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SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET NO. 97-0641

ACTION CLEANING CORPORATION,

Respondent.

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**APPEARANCES:**

For the Complainant:

Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor

For the Respondent:

Clinton D. Hubbard, Esq., San Diego, California

Before: Administrative Law Judge: Benjamin R. Loye

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the **Act**).

Respondent, Action Cleaning Corporation (Action), at all times relevant to this action maintained a place of business aboard the USS Vandergrift, where it was engaged in shipboard painting preparation. Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 27, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Action's USS Vandergrift work site (Tr. 19, 51-53). As a result of that inspection, Action was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Action brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 26, 1997, a hearing was held in San Diego. The parties have submitted briefs on the issues and this matter is ready for disposition.

## Alleged Violations

Citation 1, item 1 alleges:

29 CAR 1915.73(f): Sections of bilges from which floor plates or gratings have been removed shall be guarded by guardrails or temporary planking shall be installed

- a) USS Vandergrift (FFG 48), AMR #3, 5-292-0-E: Employees were exposed to fall hazard where deck plates were removed and not guarded.

The cited standard states:

(f) Sections of bilges from which floor plates or gratings have been removed shall be guarded by guardrails except where they would interfere with work in progress. If these open sections are in a walkway at least two 10-inch planks placed side by side, or equivalent, shall be laid across the opening to provide a safe walking surface.

### Facts

OSHA Compliance Officer (CO) Alan Traenkner testified that on February 27, the deck plates in the hold of the USS Vandergrift had been removed to allow Action employees to clean the bilge area and prepare its contents for painting (Tr. 22, 27, 64). The deck plates are normally supported by a grid of structural members approximately 84" above the deepest portion of the hull (Tr. 22-23, 29; Exh. C-1). The removal of the plates creates a checkerboard of openings between the structural members. The size of the openings varies, the CO measured two openings at 22" x 36" and 24" X 24", respectively (Tr. 23). Machinery and piping is located beneath the structural grid (Tr. 31; Exh. C-3, C-4, C-5).

Complainant concedes that guardrails would interfere with work in progress, and that it seeks to enforce only that portion of the standard which requires planking in walkways (Tr. 8). During the inspection Traenkner noted employees, including the foreman, Tony Monzon, walking on support members to access a vertical ladder which went down from the deck area to the hull, and to access the ladder leading above decks (A down ladder@) after ascending the vertical ladder (Tr. 29, 33, 43; Exh. C-1)<sup>1</sup>.

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<sup>1</sup> The hull could also be accessed from a ladder leading from above deck to the hull, and CO Traenkner also observed employees using that route (Tr. 24). Though it was possible for employees to access the machinery from walkways accessible from the bottom of the down ladder (Tr. 139, 156), employees did, in fact, use the deck level structural members to traverse the bilge (Tr. 161-62).

The CO testified that it would have been easy to get two 10" planks down into the bilge area to use as walkways (Tr. 38). He stated that the planks could have been secured with C-clamps (Tr. 39), and moved when work was to be performed in the walkway area (Tr. 41).

Roger Gruben, Action's general manager (Tr. 70), testified that Action does use planking<sup>2</sup> during the mechanical cleaning portion of their work (Tr. 94, 104, 108). On the USS Vandergrift, the prime contractor had provided plywood templates, sized to the missing deck plates, which were, at times, used as a walkway (Tr. 105, 109; *See also*, testimony of Monzon, Tr. 147). However, Gruben stated, planking interferes with Action's work during some portions of its operations, such as degreasing, and is removed during those operations (Tr. 72, 79). Gruben testified that the planking also has to be removed for the prime contractor's quality assurance inspection. Inspection of the USS Vandergrift was scheduled for 4:30 p.m. on February 28, 1997 (Tr. 87-90; Exh. R-4; *See also*, testimony of Monzon, Tr. 146). Gruben stated that signs are posted, stating "Caution, Deck Plates Removed," to alert employees to the hazard during such periods (Tr. 97).

Jerry Becasen, Action's Environmental Safety Coordinator (Tr. 128), testified that it was impossible to fall between the structural members because the equipment below the grid (Tr. 132, 138). CO Traenkner agreed that in this type of situation, an employee who trips and falls generally does not fall all the way through to the hull, but may be injured striking or catching portions of his body on the structural members, piping or machinery on the way down (Tr. 35-36; *See also*, testimony of Becasen, Tr. 141).

Action never applied for a variance from the standard (Tr. 110).

### Discussion

Action stipulates that there was no planking down on the deck level where deck plates had been removed (Tr. 182). Action argues: 1) that the standard is inapplicable because the structural grid is not a walkway; 2) that planking was infeasible at the time of the inspection; and 3) that planking posed a greater hazard to its employees than walking on the structural grid.

The cited standard is applicable in that Action's employees used the structural grid as a walkway to access the vertical ladder from the down ladder at the deck level.

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<sup>2</sup> CO Traenkner testified that Tony Monzon, Action's supervisor, told him that no planking had been used since the deck plates were removed on February 13, 1997 (Tr. 64). At the hearing, however, Monzon stated that he stated only that the deck plates had been removed since February 13, 1997 (Tr. 161).

Action maintains that the bilge was being readied for final inspection at the time OSHA arrived at the work site. Action argues that all planking had to be removed prior to the prime contractor's inspection so that the entire bilge area could be viewed. However, the evidence establishes that the OSHA inspection took place a full day prior to the prime contractor's inspection, and that work was still going on in the bilge at that time. Action failed to make any showing that the planking would have interfered with work in progress on February 27, thus it has failed to make out the affirmative defense of *Infeasibility*.@ *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD &30,485 (No. 91-1167, 1994).

Action's claim that planking poses a greater hazard to workers than walking on the exposed structural members also fails. In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD &29,239, p. 39,161 (No. 87-1359, 1991). Action admitted that it did not apply for a variance from the operation of the standard, despite its position that planking posed a hazard to its employees. The Commission has held that an employer's failure to explain its failure to apply for a variance for regularly performed operations, obviates the need to address the first two elements of the defense. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD &29,313 (No. 86-521, 1991). Action has not established the greater hazard defense.

The violation is established.

#### Penalty

The evidence establishes that the cited violation is serious, in that a fall between the structural members could result in severe cuts, contusions and possible broken bones. No evidence was introduced in mitigation of the proposed penalty (Tr. 186). The proposed penalty of \$1,250.00 will be assessed.

### **ORDER**

1. Citation 1, item 1, alleging violation of ' 1915.73(f) is **AFFIRMED**, and a penalty of \$1,250.00 is **ASSESSED**.

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Benjamin R. Loye  
Judge, OSHRC

Dated: