established rule of statutory construction is that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." 2A *Sutherland Statutory Construction* § 46.05 (5th ed. 1992). . . . *See also General Motors Corp., Electro–Motive Div.,* 14 BNA OSHC 2064, 2066 & n. 8, 1991 CCH OSHD ¶ 29,240, p. 39,165 & n. 8 (No. 82–630, 1991) (statutes should be construed so as to avoid conflict between them).

Morrison-Knudsen Co./Yonkers Contracting Co., 16 BNA OSHC 1105, 1107 (No. 88-0572, 1993). Section 1915.74(c)(2) explicitly incorporates § 1915.74(a)(7), which requires the employer to provide a walkway "[i]f the foot of the gangway is more than one foot away from the edge of the apron[.]" 29 C.F.R. § 1915.74(a)(7). The Court concludes that since a walkway is only required if the gangway falls short by more than a foot, employees "can step safely to or from" a vessel if the gap is one foot or less.

Here, except for Conaway and B.K., the workers who testified about the gap between the dock string barge and the *William* gave estimates that were less than 12 inches. B.K. estimated the gap to be 12 or 13 inches. The higher number exceeds the one-foot criterion by only an inch. The Court has no basis for determining which of B.K.'s estimates of 12 or 13 inches is more accurate. His testimony is an insufficient basis for finding the gap he observed exceeded one foot. Conaway's testimony he observed an 18-inch gap is an outlier. He did not state in his deposition testimony the date he observed a gap that wide, and at trial he did not remember observing such a gap (Tr. 896). Item 4 of the Safety Citation alleges the violation of § 1915.74(c)(2) occurred "[o]n or about January 19, 2018." There is no evidence showing Conaway's observation of an 18-inch gap between the dock slip barge and the towboat occurred during the cited timeframe.

Further, Whavers recommended the Secretary cite First Marine for violating § 1915.74(c)(2) based on his own observations of the altered conditions of the shipyard that existed *after* the explosion. However, no workers boarded the *William* the day of his inspection and therefore no workers were exposed to any violative condition existing when Whavers made his observations. Finally, the addition of the fabricated step and the installation of the handrails and swinging gate on the dock slip barge demonstrate additional measures were in place to aid workers in stepping safely to and from the towboat. The Court concludes the Secretary has failed to establish a violation of § 1915.74(c)(2) and Item 4 must be vacated.

Citation 1, Item 10

In Citation 1, Item 10 the Secretary alleges First Marine committed a serious violation of § 1915.503(b)(2)(ii), a shipyard fire protection provision, from January 17 to January 19, 2018, when it failed to "make sure that unattended fuel gas and oxygen hose lines or torches were in enclosed spaces for no more than 15 minutes[.]" (Compl. Ex. A p. 19 of 25.) The cited standard mandates the employer must make sure that "[n]o unattended charged fuel gas and oxygen hose lines or torches are in *enclosed spaces* for more than 15 minutes[.]" 29 C.F.R. § 1915.503(b)(2)(ii) (emphasis added).

Does the Cited Standard Apply to the Facts?

For the cited standard to apply to the facts, the unattended fuel gas and oxygen hose lines or torches had to be in "enclosed spaces." The deck locker of the *William* is located on her forward lower deck (Ex. R-1). When the tugboat is operational, the deck locker is a storage space for supplies and equipment (Tr. 478.) The compartment was approximately 21 feet long and 7 feet wide (Ex. C-32, p. 1) The room had four walls, but the overhead had not been completed, "just the framework for the main deck." (Tr. 479.) There were two openings in the overhead. One opening was rectangular, measuring approximately 5 feet, 8 inches by 6 feet, 6 inches. The other opening was circular (for the capstan) and measured approximately 2½ feet in diameter (Ex. C-32, p.1). The capstan opening was covered with plywood, and the rectangular opening was covered by boards when they were not being used to hand material down to the First Marine employees (Tr. 480-81).

The Secretary contends the deck locker was an enclosed space. The Secretary cites *Offshore Shipbuilding, Inc.,* 18 BNA OSHC 2169 (No. 97-257, 2000), in support of his position that the openings in the deck locker overhead do not preclude finding the compartment was an enclosed space. He contends that in *Offshore Shipbuilding*, the Commission held "a ballast tank, measuring '12 feet by 13 feet by 19 feet' to be an 'enclosed space,' even though '[i]t had three openings: two 18-22-inch diameter holes in the deck for access, and a hole approximately 10 feet by 18 inches running horizontally approximately 4 feet above the floor of the tank.'" (Compl't's Br., p. 54.) Thus, according to the Secretary, "[t]he forward compartment where [the fitter] and [B.K.] were working is an enclosed space. The space was enclosed by walls and overhead. . . . The fact that there may have been two or three partially uncovered openings in the ceiling does not transform the space into something other than an enclosed space." (Compl't's Br., p. 64, n. 10.)

First Marine disagrees. It argues,

> Both open areas above the lower forward hold remained open while [B.K.] and [the fitter] worked below, except for when they would loosely place boards over the openings because it had gotten too cold or so they could safely walk across the area. (Tr. 480-81.) Even then, the boards had gaps between them, which prevented them from creating even a makeshift ceiling. (*Id.*) In other words, at no time on January 19, 2018 was the lower forward hold closed in by a ceiling.

(Resp't's Br., p. 32.)

The Secretary mischaracterizes the Commission's holding in *Offshore Shipbuilding*. Commissioner Visscher dissented on the issue of the ballast tank being classified as an enclosed space at the time of the inspection.

> The judge found that the ballast tank was "an enclosed space, rather than a confined space" and the majority agrees with the judge. I agree that the ballast tank *when completed* would meet the standard's definition of an enclosed space.
> The record does not show, however, that the ballast tank was enclosed when [the employee] was welding deck plates on it before he was removed from this job. As the compliance officer testified, the deck plates [the employee] was welding made up the top of the tank, and he was in the process of "welding himself in; in other words, enclosing it as he went." Though the record is not entirely clear, the strongest inference to be made is that [the employee] had not completed the process of "enclosing himself in" before he was removed from the job. The compliance officer herself agreed that "a lot" of the top of the tank had been open when [the employee] began welding that morning, and another employee was assigned to complete this welding job after [the employee] was removed.

Offshore Shipbuilding, 18 BNA OSHC at 2179 (emphasis in original). Contrary to the Secretary's characterization, a footnote by the majority makes clear the parties did *not* litigate the issue of whether the ballast tank was an enclosed space.

> Commissioner Weisberg notes that the position advanced by Commissioner Visscher in his dissent, namely that the ballast tank did not become an enclosed space until after the employee had completed the process of "enclosing himself in," was neither raised nor argued by the company. Moreover, the company's expert witnesses testified that it was an enclosed space.

Id. at 2180 n. 4.

The Court concludes *Offshore Shipbuilding* does *not* support the Secretary's argument that openings in a vessel compartment's overhead do not affect its classification as an enclosed space. Further, as the Court concluded *supra*, the maritime standards define the term "enclosed space" as "any space, other than a confined space, which is enclosed by bulkheads and overhead. It includes

cargo holds, tanks, quarters, and machinery and boiler spaces." 29 C.F.R. § 1915.4(q). As commonly defined, "enclose" means "surround or close off *on all sides*." *The New Oxford American Dictionary* (2d ed. 2005) (emphasis added). Two large openings in the overhead means the space is not closed off on its top side. When the plywood and the boards are removed from the openings, the deck locker is not an enclosed space.

However, the issue is not so clear when the plywood and boards are in place over the openings. First Marine is creative in its interpretation of the testimony when it claims B.K. and the fitter "would loosely place boards over the openings because it had gotten too cold or so they could safely walk across the area." (Resp't's Br., p. 32) (*citing* Tr. 480-81). "Even then, the boards had gaps between them, which prevented them from creating even a makeshift ceiling." (*Id.*) (*citing id.*). However, the cited testimony never mentions "loosely," "cold," "safely walk[ing]," or "gaps." Contrary to First Marine's argument, B.K. did *not* testify there were gaps between the boards but testified that the opening was "completely covered up."[21]

The Secretary is alleging B.K. and the fitter discovered gas flowing from a gas hose when they arrived at the deck locker the morning of January 19. At that time, presumably the openings were covered because B.K. and the fitter had not yet started receiving the angle iron pieces lowered through the openings. The Court concludes the deck locker was an enclosed space when the two overhead openings were covered with plywood and boards.[22] Because the allegation is that an unattended gas hose in the deck locker had gas flowing through it overnight, the Court concludes the cited standard applies in those circumstances.

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[21] Q.: Was anything covering that [capstan] hole on the morning of the accident?
B.K.: Yes, plywood.
Q.: Okay. Now, I'd like to talk about the hole -- the six by eight foot hole was anything covering that on the morning of the accident?
B.K.: Yes. Two by twelves.
Q.: Okay. Was the hole completely covered up?
B.K.: Yes.
Q.: You indicated previously that you set up some fans in order to ventilate that space?
B.K. Yeah.
Q.: Did you move the boards in order to set up the fans?
B.K. Yeah, that's what held the fans up there the boards. I moved it back and slid it back so to hold the fans.
Q.: Okay. You actually used the boards to hold the fans in the space?
B.K.: Right. Yeah.
(Tr. 480-81)

[22] The Court finds the deck locker was *not* an enclosed space when the openings in the overhead were not covered by plywood and boards.

Did First Marine Meet the Requirements of the Standard?

The Secretary relies on B.K.'s signed witness statement given to Whaver and his deposition testimony where he stated the fitter left his gas hose in the deck locker overnight and propylene was flowing through it when they arrived at the deck locker the next day, as evidence the standard was violated. (Compl't's Br., pp. 64-5) (*citing* Tr. 471, 536-537). Hutco superintendent Voss also testified the fitter informed him that morning that "he believed the night shift had left his torch hose on, and it filled the bow up with a gas leak." (Tr. 363.) This corresponds with B.K.'s OSHA statement and his deposition testimony. It is possible B.K. and the fitter, who went directly to the deck locker after boarding the towboat, assumed the strong gas odor they smelled as they descended the deck locker steps was coming from the deck locker, and they assumed a gas hose was left on. At that time, they were not aware the strong odor of gas was prevalent in other areas of the vessel.

