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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PHILLIP MARABLE and GISELA  
MARABLE,

Plaintiffs,

v.

UNITED STATES OF AMERICA and  
BAE SYSTEMS SAN DIEGO SHIP  
REPAIR,

Defendants.

CASE NO. 14cv1206-WQH-KSC

ORDER

HAYES, Judge:

The matter before the Court is the Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

**BACKGROUND**

This is an action for personal injury and damages arising from an incident that occurred on August 30, 2012 on the USS Pinckney, a public vessel owned by Defendant United States of America, while it was undergoing repairs in the San Diego Harbor. Plaintiff Phillip Marable, a ship repairman working on the USS Pinckney, sustained injuries after slipping on a ladder on the vessel.

On May 13, 2014, Plaintiffs Phillip Marable and Gisela Marable initiated this action by filing a Complaint against Defendants United States of America (“United States”) and BAE Systems San Diego Ship Repair (“BAE Systems”). (ECF No. 1). Phillip Marable asserted a negligence cause of action under general maritime law against BAE Systems and a negligence cause of action pursuant to 33 U.S.C. § 905(b),

1 the Longshore and Harbor Workers' Compensation Act ("LHWCA"), against  
2 Defendant United States. Gisela Marable asserted a cause of action for loss of  
3 consortium against both Defendants. (ECF No. 1).

4 On July 14, 2014, Defendant United States filed an Answer and Cross-claim  
5 against BAE Systems for contribution and indemnity. (ECF No. 3).

6 On September 2, 2014, Defendant BAE Systems filed an Answer and Cross-  
7 claim against United States for contribution and indemnity. (ECF No. 6).

8 A bench trial took place on June 20-23 and 27, 2017. (ECF Nos. 85, 86, 89, 92,  
9 101).

### 10 **FINDINGS OF FACT**

11 The USS Pinckney ("the Vessel") is an Arleigh-Burke class guided missile  
12 destroyer of the United States Navy and public vessel owned by the United States.  
13 During a period between approximately mid-April and November 2012, the period of  
14 availability, the Vessel underwent repairs and maintenance while berthed at the 32nd  
15 Street Naval Base in San Diego. BAE Systems was the prime shipyard contractor  
16 during the period of availability responsible for the overall shipyard level maintenance.  
17 The Navy coordinated with BAE Systems through an intermediary, the Southwest  
18 Regional Maintenance Center ("SWRMC") to conduct repairs on the Vessel. SWRMC  
19 is a combination of active duty and civilian contractors working on behalf of the United  
20 States Navy. Ship's Force consists of the active duty, enlisted, and commissioned  
21 officers that serve full-time on the Pinckney. SWRMC, BAE Systems, and Ship's  
22 Force coordinated to perform the repairs on the Vessel. Safway Services, LLC  
23 ("Safway") was the scaffolding company that BAE Systems subcontracted to work on  
24 the Vessel during the period of availability.

25 As part of the repairs and maintenance to be performed on the Vessel, handrails  
26 on a number of ladders on the Vessel were to be removed for powder-coating. The  
27 Ship's Force was responsible for removing and providing the handrails to SWRMC for  
28 powder-coating. SWRMC would facilitate the powder-coating process and return the

1 handrails to Ship's Force. Ship's Force would reinstall the handrails on the Vessel.  
2 Lieutenant Christopher Brandt, the overall coordinator for the Ship's Force during the  
3 period of availability, testified that when Ship's Force removes a handrail, Ship's Force  
4 generally would notify SWRMC and BAE Systems about the removed handrail and  
5 inform them that a temporary handrail needed to be installed in its place. Brandt  
6 testified that the expectation of Ship's Force is that BAE Systems was responsible for  
7 putting a temporary handrail in place or taping off the ladder. BAE Systems was  
8 expected to conduct safety walk-throughs during the period of availability to identify  
9 and correct safety hazards. BAE Systems failed to conduct a number of safety walk-  
10 throughs in August of 2012 prior to the date Phillip Marable sustained his injuries.  
11 Darold Ellington, a gas-free safety tech in BAE System's employment, conducted a  
12 safety walk-through on August 22, 2012 and identified the incident ladder as missing  
13 a handrail but did not take any corrective action.

