

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID STILLWELL and ROCCO J.
SCALONE,

Plaintiff,

v.

Case No: 8:16-CV-02568-MSS-TGW

UNITED STATES DEPARTMENT OF
COMMERCE, NATIONAL OCEANIC
AND ATMOSPHERIC
ADMINISTRATION,

Defendant.

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ORDER

THIS CAUSE comes before the Court upon consideration of the Motion for Summary Judgment (Dkt. 10) filed by Plaintiff, David Stillwell, and the Response in opposition thereto and Cross-Motion for Summary Judgment (Dkt. 12) filed by Defendant, United States Department of Commerce, National Oceanic and Atmospheric Administration. More specifically, this action arises out of Plaintiffs' appeal of a \$5,000.00 fine imposed and affirmed upon administrative review against him for a claimed violation of the Magnuson-Stevens Act (hereinafter "MSA"), 16 U.S.C. § 1801 *et seq.*. Upon consideration of all relevant filings, case law, and being otherwise fully advised, this Court **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

I. STATUTORY AND REGULATORY FRAMEWORK

In 1976, Congress enacted the MSA as a remedial effort to protect the Nation's fisheries from the adverse impacts of overfishing, which threatened the nation's food supply, health, and economy. 16 U.S.C. § 1801(a). Congress found that immediate action was necessary to conserve and manage the fishery resources within waters of the United States. 16 U.S.C. § 1801(b)(1). The MSA establishes eight fishery management councils that are responsible for developing Fishery Management Plans ("FMPs") for fisheries in federal waters within the United States Exclusive Economic Zone ("EEZ"), which generally includes ocean waters from three to 200 miles offshore. 16 U.S.C. §§ 1852(h)(1), 1811(a). The Secretary of Commerce, advised by the councils and acting through the National Marine Fisheries Service ("NMFS")—a subagency within NOAA—is authorized to approve, disapprove, or partially approve FMPs and promulgate implementing regulations. *Id.* §§ 1854, 1855(d). FMPs must be consistent with a set of "national standards" outlined in the MSA. *Id.* § 1851(a). National Standard number 9 requires fishery management measures that "to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch." *Id.* § 1851(a)(9).

This case involves reef fish longline and hook and line fishing in the Gulf of Mexico, which sometimes results in the bycatch of sea turtles that may be caught on fishing hooks or entangled in fishing line. Sea Turtle Conservation; Observer Requirement for Fisheries, 72 Fed. Reg. 43,176, 43,176 (Aug. 3, 2007) ("Incidental take, or bycatch, in fishing gear is one of the main sources of sea turtle injury and mortality nationwide."). All six species

of sea turtles found in the United States' territorial sea and EEZ are listed as either threatened or endangered under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* See 50 C.F.R. § 17.11(h) (2011) (containing the "List of Endangered and Threatened Wildlife"); id. § 223.102(b) (2011) (listing threatened species of sea turtles); id. § 224.101(c) (2011) (listing endangered species of sea turtles). In 2005, NMFS completed a biological opinion assessing the impact of the Gulf of Mexico Reef Fish FMP on endangered and threatened species, including sea turtles, in compliance with the Endangered Species Act, 16 U.S.C. § 1536(a)(2). Sea Turtle Conservation; Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic, 74 Fed. Reg. 53,889-02, 53,890 (Oct. 21, 2009). The biological opinion determined that "a reasonable and prudent measure to minimize the impacts of the incidental take of sea turtles . . . during reef fish fishing was to ensure that any caught sea turtle . . . is handled in such a way as to minimize stress to the animal to increase its survival." Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 18A, 71 Fed. Reg. 45,428, 45,430 (Aug. 9, 2006). The biological opinion required NOAA to adopt regulations to reduce the incidental injury or mortality to sea turtles caught during reef fish fishing by mandating that fishermen comply with sea turtle handling and release protocols.