At trial, B.K. recanted his previous statements, which had been taken shortly after the accident and while he was still taking pain medication and "wasn't right." He testified at trial that he had turned off the gas at the manifold on January 18th, prior to quitting work. (Tr. 490, 536, 537, 538). B.K. was seriously injured in the explosion on January 19, 2018. It is not surprising his memory of that day is confused. It is apparent he changed his testimony on several key points from the dates he provided his OSHA statement and deposition testimony to the time he testified at the trial. B.K. appeared anxious and easily suggestible during his trial testimony. The Court therefore does not credit his testimony where it cannot be corroborated.

B.K.'s testimony is corroborated by video evidence that appears to show him turning off the gas and disconnecting the hose at 3:37 p.m. on January 18, the day before the explosion (Ex. R-35). B.K.'s testimony is also corroborated by Voss's testimony that Hutco employees ended their shift after the First Marine employees ended theirs every day and there was no night shift crew working on the vessel, and that he would have noticed a torch hose connected to the manifold the evening of January 18, 2018, as he finished his shift and he did not observe one (Tr. 670-71, 694).

As indicated *supra*, the cited standard mandates the employer must make sure that "[n]o unattended *charged* fuel gas and oxygen hose lines or torches are in enclosed spaces for more than 15 minutes[.]" 29 C.F.R. § 1915.503(b)(2)(ii) (emphasis added). OSHA interprets a *charged* fuel line to mean "any line that is connected to the manifold and filled with gas." Fire Protection in

Shipyard Employment, 69 FR 55677 (Sept. 15, 2004). The Secretary's evidence rests on B.K.'s witness statement and deposition testimony, which he recanted at the trial, and on superintendent Voss's testimony that the fitter informed him welders on the night shift left the gas hose on overnight. However, several gaps appear in this evidence.

Superintendent Thorn and supervisor Voss stated the night shift welding crew did not work that night. And the record appears to show B.K. turned off the gas at the manifold at the end of his shift on Thursday, January 18. Hutco foreman Voss stated there was no torch hose connected to the manifold when he ended his shift after B.K. and the fitter had left for the day on January 18, 2018 (Tr. 670-71, 694). If the gas hose was left in the deck locker, it was not a "charged line" when B.K. and the fitter ended their shift that day. If gas was flowing through the hose when B.K. and the fitter arrived in the deck locker shortly after 7:00 on Friday morning, there is no evidence the gas had been turned on for more than 15 minutes. The Court concludes the Secretary has failed to establish a violation of § 1915.503(b)(2)(ii) and Item 10 must be vacated.

Citation 1, Item 11

In Citation 1, Item 11 the Secretary alleges First Marine committed a serious violation of § 1915.503(b)(2)(iv) from January 17 to January 19, 2018, by failing to ensure employees rolled back disconnected oxygen and propylene hose lines to the supply manifold or to open air. (Compl. Ex. A p. 20 of 25.) The cited standard provides in relevant part that the employer must make sure that "[a]ll disconnected fuel gas and oxygen hose lines are rolled back to the supply manifold or to open air to disconnect the torch[.]" 29 C.F.R. § 1915. 503(b)(2)(iv).

Did First Marine Meet the Requirements of the Standard?

In his witness statement and in his deposition testimony, as well as his trial testimony, B.K. established that the fitter removed his torch cutter from the torch hose while he was inside the deck locker. (Tr. 490, 492-94.) Thus, the Secretary argues B.K. testified without contradiction that his co-worker disconnected his cutting torch inside the deck locker at the end of each shift. According to the Secretary, this action violated the cited standard, which requires the employer to ensure employees disconnect torches at the manifold or in open air. First Marine argues that "disconnecting a torch in the lower forward hold is not a violation of this standard because the space was open to the air." (Tr. 69). The Court finds no merit in First Marine's position.

As commonly defined, "open air" means "a free or unenclosed space *outdoors*." *The New Oxford American Dictionary* (2d Ed. 2005) (emphasis added). A ship's compartment with two

openings in the overhead is not in open air. First Marine also claims B.K. said the fitter removed his torch in the deck locker only in his OSHA statement "while he was under the influence of medication" and in his deposition testimony, "which was likely a result of [B.K.] reviewing his statement prior to the deposition." (Resp't's Br., p. 70.) This is incorrect. B.K. reaffirmed his OSHA statement and deposition testimony at the trial. When asked how he knew the fitter removed the torch while he was in the deck locker, B.K. stated, "It was his personal torch. He took it home every night" (Tr. 494.) B.K. stated he had observed him previously removing the torch in the deck locker. B.K. had worked with the fitter for at least a month on the *William* and was familiar with his work practices. The Court concludes the Secretary has established that First Marine failed to meet the requirements of the cited standard.

Did Employees Have Access to the Hazardous Condition?

B.K. and the fitter both worked in the deck locker where the torch was disconnected from the gas hose. The Court concludes the Secretary has established employees were exposed to a fire or explosion hazard.

Did First Marine Know of the Hazardous Condition?

As indicated *supra*, to establish a *prima facie* violation, the Secretary must show by a preponderance of the evidence that First Marine "knew or could have known of the hazardous condition with the exercise of reasonable diligence." *Mountain States Contractors*, 825 F.3d at 279. The Secretary does not allege First Marine had actual knowledge of the violation, but rather, argues First Marine could have known of the hazardous condition with the exercise of reasonable diligence. According to the Secretary, B.K. "testified that [the fitter] did this every day. And there is proof that the employees regularly left their lines inside vessels. Thus, First Marine should have known that employees were not rolling their lines back to open air before removing their torches." (Compl't's Br., p. 68.)

The Court concludes there is insufficient evidence to show constructive knowledge of the violation on the part of First Marine. B.K. and the fitter worked alone in the deck locker. There is no evidence of how long it took the fitter to remove his torch each day (but it was presumably done quickly). Nothing in the record indicates a First Marine supervisor ever saw the fitter remove his torch in the deck locker or had reason to know he was doing so. "Absent evidence showing how long the violative condition existed, we are unable to evaluate whether a reasonably diligent inspection by the foreman … would have informed [the company] of the deceased employees

failure[.]" *Thomas Indus. Coatings, Inc.,* 23 BNA OSHC 2082, 2086 (No. 06-1542, 2012). *See, also*, *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2196-97 (No. 90-2775, 2000) (concluding that in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even if it had been reasonably diligent in inspecting its equipment"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999) (concluding that constructive knowledge was not shown where lack of evidence of violation's duration precluded Commission from determining whether employer could have known of conditions with exercise of reasonable diligence). Thus, the Court concludes the Secretary has not established First Marine's knowledge of the violative conduct and Item 11 must therefore be vacated.

B. THE HEALTH CITATION (CASE NO. 18-1288)

Citation1, Items 4a, 4b, 5 and Citation 2, Item 1[23]

In Citation 1, Item 4a, the Secretary alleges First Marine committed a serious violation of § 1915.12(a)(1)(ii) when it "did not ensure that spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases[24] were visually inspected[25] and tested by a competent person to determine the atmosphere's oxygen content prior to initial entry into the space by an employee." (Compl. Ex. A p. 14 of 25.) More specifically, the Secretary alleges on or about January 19, 2018, First Marine exposed employees to "asphyxiation hazards" when it allegedly "required employees to enter spaces to perform work . . . and did not ensure a competent person tested the atmospheres of the space to determine the oxygen content prior to initial entry into the space by employees[.]"[26] (*Id.*) The cited standard provides the employer shall ensure that "[s]paces

[23] The Court groups these citations and items together since the analysis and disposition is the same for each.

[24] Aboard the *William*, workers used propane, propylene, diesel, and kerosene in their equipment and heaters. These substances are flammable and combustible. The heaters produced carbon monoxide, a toxic gas (Tr. 1041-42). Thus, the space where the work was being performed contained "combustible or flammable liquids or gases" and "liquids, gases, or solids that are toxic, corrosive or irritant."

[25] A "visual inspection" is "the physical survey of the space, its surroundings and contents to identify hazards …" 29 C.F.R. § 1915.11(b).

[26] Although only the introductory paragraph of Item 4a alleges First Marine failed to ensure spaces were "visually inspected" and tested, the Secretary does cite in his brief to the deposition of First Marine's Rule 30(b)(6) witness that admitted a "competent person did not *visually inspect* or test any of the spaces on the *William* in the 12-hour period prior to the explosion." (*See* Compl't's Br., p. 69; Ex. C-35, p. 21) (emphasis

and adjacent spaces that contain or have contained combustible or flammable liquids or gases" are "visually inspected and tested by a competent person to determine the atmosphere's oxygen content prior to *initial entry* into the space by an employee[.]" 29 C.F.R. §1915.12(a)(1)(ii) (emphasis added).

In Citation 1, Item 4b, the Secretary alleges First Marine committed a serious violation of § 1915.12(c)(1)(ii) on or about January 19, 2018, by exposing employees to "inhalation hazards" when it allegedly "allowed employees to enter spaces to perform work" and "did not ensure a competent person tested to determine air concentration of toxics … prior to initial entry into the space by employees[.]" (Compl. Ex. A p. 15 of 25.) The cited standard provides the employer shall ensure that "spaces or adjacent spaces that contain or have contained liquids, gases, or solids that are toxic, corrosive or irritant are … [t]ested by a competent person prior to *initial entry* by an employee to determine the air concentration of toxics, corrosives, or irritants within the space." 29 C.F.R. §1915.12(c)(1)(ii) (emphasis added).

Both Items 4a and 4b require testing (and also a visual inspection with Item 4a) by a competent person prior to "initial entry." The Secretary contends compliance is required "prior to entry" by employees. (Compl't's Br., p. 70.) And it was clear at trial that the Secretary interpreted the requirements to mean testing *every day* before workers entered the indicated spaces, or as the Secretary asserts in his post-trial brief, "prior to employees entering the space," which "was not done on the day of the accident." (*Id.* p. 71.) "Entry" means "the action by which a person passes through an opening into a space." 29 C.F.R. § 1915.11(b). The Secretary's position is contrary to the plain language of the cited provisions, which do not require compliance prior to "entry," but rather, require compliance prior to "initial entry."

Although "initial entry" is not defined in the Shipyard Standards, it is defined in its preamble. 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." *Healy Tibbitts Builders, Inc.,* No. 15-1069, 2020 WL 5934209, at *3 (OSHRC Sept. 30, 2020). The preamble addresses the issue of "initial entry" at length and indicates "for the purposes of this rule, the term 'initial entry' is interpreted by OSHA to mean the *first entry into a space*." Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment (Preamble), 59 FR 37816-01

added). Therefore, even if Item 4a was unartfully drafted, the issue of visual inspections was tried by consent.

at 37832 (July 25, 1994) (emphasis added).[27] The Court therefore rejects the Secretary's trial interpretation that the "initial" entry must be met "each workday or shift." The Court concludes that to prove a violation the Secretary must establish First Marine failed to visually inspect and/or test prior to the "initial entry," meaning prior to the "first entry into a space."