14 As part of its contractual obligations to the United States, BAE Systems must  
15 comply with NAVSEA Standard Item 009-07. NAVSEA Standard Item 009-07 states  
16 in part:

17 3.8 Accomplish a fire prevention and housekeeping inspection on a daily  
18 basis whenever work is in progress. The inspection shall be made jointly  
19 with the SUPERVISOR and the Commanding Officer's designated  
20 representative.

21 3.8.1 Submit one legible copy, in electronic media, of a written  
22 report of the discrepancies and corrective actions, using Attachment A, to  
23 the SUPERVISOR and the Commanding Officer's designated  
24 representative within 4 hours after completion of the inspection.

25 (Plaintiff Exhibit 35, NAVSEA Standard 009-07, Section 3.8).

26 Phillip Marable ("Marable") was employed by Safway as a scaffolding  
27 superintendent on the date of the incident. As of August 2012, Marable had been in the  
28 scaffolding trade for approximately thirty (30) years since his high school graduation.  
Over the span of thirty years, Marable worked as a general laborer, foreman, supervisor,  
estimator, and superintendent. Marable owned a scaffolding business for a period of  
time. Marable had spent a significant time performing scaffolding work in shipyards  
on naval and commercial vessels prior to August 2012.

1           On August 30, 2012, Marable was working on the Vessel in the course of his  
2 employment for Safway. Marable was injured when he slipped walking down the  
3 inclined ladder on the port side quarter deck on the 02 level of the Vessel. At the time  
4 of the incident, the ladder was missing its inboard handrail. The handrail had been  
5 removed by Ship's Force for the powder-coating process. The outboard handrail on the  
6 incident ladder remained in place. The incident ladder did not have any caution tape  
7 or temporary railing on the inboard side.

8           On the day of the incident, Marable used the incident ladder to access his work  
9 area. There were alternative routes by which Marable could access the work area.  
10 Marable testified that he observed that the ladder was missing a handrail but felt that  
11 he could safely climb the ladder. During his testimony, Marable was asked, "And at  
12 that time [prior to using the ladder], did you feel like you could safely get up the  
13 ladder?" Marable responded, "Yes, I did." (Marable TT, 188: 7-20). Marable testified  
14 that he does not recall exactly how he fell, but stated that his right foot slipped as he  
15 was walking down the stairs. Marable testified that he fell to the right and the inboard  
16 handrail was not there for him to grab. Marable testified that he injured his left knee  
17 in the fall. Marable testified that following his fall, he used the incident ladder again  
18 and still felt that the ladder was safe. On the same day, Marable reported the injury to  
19 Jonas Raymond Montalvo, a Safety Technician for BAE Systems at the time of the  
20 incident. Montalvo prepared an incident report which stated, "On August 30, 2012, at  
21 approximately 0815, Safway Scaffold employee slipped on a moist stairway descending  
22 from the 02 LVL portside. In an attempt not to fall, the employee reached out to grab  
23 the hand rail but it was missing and caught himself on the bulkhead preventing a fall to  
24 the 01 LVL. Initial reported as a near miss to BAE Systems Safety on August 30,  
25 2012." (Plaintiff Exhibit 17). The incident report further stated that the cause of the  
26 incident was "moisture on stairway & missing handrail" and that Marable sustained an  
27 injury to his knee. (Plaintiff Exhibit 17). Montalvo testified that he obtained the  
28 information for his report from Marable, from a document from Safway, or from

1 visually observing that the handrail was missing. Marable went to urgent care to have  
2 his knee examined on the day of the incident.

