UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PREMIER BULK STEVEDORING, LLC, Respondent.	Docket No. **23-0539**

MEMORANDUM OPINION AND ORDER

Pending in the above-styled action is Respondent Premier Bulk Stevedoring, LLC's Motion for Partial Summary Judgment[1] and the Secretary of Labor's response in opposition. For the reasons indicated *infra*, the Court concludes there is no genuine dispute as to material fact that 29 C.F.R. § 1918.81(i) was not violated by Premier Bulk, and therefore, Premier Bulk is entitled to judgment as a matter of law with respect to Citation 2, Item 1.[2]

Citation 2, Item, 1 asserts Premier Bulk violated 29 C.F.R. § 1918.81(i), the standard governing Slinging under the Handling cargo regulations, when "[d]rafts were hoisted when the winch or crane operator could not clearly see the draft itself or the signals of the signalman who was observing the draft's movement[.]" (Compl. Ex. A.) More specifically, Citation 2, Item, 1 asserts Premier Bulk "exposed employees to struck hazards in that employees were involved in longshoring activities hoisting material from the pier into the hold of a ship with the use of a shipboard crane *without the crane operator being able to see the signalman who was guiding the draft's movement*." (*Ibid.*) (emphasis added).

The cited standard mandates that "No draft shall be **hoisted** unless the winch or crane operator(s) can clearly see the draft itself or see the signals of a signalman who is observing the draft's movement." 29 C.F.R. § 1918.81(i) (emphasis added). The cited standard does not define "hoisted." "Thus, the term "hoisted" is ambiguous because the standard does not define it. The

[1] The Court will not repeat the legal standard for summary judgment motions again since it was outlined in the Court's Order denying the Secretary's motion for partial; summary judgment.

[2] The Secretary has already withdrawn Citation 1, Item 1.

Secretary has also not published any Standard Interpretations or Directives regarding the meaning of "hoisted," and the standard's preamble also does not define it.

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Burns v. Alcala*, 420 U.S. 575, 580–581 (1975). "The term '[hoisted],' being left undefined by the statute, carries its ordinary meaning," *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276 (2009) (citation omitted) (applying Webster's New International Dictionary and Random House Dictionary to ascertain the meaning of an undefined word). As Premier Bulk notes, the ordinary meaning of "hoisted" is to "lift" or "raise." *See* Merriam-Webster dictionary, https://www.merriam-webster.com/dictionary/hoisted (last visited Dec. 11, 2024); see also https://www.dictionary.com/browse/hoist (last visited Dec. 11, 2024) (same).

The Part 1918 standards repeatedly use the words "hoisting" and "lowering" separately to convey different meanings. Section 1918.51(d)(2) states, "[e]xcept for eye splices in the ends of wires, each wire rope used in **hoisting or lowering** in guying derricks, or as a topping lift, preventer, segment of a multi-part preventer, or pendant, shall consist of one continuous piece without knot or splice[.]" 29 C.F.R. § 1918.51(d)(2) (emphasis added). Section 1918.62(b)(9) uses the same language. "Except for eye splices in the ends of wires and endless rope slings, each wire rope used in **hoisting or lowering**, or bulling cargo, shall consist of one continuous piece without knot or splice." 29 C.F.R. § 1918.62(b)(9) (emphasis added). Section 1918.66(c)(2) states, "[e]xcept in an emergency, the hoisting mechanism of all cranes or derricks used to hoist personnel shall operate only in power up and power down, with automatic brake application when not **hoisting or lowering**." 29 C.F.R. § 1918.66(c)(2) (emphasis added). Section 1918.53(j) states, "[w]inches shall not be used when one or more control points, either **hoisting or lowering**, are not operating properly." 29 C.F.R. § 1918.53(j) (emphasis added). Section 1918.85(f)(1)(i)(C) states that the "speed of hoisting or lowering is moderated when heavily ladened containers are encountered." 29 C.F.R. § 1918(f)(1)(i)(C) (emphasis added.) However, section 1918.81(i), unlike other Part 1918 standards, does **not** use the phrase "hoisting or lowering."

The "inclusion of the word 'lowering' in these other Part 1918 standards combined with its absence from section 1918.81(i) can only demonstrate an intent to distinguish between the terms and exclude 'lowering' from the requirements of section 1918.81(i). "This conclusion comports with the rule of construction that where a term is carefully employed in one place and excluded in

another, it should not be implied where excluded." *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645, 648 (5th Cir. 1976).[3] "If the regulation missed its mark, the fault lies in the wording of the regulation—a matter easily remedied under the flexible regulation promulgating structure, 29 U.S.C.A. s 655(b) & (e); 29 CFR Part 1911, with no need to press limits by judicial construction in an industrial area presenting infinite operational situations." *Id.*, 528 F.2d at 648–49.

In its previous order, the Court concluded that "a violation of section 1918.81(i) can only occur while a draft is being **hoisted**, meaning while it is being 'lifted' or 'raised,' and not during some undefined 'hoisting process,' as the Secretary urges." *See* Order Denying Sec'y's Mot. P. Summ. J. at p. 9. The Court affirms that ruling again today.

It is undisputed that the crane operator could see the load of paper rolls when he hoisted it off the dock on September 11, 2022, to load Cargo Hold #2 on the M/V WESERBORG. *See* Michael Douglas 30(b)(6) deposition transcript at pp. 45-46, 74 (submitted 11/18/24 as Exhibit A to the Secretary's Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment); Nicholas DeAngelis deposition transcript at pp. 37-38 (submitted 1/17/25 as Exhibit A to the Secretary's Statement of Additional Material Facts in Opposition to Premier Bulk's Motion for Summary Judgment).

As stated in paragraph no. 6 of the Secretary's January 17, 2025, Statement of Additional Material Facts in Opposition to Premier Bulk's Motion for Summary Judgment, the Secretary's expert Nicholas DeAngelis agrees that the crane operator could see the draft when he lifted it from the dock. Therefore, the Court concludes there is no genuine dispute that the crane operator could see the draft when he lifted it from the dock, and therefore, there is no genuine dispute that Premier

[3] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.* Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

Bulk was in compliance with section 1918.81(i). Thus, Premier Bulk is entitled to judgment as a matter of law in its favor. Accordingly,

IT IS HEREBY ORDERED THAT the Premier Bulk's motion for partial summary judgment on Citation 2, Item 1 is **GRANTED**, Citation 2, Item 1 is **VACATED**, and no penalty is assessed.

IT IS FURTHER ORDERED THAT since all issues in dispute have now been resolved, the trial is **CANCELLED**.

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: May 12, 2025
Atlanta, GA