In Citation 1, Item 5, the Secretary alleges First Marine committed a violation of §1915.12(b)(1)(i)[28] on January 19, 2018, by "exposing employees to fire and explosion hazards" when it permitted "employees to enter spaces to perform work . . . and did not ensure a competent person visually inspected the spaces for the presence of combustible or flammable liquids prior to *initial entry* into the space by employees[.]"(Compl. Ex. A p. 16 of 25) (emphasis added.) The cited standard mandates that the employer shall ensure that spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases are "inspected visually by the competent person to determine the presence of combustible or flammable liquids." 29 C.F.R. § 1915.12(b)(1)(i). Therefore, even though the cited standard does not by its express language, limit the visual inspections to prior to "initial entry," the Secretary has only charged First Marine with an alleged violation prior to "initial entry," and the Court therefore limits its analysis to the initial entry.[29]

In Citation 2, Item 1, the Secretary alleges First Marine committed a testing violation of §1915.12(b)(1)(ii) on January 19, 2018, by "exposing employees to fire and explosion hazards" when it permitted "employees to enter spaces to perform work . . . where flammable gas was present, filling the space and adjacent spaces, and did not ensure a competent person tested to

[27] This does not mean an employer can test spaces once and never again concern itself with potentially dangerous atmospheres in its workplace. Retesting is required under § 1915.15 (Maintenance of Safe Conditions) when conditions change. For example, § 1915.15(e) provides: "After a competent person has conducted a visual inspection and tests required in §§ 1915.12, 1915.13, and 1915.14 of this part and determined a space to be safe for an employee to enter, he or she shall continue to test and visually inspect spaces as often as necessary to ensure that the required atmospheric conditions within the tested space are maintained." However, the Secretary has not cited First Marine for violations under the relevant retesting provisions of § 1915.15 (Maintenance of Safe Conditions).

[28] In Citation 1, Item 5, the Secretary alleges a "serious" violation of § 1915.12(b)(1)(i) and in Citation 2, Item 1 alleges a "willful" violation of § 1915.12(b)(1)(ii). Subparagraphs (1)(i) and (1)(ii) are connected by the conjunction "and." Therefore, to comply with § 1915.12(b)(1), First Marine must meet the requirements of both subparagraphs (i) and (ii). Therefore the Court analyzes the cited subparagraphs together.

[29] "In the hierarchy of law, language is king. Words matter in constitutions, treaties, statutes, rules, cases, and contracts." *Pottinger v. City of Miami*, 805 F.3d 1293 (11th Cir. 2015). Here, the Secretary could have moved to amend the citation language to track the language of the standard but he elected not to.

determine the concentration of flammable vapors and gases prior to *initial entry* into the space by employees[.]" (Compl. Ex. A p. 19 of 25) (emphasis added). The cited standard provides that the employer shall ensure that spaces and adjacent spaces that contain or have contained combustible or flammable liquids or gases are tested by a competent person *prior to entry* by an employee to determine the concentration of flammable vapors and gases within the space. 29 C.F.R. § 1915.12(b)(1)(ii) (emphasis added). Again, although the cited standard does not limit the testing to "initial entry," Since the Secretary has only charged First Marine with an "initial entry" violation, the Court again limits its analysis to the initial entry.[30]

Did First Marine Meet the Requirements of the Standards?

Ronald Thorn, First Marine's designated Competent Person, tested the atmosphere of the *William* twice: once when First Marine "first started working on the boat," (in February of 2016) and again after First Marine "had gotten the mud and stuff out of the vessel," which was "months prior" to the date of the explosion (Tr. 831-32.) Those tests occurred before First Marine moved the *William* from dry dock and moored it on the Tennessee River in December 2017. Thorn admitted First Marine did not test the atmosphere on the *William* prior to hot work being performed on January 19, 2018 (Tr. 828). Jason Strait, First Marine's designated Rule 30(b)(6) witness,[31] also admitted First Marine did not conduct any testing in the 12-hour period before the explosion on January 19, 2018, and admitted no testing was done for weeks prior to the explosion (Ex. C-35, pp. 20-21, 52; Tr. 1454).

By their express terms, or pursuant to the Secretary's limitation in his charges, each of these citations and items require a violation at the "initial entry." However, the Secretary offered no evidence to establish when the "initial entry" occurred, meaning when the "first entry into the space" occurred. The salvage crews raised the *William* on February 7, 2016, and began transporting her on February 8, and arrived at First Marine's drydock on February 14, 2016. After finishing the cleanup, which involved removing the sediment, mud, and sand from the interior of the vessel and the hull, First Marine and its subcontractors began repairing and rebuilding the towboat. The main engines and gearboxes were removed in March of 2016. The gearboxes were reinstalled in January of 2017, and the engines were reinstalled in April of 2017. Clearly, the "initial entry" was not when

[30] *See* footnote 29.

[31] "The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." Fed. R. Civ. P. 30(b)(6).

the explosion occurred "on or about January 19, 2018." Therefore, the Court concludes the Secretary has failed to establish First Marine did not meet the requirements of the cited standards since he failed to prove when the "initial entry" occurred and further, failed to prove the alleged violations occurred prior to that unknown date of "initial entry." Therefore, Citation 1, Items 4a, 4b, and 5 and Citation 2, Item 1 must be vacated.

Citation 1, Item 6[32]

In Citation 1, Item 6, the Secretary alleges First Marine committed a serious violation of § 1915.12(f) on January 19, 2018, by "exposing both site employees and contractors to asphyxiation, fire, and explosion hazards" when it permitted "contract employees to enter confined and enclosed spaces to perform work . . . without ensuring that all available information on the hazards, safety rules, and emergency procedures regarding confined and enclosed spaces or other dangerous atmospheres they would encounter was exchanged[.]" (Compl. Ex. A p. 17 of 25.) The cited standard provides that each employer whose employees work in "confined and enclosed spaces or other dangerous atmospheres" shall "ensure that all available information on the hazards, safety rules, and emergency procedures concerning those spaces and atmospheres is exchanged with any other employer whose employees may enter the same spaces." 29 C.F.R. §1915.12(f).

Does the Cited Standard Apply to the Facts?

For the cited standard to apply, First Marine had to have employees that worked in either (a) confined and enclosed spaces or (b) other dangerous atmospheres. However, the Secretary did not include the term "dangerous atmospheres" in the alleged violative description of Citation 1, Item 6. Therefore, the Court concludes since the issue of dangerous atmospheres was not within the issues raised in the pleadings, and it was not tried by the parties' express or implied consent, the Secretary may not rely on it to establish applicability. Fed. R. Civ. P. 15(b).

As to confined spaces, there is no evidence any First Marine employees were working in confined spaces on January 19, 2018. As to enclosed spaces, the only evidence of First Marine employees possibly working in an enclosed space on January 19, 2018 is when B.K. and the First Marine fitter first entered the deck locker and the plywood and boards may still have been covering the overhead openings. However, the record does not establish when the plywood and boards were removed on January 19, 2018. The record does reflect that by the time of the explosion the deck

[32] Citation 1, Item 5 alleging a serious violation of § 1915.12(b)(1)(i) is addressed with Citation 2, Item alleging a willful violation of § 1915.12(b)(1)(ii).

locker was *not* an enclosed space since B.K. and the fitter were performing hot work on angle iron that had been handed down through the overhead openings. There is also no evidence any of the subcontractors' employees entered the lower forward hold where the First Marine employees were working. Therefore, the Court concludes the Secretary has failed to establish the cited standard applied to the facts and Citation 1, Item 6 must be vacated.

Citation 1, Item 7

In Citation 1, Item 7, the Secretary alleges First Marine committed a serious violation of § 1915.14(a)(1)(i) when "[h]ot work was performed within, on, or immediately adjacent to spaces that contain or have contained combustible or flammable liquids or gases before those spaces were tested and certified by a Marine Chemist or a U.S. Coast Guard authorized person as 'Safe for Hot Work'." (Compl. Ex. A p. 18 of 25.) More specifically, the Secretary alleges on January 19, 2018, First Marine "required employees to perform hot work such as arc welding and cutting with a torch in the space below the deck locker where a flammable gas leak occurred without the space and adjacent spaces being tested and certified by a Marine Chemist or a U.S. Coast Guard authorized person as 'Safe for Hot Work.'" (*Id.*)

The cited standard provides that each employer "shall ensure that hot work is not performed in or on . . . confined and enclosed spaces and other dangerous atmospheres, boundaries of spaces or pipelines" that are "[w]ithin, on, or immediately adjacent to spaces that contain or have contained combustible or flammable liquids or gases" until "the work area has been tested and certified by a Marine Chemist or a U.S. Coast Guard authorized person as 'Safe for Hot Work'." 29 C.F.R. §1915.14(a)(1)(i). Again, the Secretary did not include the term "dangerous atmospheres" in the alleged violative description of Citation 1, Item 7. However, the Court concludes the issue was tried by the parties' express or implied consent. Therefore, the Secretary may rely on it to establish a violation.. Fed. R. Civ. P. 15(b).

Did First Marine Meet the Requirements of the Standard?

"Hot" work means "any activity involving riveting, welding, burning, the use of powder-actuated tools or similar fire-producing operations." 29 C.F.R. § 1915.11(b). B.K. and the fitter were performing hot work since it is undisputed they were welding and cutting in the deck locker on January 19, 2018. These activities constituted hot work within the meaning of the maritime standards. (Tr. 477-78). The preamble distinguishes between spaces that have contained flammable liquids or gases and those that have not:

> If hot work is to be performed, confined and enclosed spaces and dangerous atmospheres are classified in two groups. If the spaces contain or have contained flammable liquids or gases or if the spaces are adjacent to such spaces, then a Marine Chemist or Coast Guard authorized person must test and certify the space as safe for hot work. Other types of confined and enclosed spaces and hazardous atmospheres must be tested for safety by a competent person before hot work is allowed.

Preamble, 59 FR 37816-01 at 37818. OSHA sets out the rationale for § 1915.14(a)(1) in the preamble:

> The Marine Chemist Certificate can only be issued when conditions within and adjacent to spaces which have contained a flammable or combustible gas or material have been cleaned and inspected and found to be safe (gas free). Moreover, the certificate specifies other requirements for entry and work such as ventilation, fire watch placement, and personal protective equipment, and requires a competent person to reinspect and test the space as directed in order to maintain the conditions of the Marine Chemist certificate. Similarly, the competent person cannot grant permission for hot work in those locations that he or she is allowed to test and certify until the conditions are safe for hot work. In addition, both the Marine Chemist and the competent person are required to produce written certifications that must be posted, as required in §§1915.14(a)(2) and 1915.7(d) (1) and (2) respectively. As added protection, the Marine Chemist requires a competent person to recheck the space to ensure that conditions do not change. If there is a change in the space, the competent person must stop work and recall the Marine Chemist to recertify that the space is safe for hot work before work can restart.

Id. at 37844.

The Secretary contends First Marine was required to have a Marine Chemist or U.S. Coast Guard authorized person certify the deck locker before B.K. and the fitter began welding and cutting in it. First Marine admits neither a Marine Chemist nor a U.S. Coast Guard authorized person tested and certified any spaces on the *William* as "Safe for Hot Work." (Ex. C-35, pp. 10-11, 47-48.) Nonetheless, First Marine contends the deck locker and other compartments on the *William* did not contain and had not contained combustible or flammable liquids or gases.

First Marine argues the deck locker and adjacent spaces were free of combustible or flammable liquid or gas due to the thorough cleaning and refurbishing done to the *William* since it had arrived at the shipyard. However, First Marine's position ignores the change in the condition of the deck locker and other areas of the vessel that workers discovered when they boarded the towboat at approximately 7:00 a.m. on January 19, 2018. The odor of gas was pervasive throughout the *William* that morning. It so alarmed B.K. and the fitter that they notified superintendent Voss

of the smell and began to ventilate the space. Not every witness testified he smelled gas the morning of January 19, 2018, when he boarded the *William,* but most of the workers did. For those workers, the odor was distinctive and markedly different from the usual gas odors on the vessel.[33]

A "dangerous atmosphere" means "an atmosphere that *may* expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (i.e., escape unaided from a confined or enclosed space), injury, or acute illness." 29 C.F.R. § 1915.11(b) (emphasis added). First Marine also argues a "dangerous atmosphere" did not exist in the deck locker on January 19, 2018, because it showed no sign of explosion or fire damage after the explosion. Schulz testified his examination of the deck locker compartment showed there was "no evidence that any gas made it forward and accumulated into the forward hold." (Tr. 1323.) The Court finds no merit in this argument since Schulz's assessment was made post-explosion. Section 1915.14(a)(1)(i) is not concerned with whether a combustion hazard existed at the time hot work was performed—it is designed to trigger testing *before* hot work is performed when the potential for a combustion hazard exists, based on awareness the space contained or has contained combustible gas.

The Commission has focused on the word *may* in the definition, noting "[t]he emphasis is on the potential for a hazardous condition to occur, not on the existence of a hazardous condition." *Offshore Shipbuilding,* 18 BNA OSHC at 2173. Thus, "under the definition of 'dangerous atmosphere,' the Secretary need establish only that there is the potential for a hazardous condition to occur in a location[.]" *Id.* Therefore, contrary to First Marine's position, the Secretary is *not* required to show a hazardous condition existed on January 19 aboard the *William* for § 1915.14(a)(1)(i) to apply, but only that a *potential* for a hazardous condition existed. The Court

[33] A Thermal employee smelled an odor like "[g]as and oil," and stated he had not detected an odor like that before on the towboat (Tr. 66). Another Thermal employee detected the odor and developed "a bad headache," and stated, "[E]verybody else on our crew felt the same way. . . . But we just thought it was just another smell." (Tr. 102-03.) A third Thermal employee noticed "a very heavy" gas odor as soon as he entered the upper engine room. "[I]t was very disturbing to smell it." (Tr. 140.) A fourth Thermal employee detected the odor when he entered the upper engine room. "[I]t reeked like rotten eggs. . . . I know what propane smells like." (Tr. 190.) A First Marine electrician smelled gas in the lower engine room, where he had never smelled it before (Tr. 347-49). Another First Marine electrician also caught a whiff of gas in the lower engine room. "[I]t was just something that you don't usually smell." (Tr. 389.) A First Marine carpenter stated a co-worker warned him, "Don't light a cigarette. Do you smell that gas? It's strong." (Tr. 422.) An employee of Wise Staffing told OSHA, "The smell was very potent, felt like a smack in the face." (Tr. 302.) Several other workers aboard the *William* that morning stated they either smelled a strong gas odor or heard their co-workers say they smelled it upon boarding the vessel at approximately 7:00 a.m. (Tr. 464, 562, 604, 637-39, 674-75, 689-90, 776-77 79).

concludes the pervasive odor of gas on the vessel that morning, especially in the deck locker, alerted workers to the potential presence of a combustion hazard, *i.e.*, a dangerous atmosphere.

First Marine argues the "smell of gas alone does not indicate that gas is present. . . . Particularly given that people smell things differently, there is no linear relationship with the strength of the smell of gas and the actual presence of gas in the atmosphere. . . . It is also undisputed that smelling 'gas' on the [*William*] or any vessel is commonplace in a shipyard, particularly when there is hot work being done." (Resp't's Br., pp. 34-35.) In support of this position, First Marine cites Schulz's opinion that "[t]here is no correlation between smelling the gas and whether the condition or atmosphere in the space you're smelling it is dangerous or not." (Tr. 1290.)

The Court finds no merit in First Marine's argument. Schulz also testified mercaptans are added to odorless gases "as a safety strategy . . . so that leaks can be detected or . . . propane or propylene that is somewhere where it's not supposed to be." (Tr. 1289.) Thus, propane and propylene manufacturers obviously add mercaptans to the gases because they present combustion hazards. Adding mercaptans to odorless gases would serve no purpose if the intent were not to warn people of the presence of the gases. The strong odor of gas on the *William* the morning of January 19, 2018, indicated the deck locker or its immediately adjacent spaces contained combustible or flammable gases. The gas odor establishes there was a potential that a hazardous condition existed. The Court therefore concludes the Secretary has proven a dangerous atmosphere existed in the deck locker, and First Marine failed to ensure a Marine Chemist or a U.S. Coast Guard authorized person tested and certified the deck locker as "Safe for Hot Work" on January 19, 2018, before B.K. and the fitter performed welding and cutting work in the space. Thus, the Secretary has proven First Marine failed to meet the requirements of the cited standard.

Did Employees Have Access to the Hazardous Condition?

B.K. and the fitter both performed hot work in the deck locker the morning of January 19, 2018. They were exposed to a combustion hazard. Therefore, the Secretary has proven employee access to the hazardous condition.

Did First Marine Know of the Hazardous Condition?

As indicated *supra*, in the Sixth Circuit the Secretary must establish First Marine "knew of the hazardous condition or could have known through the exercise of reasonable diligence." *Mountain States*, 825 F.3d at 279 (citation omitted). "The knowledge of a supervisor or foreman,

depending on the structure of the company, can be imputed to the employer." (*Id.*) "In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy." *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987).

The Secretary contends there were four First Marine supervisors who had actual knowledge of the strong gas odor aboard the *William* the morning of January 19, 2018: Gregory Voss, Henry Scott, Deron Conaway, and Curtis Jones. Their knowledge, the Secretary argues, should be imputed to First Marine. However, the Court concludes three of the four supervisors identified by the Secretary are problematic when it comes to imputing their knowledge to First Marine.

Voss was employed by Hutco as a foreman at First Marine's shipyard (Tr. 625-26). He described Hutco as "a labor-finder" for "any type of construction that needs employees." (Tr. 628.) There is ample evidence in the record that, despite his employment by Hutco, Voss had supervisory authority over First Marine employees B.K. and the fitter.[34] Voss himself appeared to consider himself in the chain of command for First Marine. When counsel for First Marine asked who his supervisor was at the shipyard, Voss first replied, "That would be [First Marine superintendent] Ronnie Thorn." (Tr. 665.)

First Marine foreman David Bynum supervised B.K. and the fitter when the *William* was in dry dock. Once the vessel moved to the dock string, Bynum stated in his deposition, Voss supervised their work (Tr. 709-10). This deposition testimony aligns with statements he gave to OSHA during its investigation that Voss supervised First Marine employees B.K. and the fitter on January 19, 2018:

[34] Robert Miller, First Marine's carpenter superintendent, stated in his deposition that Voss supervised "First Marine guys that worked in his group," and Miller regarded Voss as their supervisor (Tr. 611). In his deposition, Miller stated he instructed Brad Stafford, a carpenter employee of Wise Staffing, to report carpentry-related issues to him and "[a]s far as all other issues on the vessel, vessel management at the time, he would report to or notify Greg Voss." (Tr. 312-13.) Henry Scott, First Marine's supervisor of laborers, was asked who was acting as supervisor on the *William* the day of the explosion. He replied, "I thought it was Greg Voss." (Tr. 778.) In his deposition testimony, First Marine superintendent Ronnie Thorn stated that Greg Voss was the supervisor of B.K. and the fitter "[a]t the time of the accident." (Tr. 817.) He said that after the William moved from dry dock to the water, Voss supervised B.K. and the fitter, and he had "the authority to fire them if they did something wrong." (Tr. 821.) He also had authority to discipline them (Tr. 822-23). At the trial, Thorn altered his characterization of Voss's authority. "I simply asked [him] to keep an eye on our guys, no more than I would have asked one of the other experienced guys to check in on them from time to time." (Tr. 820.) Thorn testified First Marine no longer asks Hutco to "provide a supervisor with their crew. We manage those employees ourselves." (Tr. 865.)

> On the day of the accident on the *William* I had two employees who worked for me who were working on the boat, but they were not working directly under me that day. . . . The person on the ship who was overseeing them was Greg Voss. . . . At the time of the accident Greg was the lead man over the project on the boat. . . . Greg works for Hutco and had his own crew on the boat and was directing the work they were doing on the boat. And since he was over there directing the work they were doing, he was supervising the two First Marine employees who were on the boat as well.

(Ex. C-7; Bates page 000652; Tr. 716-17.) Bynum attempted to walk back his prior statements at trial, stating Voss "was just asked to keep an eye on [B.K. and the fitter]. He wasn't really there to tell them what to do." (Tr. 746.) The Court credits the statements Bynum gave to OSHA during its investigation, which were more reliable since they were much closer in time to the accident than his statements at trial.

It is apparent supervisors and workers for both First Marine and its subcontractors considered Voss to have supervisory authority over subordinate employees, including First Marine employees, working aboard the *William* on January 19, 2018. Their statements to OSHA and their deposition testimony reflect their understanding of his status more accurately than their trial testimony where they appear to have been coached on this issue. The Court concludes the Secretary has established Voss was a supervisor, and he had actual knowledge of the gas odor aboard the vessel on January 19, 2018.[35] However, the Court concludes the Secretary has *not* established Voss was a supervisor employed by *First Marine*.

Imputation of a supervisor's knowledge rises only to the supervisor's *employer*. As the Eleventh Circuit has held, and the Court agrees, the rationale for imputation of knowledge is that the supervisor acts as an agent of the employer.

> "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

[35] The morning of January 19, 2018, Voss boarded the *William* a little after 7:00 (Tr. 632). Between 7:15 and 7:30, he encountered the fitter for First Marine who was working with B.K. in the deck locker (Tr. 635). Voss stated the fitter "told me that he believed the night shift had left his torch hose on, and that it filled the bow up with a gas leak." (Tr. 636.) Then a painter told Voss he smelled gas in the engine room. Voss stated, "I started walking around to see if I could smell it," because "that was the second time that I'd heard somebody mention gas." (Tr. 638.) Voss testified he smelled gas "briefly at one point, but it was just like a residual smell that you would smell on a daily basis" while he was standing on the bow (Tr. 638-39.) Voss went to the deck locker to check on First Marine employees B.K. and the fitter. "I asked them if they had checked their torch and torch hose. They told me they did and they weren't leaking. Nor could I smell it. They had already start[ed] cutting and they were smoking cigarettes, so I didn't worry about it anymore. I walked back out and just assumed that it was gas just when they was lighting up the torch." (Tr. 641-42.)

> with the supervisor's actual or constructive knowledge of noncomplying conduct of a subordinate." *Mountain States[Tel. and Tel. Co. v. OSHRC],* 623 F.2d [155,] 158 [(10th Cir. 1980)]. It is reasonable to do this because a corporate employer can, of course, only act through its agents—as several of the above-cited cases have recognized—and the supervisor acts as the "eyes and ears" of the absent employer. That makes his knowledge the employer's knowledge.

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1317 (11th Cir. 2013). Here, the Secretary does not dispute that Hutco was Voss's employer. As such, Voss was *not* an agent of *First Marine*, and he was *not* acting as the "eyes and ears" of First Marine. Therefore, the Court declines to impute Voss's knowledge to First Marine.

Deron Conaway

Conaway is First Marine's Safety Director. In his deposition testimony, Conaway stated he did not remember whether he boarded the *William* the morning of the explosion (Tr. 894-95). However, Voss saw Conaway aboard the *William* the morning of January 19, 2018, between 8:00 and 8:30, talking to First Marine employee Henry Scott in the generator room (Tr. 656-658, 679). Conaway was also seen by carpenter Brad Stafford that morning. In his statement to OSHA, Stafford stated, "I do remember seeing Deron walk on the vessel on the day of the accident prior to the event occurring. I don't know what he was doing. I do know he walked on a couple of times." (Tr. 302.) Hutco electrician Samuel Gutierrez also saw Conaway on the *William* the morning of January 19, 2018, between 8:15 and 8:20 (Tr. 565): "He was in a hurry. He went into one door. He went to the boat and went out another door that's at the back." (Tr. 565.) "He went through the engine room and he passed to the door on the other side." (Tr. 567.)

At the trial, Conaway changed his testimony and denied he was on the vessel that morning. "I did not board that boat. I said before that I did not recall. If I had been on that boat, I'm sure I would have recalled it. . . . I'm saying today that I still have no recollection of being on that boat, and that I feel that I would recall being on that boat if I had been on the boat that day." (Tr. 895.) The Court credits the testimony of the three witnesses who stated they saw Conaway on the towboat the morning of the explosion. They were matter of fact in their demeanor and evinced no hesitation or uncertainty in their testimony. There is no evidence of an ulterior motive or motives that would prompt Voss, Stafford, and Gutierrez to lie about seeing Conaway that morning. Conaway, in contrast, was nervous and defensive on the stand. His recantation of his deposition testimony appeared rehearsed. And, unlike the three witnesses who saw him on the vessel, he had

a reason to lie about his presence that morning since his knowledge of a violative condition as First Marine's Safety Director can be imputed to First Marine. The Court does not credit Conaway's trial testimony on this point.

Nonetheless, the Court concludes Conaway's presence on the *William* on January 19, 2018, is insufficient to establish employer knowledge of the gas odor permeating the vessel that day. There is no evidence Conaway smelled gas while he was aboard the towboat and no witnesses testified they informed him of the odor or observed other workers inform him. Voss stated he saw Conaway speaking with Scott and he thought Conaway might have been looking for the source of the odor, but he could not be certain. At trial, Scott was evasive when asked about encountering Conaway on the towboat that morning.

> Scott: I was sent to find somebody.
> Q.: Okay. Who were you sent to find?
> Scott: I don't remember who I was sent to find.
> Q.: Okay. Was it Deron Conaway?
> Scott: No.

(Tr. 775.)

> Q.: Did you ever find the person that you were looking for?
> Scott: Eventually.
> Q.: Okay. And how do you know?
> Scott: Because after the accident, the entire crew was accounted for.
> Q.: Okay. But it's my understanding you -- as you sit here today, you don't know who that was that you went looking for?
> Scott: Am I positive? No, I'm not.
> Q.: Okay. Who do you think it is?
> Scott: I think it was a guy named Dominick.
> Q.: Okay. Fair enough.
> Scott: But that's -- I don't know for sure.
> Q.: Understand. On the day of the accident, did you see Deron Conaway on the *William*?
> Scott: I don't remember.

(Tr. 777-78.) The Court concludes the record does not establish by a preponderance of the evidence that Conaway had knowledge of the gas odor on the *William* the morning of January19, 2018.

Henry Scott

At the time of the explosion Scott was employed by First Marine as a general laborer (Tr. 769-70). However, he had identified himself as a "leadman, general laborer" in his statement to OSHA in May of 2018 (Ex. C-4; Tr. 771). At trial, he stated First Marine did not have leadmen.

When asked how he knew this, he stated, "I've been specifically told that I was not a leadman." (Tr. 781.) However, Voss identified Scott as First Marine's "clean-up guy or their lead man," (Tr. 657-58) and as a "foreman or a lead man." (Tr. 680.) The morning of January 19, 2018, Scott was aboard the *William.* About 7:30, he met the First Marine fitter, who told him "not to go down to the lower deck locker because they were ventilating it because gas was smelled." (Tr. 776.) Scott also smelled the gas odor (Tr. 777).

Scott's situation is the converse of Conaway's. Conaway was undoubtedly a supervisor, but the record is insufficient to establish he had knowledge of the gas odor. Scott knew of the gas odor, both because the First Marine fitter informed him of it and because he himself could smell it. However, the record is insufficient to establish Scott was a supervisor the day of the explosion. Whether his actual title was *leadman* is of secondary importance to his actual responsibilities. "The Commission has long recognized that 'an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor' for the purpose of establishing knowledge." *Am. Eng'g & Dev. Corp.,* 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (quoting *Access Equip. Sys.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999)). "In deciding whether an employee qualifies as a supervisor, '[i]t is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority.'" (*Id.*) (quoting *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 [] (No. 91-862, 1993).

Here, there is evidence of Scott's subordinate role the day of the explosion. Prior to being dispatched to look for "Dominick," he had been sent to collect shovels from the tool room (Tr. 774-75). Stafford would tell Scott the orders for the day and Scott would relay them to the other laborers (Tr. 782). There is no evidence of Scott exercising any authority over another employee. The Court concludes the record does not support the Secretary's assertion that Scott was a supervisory employee, such that his knowledge could be imputed to First Marine. Therefore, the Court declines to impute Scott's knowledge to First Marine.

Curtis Jones

Finally, Jones is First Marines' supervisor of electricians and he supervised three First Marine employees at the time of the explosion (Tr. 788-90). He boarded the *William* at approximately 7:15 the morning of January 19, 2018, and went to the lower engine room, where he smelled gas (Tr. 794). He had never detected an odor like that on the *William*. He discussed it with two of the First Marine electricians (Tr. 795). He described what happened next.

> Sat there and two Hutco guys was up there at the front of the engine, and I asked my guys to ask them -- because I didn't know if they spoke any English or not -- to ask them if they smelled gas also. They said yes that they know about it and that they was telling Greg Voss about it, which was their supervisor. Then after that, I looked around the engine room. Didn't see any kind of hoses or torches or anything in the engine room. . . . [A]s I was leaving the engine room after I didn't find anything, I seen where the Rupke guys were changing out a propane tank or working on a heater up there at the hold by the steps. And I assumed that was it, so I moved on up to the second deck.

(Tr. 795.)

When asked why he did not take any action in response to the odor of gas in the lower engine room, Jones replied, "Because Greg Voss is more qualified than I am about the gas. I don't really mess with gas that much. And I figured he had it under control." (Tr. 798.) Jones was aware workers, including First Marine employees B.K. and the fitter, were performing hot work on the vessel (Tr. 792-93).

First Marine argues Jones's knowledge of the gas smell was limited to the lower engine room and he properly deferred responsibility for addressing the issue to Gregory Voss.[36]

> Mr. Jones was the only First Marine supervisor on the boat that morning. Although he smelled gas in the lower engine room, he reasonably believed he found the source of the gas to be the changing out of a propane tank on a heater. (Tr. 795-796, 798.) Given the amount of ventilation in the lower engine room and based on his competent person training, Mr. Jones did not believe what he smelled was strong enough to investigate further. (Id.) He also knew that the Hutco welders were going to report the smell to their supervisor, Mr. Voss. (Tr. 795.) After Mr. Jones left the lower engine room, neither he nor the electricians smelled the gas again, nor did anyone report to Mr. Jones that they smelled gas. (Tr. 679.)

(Resp't's Br., p. 45.) The Court finds no merit in First Marines' position.