3 In December 2012, Marable underwent a total left knee replacement surgery.  
4 Around two or three months after the knee replacement surgery, Marable returned to  
5 work on light duty. In October 2013, Marable underwent a revision surgery of his left  
6 knee replacement. Marable testified that during the time he was going through physical  
7 therapy after the second knee surgery, he began to suffer pain in his lower back and  
8 gait disturbance. Marable testified that he was referred to a spine specialist, Dr. Paul  
9 Kim. Marable began receiving treatment from Dr. Kenneth Romero, a doctor  
10 specializing in pain medicine, beginning in June 2014. Marable underwent a lumbar  
11 fusion surgery in November 2015. Marable underwent a second lumbar fusion surgery  
12 on January 13, 2017. Marable has not been medically cleared to return to work since  
13 the second surgery on his knee in October 2013. Marable and his wife, Gisela Marable,  
14 testified that although Marable's condition is improving, he remains in pain and the  
15 injuries have negatively impacted their previously active lifestyle and their relationship.

## 16 CONCLUSIONS OF LAW

### 17 **I. Negligence Against the United States Under the Longshore and Harbor** 18 **Workers' Compensation Act**

19 This is an admiralty and maritime matter within the meaning of Rule 9(h) of the  
20 Federal Rules of Civil Procedure. The Public Vessels Act, 46 U.S.C. §§ 781-790,  
21 which incorporates the consistent provisions of the Suits in Admiralty Act, 46 U.S.C.  
22 §§ 30901, *et seq.*, provides a limited waiver of the United States' sovereign immunity  
23 from suit for certain maritime claims involving a public vessel, such as the USS  
24 Pinckney. Under the Public Vessels Act, an injured party has no greater claim against  
25 the United States than one would have against a private person under similar  
26 circumstances. 46 U.S.C. § 30903; *Canadian Aviator, Ltd. v. United States*, 324 U.S.  
27 215, 228 (1945). Marable has asserted a cause of action against the United States for  
28 negligence pursuant to the Longshore and Harbor Workers' Compensation Act, 33

1 U.S.C. § 905(b). The parties have stipulated that liability against the United States shall  
2 be determined exclusively under 33 U.S.C. § 905(b). (ECF No. 83 at 26).

3 Section 905(b) of the LHWCA preserves a longshoreman’s right to recover from  
4 a shipowner under a negligence cause of action. *See* 33 U.S.C. § 905(b); *Scindia Steam*  
5 *Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 165 (1981); *Murray v. Southern Route*  
6 *Maritime SA*, 870 F.3d 915, 918-19 (9th Cir. 2017). The duty of care delineated in  
7 *Scindia* as to longshoremen applies equally to repairmen. *Cook v. Exxon Shipping Co.*,  
8 762 F.2d 750, 752 (9th Cir. 1985), *amended on reh’g*, 773 F.2d 1001 (9th Cir. 1985).  
9 In *Scindia Steam Navigation Company*, the Supreme Court established the duty of care  
10 applicable to an action under § 905(b). *Scindia Steam*, 451 U.S. at 166-67. The  
11 Supreme Court stated:

12 [T]he vessel owes to the stevedore and his longshoremen  
13 employees the duty of exercising due care “under the  
14 circumstances.” This duty extends at least to exercising  
15 ordinary care under the circumstances to have the ship and its  
16 equipment in such condition that an expert and experienced  
17 stevedore will be able by the exercise of reasonable care to  
18 carry on its cargo operations with reasonable safety to  
19 persons and property, and to warning the stevedore of any  
20 hazards on the ship or with respect to its equipment that are  
21 known to the vessel or should be known to it in the exercise  
22 of reasonable care, that would likely be encountered by the  
23 stevedore in the course of his cargo operations and that are  
24 not known by the stevedore and would not be obvious to or  
25 anticipated by him if reasonably competent in the  
performance of his work . . . . The shipowner thus has a duty  
with respect to the condition of the ship’s gear, equipment,  
tools, and work space to be used in the stevedoring  
operations; and if he fails at least to warn the stevedore of  
hidden danger which would have been known to him in the  
exercise of reasonable care, he has breached his duty and is  
liable if his negligence causes injury to a longshoreman. . . .  
It is also accepted that the vessel may be liable if it actively  
involves itself in the cargo operations and negligently injures  
a longshoreman or if it fails to exercise due care to avoid  
exposing longshoremen to harm from hazards they may  
encounter in areas, or from equipment, under the active  
control of the vessel during the stevedoring operation.