Accordingly, NOAA promulgated regulations requiring commercial Gulf reef fishing vessels to: (a) post on board a copy of a document issued by NMFS entitled "Careful Release Protocols for Sea Turtle Release With Minimal Injury"; (b) comply with sea turtle bycatch mitigation measures to safely handle and release sea turtles; and (c) keep certain

sea turtle bycatch mitigation gear on board. 50 C.F.R. § 635.21(c)(2)(vii)¹. Pursuant to 50 C.F.R. § 622.179(a)(1)(iii), vessels with a freeboard height of four feet or less such as the F/V Miss Stephanie “must have on board” eight items of sea turtle mitigation gear:

1. A dipnet meeting minimum design standards, including a sturdy net hoop with at least a 31-inch diameter and 38-inch bag depth. 635.21(c)(5)(i)(E).
2. A standard passenger vehicle tire for supporting a turtle in an upright orientation while it is on board or, as an alternative, “life rings, seat cushions, life jackets, and life vests or any other comparable, cushioned, elevated surface that allows boated sea turtles to be immobilized.” 635.21(c)(5)(i)(F).
3. A shorthanded dehooker meeting minimum design standards. 635.21(c)(5)(i)(G), (H).
4. Long-nose or needle-nose stainless steel pliers approximately 12 inches long. 635.21(c)(5)(i)(I).
5. Bolt cutters approximately 17 inches in total length, with 4-inch long blades that are 2 ¼ inches wide when closed, 13-inch long handles, and the ability to cut hard metals up to ¼ inch in diameter. 635.21(c)(5)(i)(J).
6. Monofilament line cutters meeting minimum design standards. 635.21(c)(5)(i)(K).
7. A mouth opener or gag that can be used to open sea turtle mouths and keep them open when removing ingested hooks. Accepted types of mouth openers/gags include: a block of hard wood, a set of three canine mouth gags, a set of two sturdy dog chew bones, a set of two rope loops covered in hose, a hank of rope of

¹ This citation reflects the current regulation. At the time of the incident in question the relevant citation was 50 C.F.R. § 622.10(b)(1). The Factual Background section references the regulation in question as it was cited at the time of the incident.

approximately 2 to 4 inches in thickness, a set of four PVC splice couplings, or a large avian oral speculum. Each type of mouth opener/gag must meet the minimum design standards prescribed by regulation. 635.21(c)(5)(i)(K).

8. A second mouth opener or gag that also complies with the requirements set forth within 635.21(c)(5)(i)(K).

These eight items of gear must be kept on board and “must be used to disengage any hooked or entangled sea turtles in accordance with the handling requirements.” 50 C.F.R. § 635.21(c)(5)(i). As explained in the regulations, the large dipnet is necessary to safely bring a sea turtle on board a vessel. 50 C.F.R. § 635.21(c)(5)(i)(E), (ii)(B). At least one tire or alternative cushioned surface is used to immobilize the turtle in an upright orientation so that hooks and line can be removed safely. 50 C.F.R. §§ 635.21(c)(5)(i)(F), (ii)(B)(1). Depending on the location of an embedded hook, the short-handled de-hooker and needle-nose pliers are used to remove embedded or ingested hooks. 50 C.F.R. §§ 635.21(c)(5)(i)(G)-(I), (ii)(B)(4). If the hook is inside the sea turtle’s mouth, the fisherman must use the mouth openers/gags to open and keep open the turtle’s mouth in order to allow access to the hook or line without causing further injury to the turtle. 50 C.F.R. § 635.21(c)(5)(i)(L). Needle-nose pliers may also be used to hold certain mouth openers in place. 50 C.F.R. § 635.21(c)(5)(i)(I). Bolt cutters are essential for cutting the eye or barb off of an embedded fishing hook, which may facilitate the removal of the hook, or if the hook cannot be safely removed, minimize the amount of the hook left in the sea turtle. 50 C.F.R. §§ 635.21(c)(5)(i)(J), (ii)(B)(3), (4). Finally, line cutters are necessary to remove as much line as possible from the sea turtle. 50 C.F.R. §§ 635.21(c)(5)(i)(K), (ii)(B)(3).

It is unlawful for any owner or operator of a Gulf reef commercial fishing vessel to fail to comply with these protected species conservation measures. 16 U.S.C. § 1857(1)(A). NOAA may enforce these requirements by assessing a monetary penalty for violations of the MSA or its regulations. See 16 U.S.C. § 1858(a); 50 C.F.R. § 600.740. The MSA provides a maximum civil penalty of \$140,000 per day for each violation. 16 U.S.C. § 1858(a) (setting the civil penalty maximum at \$100,000 per violation); 15 C.F.R. § 6.4(f)(14) (2011) (adjusting the maximum penalty up to \$140,000 per violation, due to inflation).