Jones smelled an unusually strong gas odor aboard the *William* and discussed it with several employees. He learned Hutco's employees planned to notify Voss of the odor. Jones did not check other areas of the towboat to determine the scope of the gas odor or follow up with Voss to learn what his response to the situation would be. Therefore, Jones failed to exercise reasonable diligence in investigating and addressing the atypical gas odor, which was a general topic of

[36] First Marine attempts to use Voss as a sword and a shield on the issue of employer knowledge. It relies on his status as a Hutco employee to deflect imputation of knowledge, but argues Jones appropriately abdicated his responsibility to deal with the situation to Voss (who took no steps to halt work or conduct testing).

conversation that morning. Jones is employed by First Marine; he is a supervisor of electricians; he smelled the gas odor aboard the *William* the morning of January 19, 2018; and he knew First Marine employees were performing hot work that day. The Court imputes his actual knowledge of the gas odor to First Marine. Therefore, the Court concludes the Secretary has established First Marine knew of the dangerous atmosphere aboard the *William* the morning of January 19, 2018.

Thus, under § 1915.14(a)(1), First Marine was required to have a Marine Chemist or a U.S. Coast Guard authorized person certify the spaces where hot work was to be performed as "Safe for Hot Work" before the work proceeded. First Marine failed to do so, exposing B.K. and the fitter to the hazard of combustible gas. Therefore, Citation 1 , Item 7 must be affirmed.

Characterization of the Violation

The Secretary characterized the violation of § 1915.14(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Here, two employees were exposed to the hazard of combustible gases in a space that had not been certified as "Safe for Hot Work." The violation is properly characterized as serious.

Citation 2, Item 2

In Citation 2, Item 2, the Secretary alleges First Marine committed a willful violation of § 1915.12(d)(1) when it "did not ensure that each employee entering a confined or enclosed space or other areas with dangerous atmospheres was trained to perform all required duties safely." (Compl. Ex. A p. 20 of 25.) More specifically, the Secretary alleges on January 19, 2018, First Marine exposed "employees to atmospheric, fire, and explosion hazards" when it "allowed employees to enter confined and enclosed spaces to perform work … without training the employees on the hazards of confined and enclosed spaces[.]" (*Id.*) The cited standard mandates the employer "shall ensure that each employee that enters a confined or enclosed space and other areas with dangerous atmospheres is trained to perform all required duties safely."[37] 29 C.F.R. § 1915.12(d)(1).

[37] Section 1915.12(d)(2) lists the training that is required. It requires the employer ensure that each employee who enters a confined space, enclosed space, or other areas with dangerous atmospheres is trained to: "(i) Recognize the characteristics of the confined space; (ii) Anticipate and be aware of the hazards that may be faced during entry; (iii) Recognize the adverse health effects that may be caused by the exposure to a hazard; (iv) Understand the physical signs and reactions related to exposures to such hazards; (v) Know

Did First Marine Meet the Requirements of the Standards?

Matthew McCoy is a carpenter for First Marine. He did not attend a trade school and had not worked at other shipyards before First Marine hired him (Tr. 305). When he started with First Marine, he received safety training in the carpentry shop but was not trained in shipyard hazards (Tr. 306). He testified Robert Miller, First Marine's carpenter supervisor, did not provide training in atmospheric hazards or what to do if he smelled gas aboard a vessel (Tr. 320). He smelled gas the morning of January 19, 2018, and discussed it with other workers, but he was not aware it was potentially dangerous (Tr. 321).

Manuel Macario Garcia is an electrician for First Marine. He received an associate degree from West Kentucky Community Technical College. First Marine is the first shipyard for which he has worked (Tr. 340). He did not receive training in shipyard hazards when he began work at First Marine (Tr. 341). He smelled gas the morning of January 19, 2018. Macario stated his supervisor, Curtis Jones, had talked to him about dangerous atmospheres but did not tell him what to do if he smelled gas (Tr. 365).

Victor Pineda is also an electrician for First Marine (Tr. 378). He attended trade school for carpentry and graduated in 2017. First Marine was his first place of employment after his graduation. He received no training in shipyard hazards when he began working at First Marine (Tr. 379). He was not trained in hazards associated with confined and enclosed spaces (Tr. 381). He smelled gas when he boarded the *William* on January 19, 2018 (Tr. 389). The only instruction he received if he smelled gas was to inform his supervisor (Tr. 402).

Jerry Price is a carpenter for First Marine. He had previously worked at other shipyards (Tr. 412-13). His supervisor Robert Miller did not provide training to him in shipyard hazards or in working in confined and enclosed spaces or dangerous atmospheres (Tr. 414-15). He had not been instructed what to do if he smelled gas in the workplace (Tr. 422, 430-31). Price smelled gas when he boarded the towboat the morning of January 19, 2018 (Tr. 421). He testified regarding his response to the odor.

> Q.: You said that when you first got on the boat, you and Brad Stafford talked about the smell of [gas] . . . And he said, "Don't light a cigarette." Was that like in a joking manner?
> Price: I'm assuming it was because I was smoking one.

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what personal protective equipment is needed for safe entry into and exit from the space; (vi) Use personal protective equipment; and (vii) Where necessary, be aware of the presence and proper use of barriers that may be needed to protect an entrant from hazards." 29 C.F.R. § 1915.12(d)(2).

Q.: Did you put your cigarette out?
Price: No.
Q.: Did you have any safety concerns that day working on the boat?
Price: No.
Q.: What about any other day?
Price: No.
Q.: So, the smell of gas didn't alert you at all that morning? You didn't think you needed do anything about it, sir?
Price: No.

(Tr. 432-33.)

Price was asked if knew what confined and enclosed spaces are. He responded, "I'm somewhat aware more so now than what I was. But before, no." (Tr. 439.) At the time of the trial, Price still had no understanding of the definition of a dangerous atmosphere.

Q.: Do you understand what a dangerous atmosphere is?
Price: I don't think I understand the full meaning of it, dangerous atmosphere.
Q.: What was your meaning of dangerous atmosphere? . . . What is your definition of a dangerous atmosphere?
Scott: Well, I've so learned that it's asbestoses [sic] and it could be, there again, a number of things.

(Tr. 439.)

B.K. worked as a welder for First Marine. He had worked at another shipyard (Tr. 460-61). As previously noted, B.K. smelled a strong odor of gas when he boarded the towboat the morning of January 19, 2018, and he set about ventilating the deck locker. When asked what he and the fitter were doing as they ventilated the space, he responded, "Standing around smoking cigarettes." (Tr. 474.) B.K. testified First Marine did not provide training to him on the hazards associated with propylene or compressed oxygen (Tr. 499). When he worked previously at the James Marine shipyard, he had been instructed to perform hot work only if "Safe for Hot Work" documentation was posted outside the space. First Marine did not provide him with this instruction (Tr. 500). He stated the First Marine welders would have safety meetings in the morning before boarding the towboat. "Yeah, they would just tell us what to do. And basically, everybody knew what, you know, don't leave nothing in the hold. Stuff like that." (Tr. 509.) B.K. testified that after he had ventilated the deck locker, he checked for the odor of gas by sniffing with his nose low in the room. He stated the space "didn't smell. Lit a cigarette and nothing happened." (Tr. 528.)

Adam Leroy works as a welder for First Marine (Tr. 1387). He testified he received training in confined spaces when he started working at First Marine. "Just proper ventilation and like as far

as being in the hold, the hazards to be aware of, like your torch being in there while you're on break and things like that." (Tr. 1394.) He was trained to visually inspect confined spaces when he approached them, "looking for WD-40 cans, greasy rags, things like that, anything that could be flammable." (Tr. 1395) He was told to alert his supervisor if he smelled "anything unusual" while working (Tr. 1395). Leroy worked on the *William* while it was in dry dock. He did not work on the vessel once it was moved to the Tennessee River (Tr. 1399).

Miller, the supervisor of First Marine's carpentry crew, has worked for First Marine since 2011(Tr. 599-600). He was not aboard the *William* at the time of the explosion but was in First Marine's carpentry shop on the barge string next to the vessel (Tr. 602). Miller testified if his crew members smelled gas on the towboat, "They should immediately notify me. That's what I would hope. . . . I would [have] immediately taken action, either, you know, called the shipyard superintendent—we'd have done something." (Tr. 618.) He stated he had told his crew this and had provided one-on-one safety and competency training to his crew members (Tr. 618).

Byrum, First Marine's dry dock foreman, supervises welders and fitters (Tr. 704). In the statement he gave to OSHA on March 13, 2018, Byrum indicated, "All employees who work on the boats here at the facility may be required to enter a confined space and perform work. The work may include hot work such as cutting and grinding." (Tr. 718-19.) When asked if First Marine had provided him with training in confined and enclosed spaces. He responded it had not, but it "didn't have to." (Tr. 719.) Byrum believes on-the-job training is more effective than classroom training.

> [I]f you ever been [in] a classroom you see a lot of people don't give a toot about being in that classroom, don't give -- they wouldn't be able to tell you 10 minutes after the class what you talked about. . . . Side-by-side is the best training anyone can have.

(Tr. 731-32.) Byrum did not document any of the training he provided to employees (Tr. 759). But he explained the protocol to be followed if one of his crew smelled gas on a vessel.

> Q.: Now, if any of the employees working on your crew of welders and fitters were to smell anything unusual on a vessel including gas, what are they supposed to do?
> Byrum: Remove the source -- all sources of gas. Whether it be one, two, four it doesn't matter. Remove all of them, find the source and ventilate.
> Q.: And if you were aware of gas being inside a vessel, would you speak to Ronnie Thorn about this?
> Byrum: Absolutely.

> Q.: And would Ronnie Thorn have to okay a vessel before you would be allowed to board back on and perform work?
> Byrum: He and I would make that discussion, yes.
> Q.: And if employees working on your crew were to smell something unusual including gas on a vessel, how do they know they're supposed to come to you?
> Byrum: Because I tell them to.

(Tr. 737-38.) Byrum testified if an employee had told him he smelled gas on the *William,* "[The explosion] probably never would have happened. . . . Because I would have shut the job down, turn[ed] off all power sources and shut the job down." (Tr. 750.)

Scott worked for First Marine as the supervisor of laborers at the time of the trial (Tr. 769).[38] Scott smelled gas the morning of January 19, 2018. He did not report it to anyone (Tr. 784). Scott had received safety training when he worked for another employer, but First Marine did not provide him with any safety training (Tr. 785).

Jones, First Marine's supervisor of electricians, began working for First Marine in 2015 (Tr. 788). Prior to working for First Marine, he received training as a shipyard competent person from a Marine Chemist (Tr. 791). As noted previously, Jones smelled gas when he boarded the *William* on January 19, 2018. He discussed it with other employees, briefly looked for the source of the odor, and then turned his attention to other matters when he learned the employees planned to inform Voss of the odor (Tr.794-96, 798). Jones testified he observed welders working in confined spaces on the *William* in the days leading up to the explosion (Tr. 802).