26 *Id.* In cases following *Scindia Steam*, the Ninth Circuit Court of Appeals identified  
27 “five distinct aspects of that duty”: (1) the turnover duty of safe condition; (2) the  
28 turnover duty to warn; (3) the active involvement duty; (4) the active control duty; and

1 (5) the intervention duty. *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204,  
2 1207 (9th Cir. 1989). The Supreme Court and the Ninth Circuit later characterized  
3 *Scindia* as “outlin[ing] three general duties shipowners owe to longshoremen” and  
4 construed the active involvement and active control duty together. *Howlett v. Birkdale*  
5 *Shipping Co., S.A.*, 512 U.S. 92, 98 (1994); *Christensen v. Georgia-Pacific Corp.*, 279  
6 F.3d 807, 812 (9th Cir. 2002) (“[T]he Supreme Court has limited the duties that a vessel  
7 owner owes to the stevedores working for him or her: the turnover duty, the active  
8 control duty, and the intervention duty. . . .”).

9 In this case, Plaintiffs claimed that the active involvement duty is applicable and  
10 that Defendant United States violated its duty of reasonable care under the  
11 circumstances by removing the incident ladder’s inboard handrails. (ECF No. 119 at  
12 21). The United States contends that all aspects of the vessel owner’s duty of  
13 reasonable care under the circumstances must be viewed in the context of an expert and  
14 experienced ship repair person. The United States further asserts that the missing  
15 handrail was not a breach of the active control duty regardless of whether the standard  
16 of care is viewed in light of a ship repair person or an expert and experienced ship  
17 repair person.<sup>1</sup>

18 The Court finds that the active involvement/control duty is applicable to this case  
19 because the United States was responsible for the removal of the inboard handrail on  
20 the incident ladder. The United States owed to Marable a duty of reasonable care under  
21 the circumstances with respect to the ladder. *See Howlett*, 512 U.S. at 98 (“The second  
22 duty, applicable once stevedoring operations have begun, provides that a shipowner  
23 must exercise reasonable care to prevent injuries to longshoremen in areas that remain  
24 under the ‘active control of the vessel.’”). “The active control duty requires the vessel  
25 owner to act reasonably if it actively participates in the cargo operations, and to avoid  
26 exposing the stevedores to harm from hazards they may encounter in areas . . . under

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27  
28 <sup>1</sup> Defendant United States and Plaintiffs filed briefs regarding the applicable  
standard of care in the negligence action against the United States prior to the trial.  
(ECF Nos. 65, 68, 70).

1 the active control of the ship.” *Christensen*, 279 F.3d at 812; *Howlett*, 512 U.S. at 98.  
2 The Court concludes that the duty of reasonable care under the circumstances must be  
3 viewed in the context of an “expert and experienced” ship repair person. *See, e.g.*,  
4 *Scindia Steam*, 451 U.S. at 166-67 (“This duty extends at least to exercising ordinary  
5 care under the circumstances to have the ship and its equipment in such condition that  
6 an expert and experienced stevedore will be able by the exercise of reasonable care to  
7 carry on its cargo operations with reasonable safety to persons and property”);  
8 *Bjaranson*, 873 F.2d at 1208 (discussing the turnover duty and stating “the vessel must  
9 exercise ordinary care in light of the fact that the operation will be conducted by an  
10 ‘expert and experienced’ stevedore”); *Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941  
11 F.2d 849, 852 (9th Cir. 1991) (discussing the turnover duty and stating “A  
12 longshoreman is an expert who is required to be ‘mindful’ of hazards – not forgetful of  
13 them . . . . It is for this reason that the question whether an average reasonable person  
14 would be excused from forgetting about a hazard aboard ship is irrelevant when the  
15 issue is whether a longshoreman should be excused from forgetting such a hazard.”).

16 At the time of Marable’s alleged injury, the inboard handrail had been removed  
17 from the incident ladder for powder-coating. However, the outboard handrail on the  
18 incident ladder remained in place. Marable testified that he recognized that the incident  
19 ladder was missing one of its two handrails prior to using it. During his testimony,  
20 Marable was asked, “And at that time [prior to using the ladder], did you feel like you  
21 could safely get up the ladder?” Marable responded, “Yes, I did.” (Marable TT, 188:  
22 7-20). Marable testified that as superintendent he had the authority and responsibility  
23 to stop work if he identified an unsafe condition. Marable testified that he climbed the  
24 incident ladder both before and after his slip although he was aware of available  
25 alternate routes by which he could reach his work area. Marable testified that even after  
26 the slip, he “knew [the ladder] was safe.” (Marable TT 238:19, 193-194). Further,  
27 Marable had thirty years of experience doing scaffolding work and had spent significant  
28 time working on vessels such as the USS Pinckney.



1 The United States provided testimony by expert witness James Dolan, a marine  
2 consultant. Dolan testified that “anybody working in our industry transiting walkways  
3 and watertight doors and anything else” should be able to safely “go up and down” the  
4 incident ladder as well as “determine whether it is safe to go up and down the ladder.”  
5 (Dolan TT 503 at 14-18). Dolan testified that “any experienced ship person or shipyard  
6 or repair person should have been able to go down that ladder or up that ladder safely.”  
7 (Dolan TT, 504:1-5). Dolan testified that it is common for experienced ship repairman  
8 to go up and down a ladder using one hand on a railing and that a ladder with one  
9 handrail removed would not be a safety hazard for the experienced ship repair person,  
10 like Marable.<sup>2</sup> The Court finds this expert testimony to be credible and persuasive.

11 The Court finds that the incident ladder with the missing inboard handrail did not  
12 create an unreasonably hazardous condition for an expert and experienced ship repair  
13 person such as Marable. Plaintiffs have not demonstrated by a preponderance of the  
14 evidence that Defendant United States breached its duty of reasonable care under the  
15 circumstances.

## 16 **II. Negligence Against BAE Under General Maritime Law**

17 The parties have stipulated that liability against Defendant BAE is governed  
18 under general maritime law of negligence. (ECF No. 83 at 26-27). Work performed  
19 aboard a ship docked at a shipyard on navigable waters is within the jurisdiction of  
20 federal maritime law under 29 U.S.C. § 1331. *See Sisson v. Ruby*, 497 U.S. 358, 367  
21 (1990). General maritime law recognizes the tort of negligence. *Norfolk Shipbuilding*  
22 *& Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001). “To recover for negligence,  
23 a plaintiff must establish: (1) duty; (2) breach; (3) causation; and (4) damages.”  
24 *Samuels v. Holland American Line-USA, Inc.*, 656 F.3d 948, 953 (9th Cir. 2011). The  
25 duty owed to a ship repairman in a general maritime action for negligence is the

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26  
27 <sup>2</sup> Plaintiffs provided expert testimony by Thomas Dyer who testified that the  
28 incident ladder with the missing inboard handrail was “hazardous.” Dyer testified,  
“[T]here is two functions of the railings. One of them is one hand for yourself, but the  
other one is to keep from you falling off the side of the ladder if something goes  
wrong.” (Dyer TT, 275:21-277:10).

1 ordinary negligence duty of reasonable care under the circumstances. *Peters v. Titan*  
2 *Nav. Co.*, 857 F.2d 1342 (9th Cir. 1988); *see also Weyerhaeuser Co. v. Atropos Island*,  
3 777 F.2d 1344, 1347 (9th Cir. 1985) (finding the standard of “reasonable care under the  
4 circumstances” consistent with the standard “human skill and precaution, and a proper  
5 display of nautical skill.”). “In maritime law, general principles of negligence law  
6 guide the federal courts.” *Peters*, 857 F.2d at 1345 n.1.