Ronald Thorn is First Marine's superintendent. He began working for First Marine in May of 2013 (Tr. 811). Thorn admitted First Marine was not following the safety procedures set out in its *Safety and Health Manual* (Ex. C-9; Tr. 829-30, 833). He claimed First Marine trained its employees in shipyard safety. When asked if this training was documented, Thorn replied, "I'm sure there is some documents somewhere." (Tr. 833.) He agreed with Byrum that on-the-job training is superior to classroom training (Tr. 846). He stated it was possible some First Marines are functionally illiterate and will not benefit from classroom training (Tr. 847). Thorn testified he held weekly safety meetings for First Marine and subcontractor employees (Tr. 847-48). He stated

[38] In the section addressing Citation 1, Item 7 of the Health Citation, the Court notes there is a question of whether Scott was a leadman at the time of the explosion. First Marine promoted him to the position of supervisor between the time of the explosion and the start of the trial (Tr. 773). The Court groups Scott with First Marine's supervisors for the purpose of analyzing this item.

First Marine trained its employees in confined and enclosed spaces safety (Tr. 848). Thorn explained First Marine's ideal response to the detection of a gas odor aboard a vessel.

> Q.: If First Marine employees smell anything unusual on a vessel including gas, what are they supposed to do?
> Thorn: Stop work.
> Q.: And what should happen next?
> Thorn: They should report it to their supervisor.
> Q.: And then if it were reported to you, what would you do?
> Thorn: I would [get] everyone off the vessel and shut all the gas lines and figured out what was going on.
> Q.: And what -- before you allowed everybody to come back to work is there something you would do?
> Thorn: Oh, yeah, the competent person or myself would sniff the vessel.

(Tr. 853-54.)

Conaway, First Marine's safety director, started in that position in August of 2017 (approximately five months before the explosion) (Tr. 883). He has a Bachelor of Science degree from Murray State University in Occupational Safety and Health (Tr. 886). Conaway stated First Marine originally hired him because of his "background in purchasing and sales as a purchasing agent for the shipyard." (Tr. 900.) He agreed most of his working time before the explosion was "devoted to [his] role in purchasing." (Tr. 902.)

Conaway admitted that when he began working as safety director, his safety knowledge "was very limited. So, a really rigorous detailed inspection was not something that I was qualified to do." (Tr. 885.) The defensive tenor of his testimony is captured in the following excerpt:

> Q.: [D]o you have the authority to correct employees if you see them doing something unsafe?
> Conaway: You asked me that before. Nothing has ever been stated explicitly what my authority is. I told you before, I just do it. I correct action.
> Q.: Okay. When you were hired back in August 15 of 2017, did you replace the prior safety man?
> Conaway: I wasn't aware I was replacing anyone.
> Q.: Was there a safety man employed by First Marine when you were hired?
> Conaway: I don't recall. I'm not aware of one.
> Q.: At some point before you came on board, was there a safety man employed by First Marine?
> Conaway: I'm not aware.
> Q.: You don't know if the company has ever had a safety man?
> Conaway: Well, people can wear many hats, can't they? So, I don't know if there was somebody that was responsible for safety.

(Tr. 885-86.)

First Marine is the first shipyard at which Conaway has worked. He did not "undergo any type of training" when he began working at First Marine (Tr. 886). He conceded he did not feel qualified to work as a safety professional in January of 2018 (Tr. 887). Despite being First Marine's safety director, he was unaware of safety training provided by his employer.

> Q.: [W]ere the employees who went to work on the *William* on January the 19th, 2018, trained to work in confined and enclosed spaces?
> Conaway: Prior to the accident, I was not specifically aware of any training in confined spaces.
> Q.: What about enclosed spaces?
> Conaway: Prior to the accident, I wasn't aware of any specific training.
> Q.: Prior to the accident, were you aware if First Marine was documenting any training that was being performed at the shipyard?
> Conaway: I was not aware.
> Q.: Prior to the accident, were employees trained on the requirements of First Marine's safety and health program?
> Conaway: I was not aware.
> Q.: You didn't do any such training?
> Conaway: No, sir. To qualify, I had given some safety talks, some morning briefings prior to the accident. It wasn't a matter of routine. It was as I saw an opportunity.

(Tr. 893.) Conaway testified he conducts safety inspections, safety meetings, and new-hire orientation (Tr. 884). In his safety meetings, he would speak to employees about housekeeping; slips, trips, and falls and things like that; PPE." (Tr. 902.)

First Marine's Safety and Health Manual

First Marine had a *Safety and Health Manual* onsite the day of the explosion but it did not distribute copies to its employees. Conaway testified First Marine did not provide him with a copy of the manual but he "was made aware that there was one in the office. We did have a manual in the office and I knew it was there." (Tr. 886.) At the time of the explosion, Conaway was "working on" reading the manual, but stated, "I wouldn't say I had read it in its entirety, no." (Tr. 886-87.) The *Safety and Health Manual* includes First Marine's *Fire Safety Plan*, which requires a competent person to inspect spaces each shift where hot work is scheduled to be performed :

> The Supervisor is responsible for training employees and implementation of the outlined procedures.
> . . .
> First Marine, LLC conducts hotwork utilizing various means of welding, jointing, metal fusing, and pipe connection.

> . . .
> Hotwork aboard any vessel in the facility is also inspected, authorized, and monitored by a First Marine, LLC employee who is a Shipyard Competent Person, or by a Marine Chemist. This survey will take place at a minimum of each shift, or more frequently as necessary if conditions change at the work-site.

(Ex. C-9, Bates page 000858.)

Of the six First Marine non-supervisory employees who testified, only Leroy stated he had received the training required by § 1915.12(d). The other five employees stated consistently First Marine did not train them in confined and enclosed space and dangerous atmosphere safety (Tr. 320, 341, 379, 414-15, 500). Each of these employees smelled gas aboard the *William* on January 19, 2018, but was not aware of the potential hazard it signified. Price and B.K. smoked cigarettes as they smelled the gas odor (Tr. 432-33, 474). B.K. assumed the ventilation he placed in the deck locker worked because he "[l]it a cigarette and nothing happened." (Tr. 528.) At time of the trial, Price thought a dangerous atmosphere involved asbestos (Tr. 439).

First Marine supervisors Byrum and Thorn touted on-the-job training over classroom training, but the testimony of the five subordinate employees indicate they either received no on-the-job training or the training they did receive was inadequate. The lack of training extends also to the supervisors. Miller stated his employees should have immediately informed him they smelled gas and he would have acted (Tr. 618). Byrum testified he would have shut down work on the vessel if he had been told of the gas odor (Tr. 750). Thorn stated he would have ordered everyone off the vessel and shut down all gas lines (Tr. 853-54). Yet supervisor Jones, who was on the vessel and smelled the gas himself, took none of these actions. He relied on Voss to respond to the situation (Voss also took no action).

Safety director Conaway was not aware of any training provided to employees regarding confined and enclosed spaces or dangerous atmospheres. He did not know if training was documented (Tr. 893). Thorn believed there were "some documents somewhere" documenting safety training, but none were adduced at trial (Tr. 833).[39] Thorn admitted First Marine did not follow the procedures set out in its own *Safety and Health Manual* (Tr. 829-30, 833).

The Court credits the testimony of McCoy, Macario, Pineda, Price, and B.K that First Marine did not provide them with safety training in confined and enclosed spaces and dangerous

[39] Section 1915.12(d)(5) provides, "The employer shall certify that the training required by paragraphs (d)(1) through (d)(4) of this section has been accomplished."

atmospheres.[40] It was clear from their testimony that at the time of the trial they did not have a firm grasp of proper safety procedures. First Marine's supervisors claim they provided adequate training, but First Marine adduced no documentation to back up this claim. As management personnel who still work for First Marine, the supervisors are motivated to close ranks and declare First Marine provided the required training. The Secretary has established First Marine failed to meet the requirements of § 1915.12(d).

Did Employees Have Access to the Hazardous Condition?

The untrained employees were required to work in confined and enclosed spaces and in dangerous atmospheres at First Marine's shipyard. Their lack of knowledge regarding the proper procedures to follow and the hazards presented in the spaces and atmospheres exposed them to potential physical harm or death. The preamble explains that § 1915.12(d) "is requiring employers to ensure that employees who must enter confined or enclosed spaces or other dangerous atmospheres are trained to perform their duties safely." Preamble, 59 FR 37816-01, at 17839. "This provision is intended to ensure that employees are familiar with the duties imposed by final revised Subpart B so that the work practices they use will conform to the standard and will protect them from hazards posed by these spaces." *Id.* The Secretary has established First Marine's employees had access to the hazard of being inadequately trained in safely working in confined and enclosed spaces and dangerous atmospheres.

Did First Marine Know of the Hazardous Condition?

While not binding precedent, the Court agrees with the Tenth Circuit that employer knowledge of the violative condition "will almost invariably be present where the alleged violative condition is inadequate training of employees." *Compass Env't, Inc. v. Occupational Safety & Health Rev. Comm'n*, 663 F.3d 1164, 1168 (10th Cir. 2011). Thus, the Commission has held to establish noncompliance with a training standard, the Secretary must show that the cited employer "failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2125 (No. 96–0606, 2000). *See, also*, *Capform, Inc.*, 19 BNA OSHC 1374 (No. 99–0322, 2001); *Baker Tank Co.*, 17 BNA OSHC 1177 (No. 90–1786, 1995). Here, First Marine's own safety manual states it is the

[40] The Court does not discredit the testimony of Leroy. It is possible his supervisor provided him with adequate training when he was hired. However, Leroy did not work on the *William* after the vessel left dry dock.

responsibility of supervisors to train their crew members in confined and enclosed spaces and dangerous atmosphere safety. The supervisors knew they were not providing the required training and their knowledge is imputed to First Marine. Therefore, the Secretary has established First Marine knew of the hazardous condition. Thus, the Court concludes the Secretary has established First Marine violated § 1915.12(d)(1) and Citation 2, Item 3 must be affirmed.