7 Plaintiffs contend that under general maritime law, BAE Systems owed to  
8 Marable a duty of reasonable care under the circumstances. Plaintiffs contend that BAE  
9 Systems had a contractual duty of care under NAVSEA Standard 009-07 to perform  
10 daily safety walk-throughs every Monday through Friday during the availability period  
11 and to identify and remedy safety hazards. (ECF No. 119 at 25). Plaintiffs contend that  
12 BAE Systems breached its duty to put caution tape around the ladder to prevent expert  
13 and experienced workers from accessing the ladder. *Id.* at 26. Plaintiffs contend that  
14 BAE Systems failed to uphold its duty to correct the hazardous condition of the incident  
15 ladder after identifying that it was missing a handrail. *Id.*

16 BAE Systems contends that the negligence claim against BAE Systems is  
17 governed by general maritime law. BAE Systems contends that “the *Scindia* duties  
18 owed by a vessel owner to a longshoreman working on a vessel are instructive with  
19 respect to the duties owed by a ship repair contractor like BAE to a ship repair worker  
20 like Plaintiff.” (ECF No. 118 at 11-12). BAE Systems contends that it did not breach  
21 its duty of care because the ladder with the missing handrail did not constitute an  
22 unreasonably dangerous hazard. *Id.* at 12-13. Further, BAE Systems contends that it  
23 did not have a duty to warn of or remedy the condition of the ladder because the missing  
24 inboard handrail constitutes an “open and obvious hazard.” *Id.* at 14-15. BAE Systems  
25 contends that it does not owe Marable any contractual duty under NAVSEA Standard  
26 009-07 because (1) Plaintiffs failed to plead a breach of contract cause of action against  
27 BAE or to allege that they were third-party beneficiaries under the contract between  
28 BAE and the U.S. Navy; (2) Plaintiffs did not raise the issue of breach of contractual

1 duty in the pretrial order or pretrial brief; and (3) Plaintiffs failed to demonstrate at trial  
2 that they were parties to the contract between BAE and the Navy or that they were  
3 intended third-party beneficiaries of the government contract. (ECF No. 124 at 16-17).

4 The Court concludes that BAE Systems did not owe Marable a contractual duty  
5 to identify and remedy the condition of the incident ladder with the missing inboard  
6 handrail under NAVSEA Standard 009-07. Plaintiffs cite section 3.8 of the NAVSEA  
7 Standard 009-07 as the basis of this contractual duty. This section states,

8 3.8 Accomplish a fire prevention and housekeeping inspection on a daily  
9 basis whenever work is in progress. The inspection shall be made jointly  
10 with the SUPERVISOR and the Commanding Officer's designated  
11 representative.

12 3.8.1 Submit one legible copy, in electronic media, of a written  
13 report of the discrepancies and corrective actions, using Attachment A, to  
14 the SUPERVISOR and the Commanding Officer's designated  
15 representative within 4 hours after completion of the inspection.

16 (Plaintiff Exhibit 35 at 9). Attachment A included within NAVSEA Standard 009-07  
17 is the discrepancy and corrective action log listed in Section 3.8.1 and lists Type Codes  
18 for use in completing the log, including "12-Unguarded/Edges/Holes/Openings/Fall  
19 Protection." (Plaintiff Exhibit 35 at 11-12).

20 Plaintiffs have not satisfied their burden to establish a right to bring a claim  
21 premised on a provision in NAVSEA Standard 009-07. NAVSEA Standard 009-07 is  
22 incorporated into a contract between BAE Systems and the United States, through  
23 SWRMC. "[O]nly a party to a contract or an intended third-party beneficiary may sue  
24 to enforce the terms of a contract or obtain an appropriate remedy for breach."  
25 *GECCMC 2005-C1 Plummer St. Office Ltd. Partnership v. JPMorgan Chase Bank,*  
26 *Nat'l Assoc.*, 671 F.3d 1027, 1033 (9th Cir. 2012). "This is 'a comparatively difficult  
27 task': a party that benefits from a government contract is presumed to be an incidental  
28 beneficiary, and that presumption may not be overcome without showing 'a clear intent  
to the contrary.'" *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1160  
(9th Cir. 2016) (citing *Cty. of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1244 (9th  
Cir. 2009)). "[A] putative third-party beneficiary must demonstrate an intent on the part  
of the contracting parties to 'grant [it] enforceable rights.'" *Id.* (citing *Orff v. United*

1 *States*, 358 F.3d 1137, 1147 (9th Cir. 2004)). Plaintiffs have failed to provide evidence  
2 to establish that Marable is a party to or an intended third-party beneficiary to the  
3 contract incorporating the responsibilities set forth in NAVSEA Standard 009-07.

4 The Court concludes that BAE Systems owed to Marable “the ordinary  
5 negligence duty of reasonable care under the circumstances.” *Peters*, 857 F.2d at 1344  
6 (holding that the duty owed to a ship repairman in a general maritime action for  
7 negligence is the ordinary negligence duty of reasonable care under the circumstances).<sup>3</sup>

8 On the day of the incident, the inboard handrail on the incident ladder had been  
9 removed. The outboard handrail on the incident ladder remained in place. Marable  
10 testified that he recognized that the incident ladder was missing one of its two handrails  
11 prior to using it and felt that it was safe. During his testimony, Marable was asked,  
12 “And at that time [prior to using the ladder], did you feel like you could safely get up  
13 the ladder?” Marable responded, “Yes, I did.” (Marable TT, 188: 7-20). Marable had  
14 thirty years of experience doing scaffolding work and had spent significant time  
15 working on vessels such as the USS Pinckney. Marable testified that as superintendent  
16 he had the authority and responsibility to stop work if he identified an unsafe condition.  
17 Marable climbed the incident ladder both before and after his slip although he was  
18 aware of available alternate routes by which he could reach his work area. Marable  
19 testified that even after the slip, he “knew [the ladder] was safe.” (Marable TT 238:19,  
20 193-194). Further, expert witness James Dolan testified that it is common for  
21 experienced ship repairman to go up and down a ladder using one hand on a railing and  
22 that a ladder with one handrail removed would not be a safety hazard for the  
23 experienced ship repair person like Marable. The Court concludes that the incident  
24 ladder with an outboard handrail in place did not constitute an unreasonably dangerous  
25 condition to an experienced ship repair person.

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26  
27 <sup>3</sup> Defendant BAE and Plaintiffs filed briefs regarding the applicable standard of  
28 care in the negligence action against the BAE prior to the trial. (ECF Nos. 64, 67, 69).  
Defendant BAE’s “Motion Regarding the Appropriate Standard of Care” is granted in  
that this Order determines that BAE Systems owed a duty of reasonable care under the  
circumstances to Marable. (ECF No. 64).