Characterization of the Violation

The Secretary alleges violation was willful. The Sixth Circuit has held "that a willful violation is action 'taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality.'" *Nat'l Eng'g & Contracting Co. v. Herman*, 181 F.3d 715, 721 (6th Cir. 1999) (quoting *Empire–Detroit Steel Div. v. Occupational Safety and Health Review Comm'n*, 579 F.2d 378, 383 (6th Cir.1978)). "A willful violation occurs where the employer is 'conscious' of the requirements of a rule and 'nonetheless ... consciously continues' in its contrary practice." *Id.* (quoting *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir.1983)). "Conduct is willful if it is 'intentional, deliberate, and voluntary.'" *Id.* (quoting *id.*)

First Marine knew it was required to provide safety training in confined and enclosed spaces and dangerous atmospheres. This requirement is incorporated in its safety manual. It knew its employees are routinely required to enter confined and enclosed spaces and dangerous atmospheres are common in shipyard employment. Its supervisors, to whom First Marine delegated the responsibility of training the employees, knew they were not providing the training. Thorn conceded First Marine was not following its own safety procedures. The Court concludes First Marine demonstrated plain indifference to employee safety. This is evident in supervisor Jones's lack of urgency when he detected gas aboard the *William* and First Marine's choice of Conaway as safety director.

Thorn, Miller, and Bynum, who were not on the *William* the morning of January 19, 2018, testified to the rapid, forceful action they would take if they knew a strong gas odor was detected aboard the vessel.[41] Their hypothetical decisive action contrasts with supervisor Jones's mild response to the odor. His lack of urgency lulled other workers into a false sense of safety. A Thermal employee stated he was not worried about the gas odor. He believed if workers were

[41] The Court does not credit the testimony of these three supervisors that they would have shut down work, evacuated the vessel, and performed testing. The Court ascribes their testimony to a combination of Monday morning quarterbacking and toeing the company line.

permitted to stay on the vessel, it was safe. "I figured if it was something to be concerned about, they wouldn't let us on the boat." (Tr. 69.) Another Thermal employee testified everyone in his crew detected the odor when they boarded the vessel, but no one directed them to stop work or leave. "[T]hey didn't act like there was even a problem." (Tr. 103.) A third Thermal employee stated he stayed aboard the towboat despite smelling gas because he "figured if it was a big problem nobody would be on the boat." (Tr. 214.) Had Jones himself been adequately trained he would have responded to the pervasive strong odor of gas with more diligence.

First Marine originally hired Conaway for his background as a purchasing agent. He conceded he did not feel qualified to work as a safety director when First Marine promoted him to that position. First Marine did not provide Conaway with safety training, other than to let him know there was a copy of its safety manual in the office, which Conaway was still working his way through at the time of the explosion. Despite being the safety director of a shipyard, Conaway was not familiar with OSHA's § 1915 maritime standards (Tr. 888). Conaway was uncertain of his own authority in correcting employees since First Marine had not informed him of the scope of his authority (Tr. 885-86).

Indifference to employee safety is manifested in the behavior of Jones, as a First Marine supervisor, who shrugged off responsibility to stop work or notify Thorn or another First Marine management official that a pervasive odor of gas was present aboard the *William.* Indifference to employee safety is also manifested by First Marine's hiring of Conaway as its safety director. It is evident to the Court, as it was self-evident to Conaway, that he was ill-equipped for the position. Once Conaway was in the position, First Marine did not provide him with training, safety documentation, or a description of his responsibilities and authority as safety director. It is clear employee safety was not a paramount concern for First Marine. The Court concludes First Marine committed a willful violation of § 1915.12(d)(1).

Citation 2, Item 3

In Citation 2, Item 3, the Secretary alleges First Marine committed a willful violation of § 1915.14(b)(1) on January 19, 2018, for "exposing employees to fire and explosion hazards" when it permitted "employees to perform hot work . . . in an enclosed space with a dangerous atmosphere below the deck locker, where flammable gas was present, without the space being tested to assure it contained no concentration of flammable vapors equal to or greater than 10 percent of the lower explosive limit[.]" (Compl. Ex. A p. 21 of 25.) The Cited Standard provides:

> Hot work is not permitted in or on the following spaces or adjacent spaces or other dangerous atmospheres until they have been tested by a competent person and determined to contain no concentrations of flammable vapors equal to or greater than 10 percent of the lower explosive limit:
> (i) Dry cargo holds,
> (ii) The bilges,
> (iii) The engine room and boiler spaces for which a Marine Chemist or a Coast Guard authorized person certificate is not required under paragraph (a)(1)(i) of this section.
> (iv) Vessels and vessel sections for which a Marine Chemist or Coast Guard authorized person certificate is not required under paragraph (a)(1)(iv) of this section, and
> (v) Land-side confined and enclosed spaces or other dangerous atmospheres not covered by paragraph (a)(1) of this section.

29 C.F.R. § 1915.14(b)(1).

Does the Cited Standard Apply to the Cited Condition?

Section 1915.14(b)(1) requires the employer to test for concentrations of flammable vapors equal to or greater than 10 percent of the lower explosive limit before it permits hot work to be performed in a dry cargo holds; bilges; the engine room and boiler spaces for which a Marine Chemist or a Coast Guard authorized person certificate is not required under paragraph (a)(1)(i) of this section; vessels and vessel sections for which a Marine Chemist or Coast Guard authorized person certificate is not required under paragraph (a)(1)(iv) of this section; and land-side confined and enclosed spaces or other dangerous atmospheres not covered by paragraph (a)(1) of this section.

In Item 3, the Secretary identifies the space at issue as the deck locker but does not specify which of the five subsections of § 1915.14(b)(1) applies. The deck locker does not meet the definitions of any of five subsections. The deck locker is designed to store tools and equipment needed on the towboat when it is operational. It is not a cargo hold or a bilge, as listed in subsections (i) and (ii) of the cited standard. The other three subsections identify areas "for which a Marine Chemist or a Coast Guard authorized person certificate is not required under paragraph (a)(1)(i) of this section." The Secretary cited First Marine for a violation of §1915.14(a)(1)(i) in Citation 1, Item 7 of the Health Citation for failing to have a Marine Chemist or a Coast Guard authorized person certify the deck locker as "Safe for Hot Work." According to the terms of §§ 1915.14(a) and (b), if § 1915.14(a) applies to the cited condition, then § 1915.14(b) cannot. The Court concluded *supra* § 1915.14(a)(1)(i) applied to the cited condition in Item 7 and affirmed the

violation. Therefore, the Court concludes § 1915.14(b) does not apply here and Item 3 must be vacated.[42]

IV. PENALTY DETERMINATION

"[T]he Commission has authority 'to assess all civil penalties … giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." *Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1296 (6th Cir. 1976) (*quoting* 29 U.S.C. s 666(j)). "Gravity of violation is the key factor." (*Id.*) "Gravity . . . is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted). "The other factors are concerned with the employer generally and are

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[42] In addition, Citation 2, Item 3 of the Health Citation is duplicative of Citation 1, Item 7 of the Health Citation.

> Violations are duplicative where the abatement of one violation necessarily results in the abatement of the other. *See Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056-57 (No. 90-2873, 1992). The Commission has also found that violations are duplicative where they require the same abatement conduct, *see J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993); where they involve substantially the same violative conduct, *see Cleveland Consol., Inc.*, 13 BNA OSHC 1114, 1118 (No. 84-696, 1987); or where they involve the same abatement. *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1561 (No. 94-1979, 2009) (citing *Capform, Inc.*, 13 BNA OSHC 2219, 2224 (No. 84-0556, 1989), *aff'd*, 901 F.2d 1112 (5th Cir. 1990)). Violations are not duplicative where they involve standards directed at fundamentally different conduct, *J.A. Jones Constr.*, 15 BNA OSHC at 2207, or where the conditions giving rise to the violation are separate and distinct. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981). Here, the inquiry falls within the category of duplicative violations that may involve the same abatement. *Capform*, 13 BNA OSHC at 2224.

N. E. Precast, LLC, Nos. 13-1169 & 1170, 2018 WL 1301480, at *5 (OSHRC Feb. 28, 2018).

The standard cited here requires the competent person to test a space to determine it contains "no concentrations of flammable vapors equal to or greater than 10 percent of the lower explosive limit." Section 1915.14(a)(1) requires a Marine Chemist or a U.S. Coast Guard authorized person certify the space as "Safe for Hot Work." Section 1915.11(b) provides,

> Safe for Hot Work" denotes a space that meets all of the following criteria:
> . . .
> (2) The concentration of flammable vapors in the atmosphere is less than 10 percent of the lower explosive limit[.]

The abatement required by Citation 1, Item 7 of the Health Citation results in the abatement of Citation 2, Item 3 of the Health Citation. The two items are therefore duplicative.

considered as modifying factors.'" *Natkin & Co. Mech. Contractors,* 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973).

First Marine employs approximately 300 employees (Tr. 955). Therefore, it is not entitled to a reduction in the penalties based upon its size. Since OSHA had previously cited First Marine for violations of the Act (Tr. 956), it is also not entitled to a reduction in the penalties based upon a lack of history of penalties. The Court also concluded First Marine is not entitled to a credit for good faith since any basis for finding good faith is diminished by First Marine's "failure to adequately prepare and train" its employees, "which demonstrates a lack of good faith." *MEI Holdings, Inc*., 18 BNA OSHC 2025, 1029 (No. 96-740, 2000). *See also Gen. Motors,* 22 BNA OSHC 1019, 1057 (Nos. 91-2834E & 91-2950, 2007) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The Court concludes that with Citation No 1, Item 7 of the Health Citation, the gravity of this violation is high. Failure to have a Marine Chemist certify a space that contains a dangerous atmosphere prior to the performance of hot work as "Safe for Hot Work" exposed employees to combustion hazards. Giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations, the Court concludes a penalty of $12,934 is appropriate. The Court concludes that with Citation 2, Item 2 of the Health Citation, the gravity of this violation is also high. First Marine failed to train employees in safe procedures when working in confined and enclosed spaces and dangerous atmospheres. Without this training, the employees were deprived of crucial information that could protect them from serious physical harm or death. Giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations, the Court concludes a penalty of $129,336 is appropriate. Accordingly,

VI. ORDER

IT IS HEREBY ORDERED THAT the remaining cited items of the Safety Citations are **VACATED** and the remaining cited items of the Health Citations are **VACATED** except Citation 1, Item 7 and Citation 2, Item 2, which are both **AFFIRMED**, with penalty **ASSESSMENTS** of $12,934 and $129,336 respectively.

SO ORDERED.

/s/

First Judge John B. Gatto

Dated: April 19, 2021
Atlanta, GA