1 Further, the Ninth Circuit has held that “the limits of negligence liability in  
2 section 905 cases against a Vessel [are] instructive on the limits of negligence liability  
3 in suits against other defendants.” *Peters*, 857 F.2d 1342, 1345 (9th Cir. 1988). In  
4 *Peters*, the Ninth Circuit Court of Appeals considered a similar negligence action by a  
5 ship repairman against a non-vessel defendant under general maritime law after the  
6 repairman suffered injuries while conducting repair work. *Id.* at 1343-45. The Court  
7 of Appeals applied § 905(b) case law that held that defendants were not liable where a  
8 plaintiff-ship repair person was injured by the condition he was hired to repair. *Id.* at  
9 1345. In various negligence cases under the LHWCA, courts have held that vessel  
10 owners do not have a duty to warn of open and obvious conditions. *See Howlett*, 512  
11 U.S. at 99-100 (“[T]he duty [to warn] attaches only to latent hazards, defined in this  
12 context as hazards that would be neither obvious to nor anticipated by a competent  
13 stevedore in the ordinary course of cargo operations.”); *Ludwig*, 941 F.2d at 852 (“A  
14 shipowner may rely on the expertise of longshoremen and leave unremedied conditions  
15 that would otherwise be considered dangerous to less skilled persons.”). In this case,  
16 Marable testified that he was aware of the missing inboard handrail on the incident  
17 ladder prior to using the ladder. The Court concludes that the missing inboard handrail  
18 on the incident ladder constituted an open and obvious condition. In light of *Peters* and  
19 the section 905(b) cases limiting liability for open and obvious conditions, the Court  
20 concludes that BAE did not have a duty to warn or remedy due to the open and obvious  
21 nature of the missing inboard handrail on the incident ladder.

22 The Court concludes that Plaintiffs did not prove by a preponderance of the  
23 evidence that the missing inboard handrail on the incident ladder created an  
24 unreasonably dangerous condition to an experienced ship repair person. The Court  
25 concludes that Defendant BAE Systems did not have any duty to warn Marable of the  
26 missing inboard handrail on the incident ladder or remedy the condition of the incident  
27 ladder. The Court finds that Plaintiffs have not demonstrated by a preponderance of the  
28 evidence that Defendant BAE Systems breached its duty of reasonable care under the

1 circumstances.

2 **III. Loss of Consortium**

3 Because the Court concludes that Defendants United States and BAE Systems are  
4 not liable to Plaintiffs for any act of negligence in relation to injuries sustained by  
5 Phillip Marable, Plaintiff Gisela Marable's cause of action for loss of consortium is  
6 dismissed. *See Hahn v. Mirda*, 54 Cal. Rptr. 3d 527, 531 (Ct. App. 2007) ("A cause of  
7 action for loss of consortium is, by its nature, dependent on the existence of a cause of  
8 action for tortious injury to a spouse. . . . [I]t stands or falls based on whether the spouse  
9 of the party alleging loss of consortium has suffered an actionable tortious injury.").  
10 Judgment shall be entered in favor of the United States and BAE Systems as to  
11 Plaintiffs' third cause of action.

12 **IV. Cross-Claims by BAE Systems and United States**

13 BAE Systems brings cross-claims for contribution and indemnity against the  
14 United States. (ECF No. 6 at 9-11). The United States also brings cross-claims for  
15 contribution and indemnity against BAE Systems. (ECF No. 3 at 12-15). These claims  
16 were predicated on the Court finding any liability on the part of either Defendant on the  
17 negligence causes of action. The Court has not found that either Defendant was  
18 negligent with respect to any duty owed to Phillip Marable under general maritime law  
19 or the LHWCA. Accordingly, the Court dismisses the United States' cross-claims for  
20 contribution and indemnity and Defendant BAE System's cross-claims for contribution  
21 and indemnity.

22 **CONCLUSION**


23 Plaintiffs have failed to establish by a preponderance of the evidence that they  
24 are entitled to prevail on the three causes of action alleged in the Complaint.

25 IT IS HEREBY ORDERED that the Clerk of Court shall enter judgment in favor  
26 of Defendants BAE Systems San Diego Ship Repair Inc. and United States and against  
27 Plaintiffs Phillip Marable and Gisela Marable as to all causes of action in the  
28 Complaint.

1 IT IS HEREBY ORDERED that the cross-claims for contribution and indemnity  
2 by the United States and BAE Systems are dismissed.

3 IT IS FURTHER ORDERED that the Motion to Apply the Appropriate Standard  
4 of Care filed by Defendant BAE Systems is granted. (ECF No. 64).

5 DATED: December 21, 2017

6   
7 **WILLIAM Q. HAYES**  
8 United States District Judge

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