II. FACTUAL BACKGROUND

On February 16, 2012, United States Coast Guard Boatswain's Mate, First Class Petty Officer Gary P. Ruane II boarded the F/V Miss Stephanie to conduct a random inspection for compliance with federal law. (AR at 412; AR at 437 – 38; AR. at 760; AR at 767). Plaintiff David Stillwell owned the F/V Miss Stephanie and, at the time of boarding, Plaintiff Rocco Scalone was acting as the vessel's captain. (AR at 412; AR at 440). At the time of the inspection Ronald Castro was also on board the vessel as a crew member. (AR. at 440). Because the F/V Miss Stephanie had a freeboard height of less than four feet, Officer Ruane inspected the vessel for compliance with the sea turtle bycatch mitigation requirements found at 50 C.F.R. § 622.10(b)(1). (AR. at 445 – 47; AR. at 767).

Utilizing a Coast Guard sea turtle mitigation gear checklist, Officer Ruane went “line-by-line” asking Scalone for each item of required gear. (AR. at 259; AR. at 446 – 47; AR. at 860). Scalone was not able to produce five of the required eight pieces of sea turtle mitigation gear, although Officer Ruane gave Scalone time to search for each piece of the required gear. (AR. at 504 – 05; AR. at 577). Specifically, Scalone was unable to produce

a dipnet, bolt cutters, a tire or equivalent cushioned surface, or two types of mouth gags/openers. (AR. at 448; AR. at 450 – 51; AR. at 449). Based on the observation that five pieces of sea turtle mitigation gear were missing, Officer Ruane found the F/V Miss Stephanie was not in compliance with 50 C.F.R. § 622.10(b)(1) and prepared a Fisheries Violation Report, which Scalone signed. (AR. at 455; AR. at 760 – 64; AR. at 767).

The Coast Guard forwarded the report to NOAA. On September 25, 2012, NOAA issued a notice of Violation and Assessment to Plaintiffs Stillwell and Scalone, asserting that Plaintiffs failed to comply with the sea turtle conservation measures provided by 50 C.F.R. § 622.10(b)(1) in violation of the MSA, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(ff). (AR. at 2 – 4). NOAA imposed a \$5,000.00 penalty. (AR. at 2 – 6). Plaintiffs requested an administrative hearing pursuant to 16 U.S.C. § 1858(a), (AR. at 6), and in March 2014 the hearing commenced before Administrative Law Judge M. Lisa Buschmann in Tampa, Florida.

Scalone, Stillwell, and Castro each testified at the hearing. The witnesses testified that the five items of sea turtle mitigation gear were on board, even though they were not presented to Officer Ruane. (See, e.g., AR. at 665-69; AR. at 692-94). Scalone testified that he “d[id]n’t recall if [Officer Ruane] expressly said ‘I need to see this, this and this’” but remembered Officer Ruane asking to see the gear. (AR. at 565-66). Scalone admitted that he “did not know where all that [sea turtle mitigation] equipment was.” (AR. at 577). The ALJ accepted into evidence several photographs submitted by Plaintiffs to show potential sea turtle mitigation gear on the boat. (AR. at 874-75; AR. at 880-87; AR. at 892-96). One of these photos was date stamped from the same trip the F/V Miss Stephanie was on when Officer Ruane boarded and found the violation. (AR. at 874-75).

Scalone testified that it is possible to change the date and time stamp on the camera, but claimed that he did not do so. (AR. at 537-38; AR. at 544-45; AR. at 631).

The ALJ carefully weighed the evidence offered at the hearing and the arguments raised in the parties' Post-Hearing Briefs. In May 2015, the ALJ issued an Initial Decision and Order finding that the agency had proven by a preponderance of the evidence that Plaintiffs had violated the MSA, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 622.7(ff) by failing to comply with sea turtle bycatch mitigation measures. (AR. at 271). The ALJ specifically found that Plaintiffs were missing five pieces of sea turtle mitigation gear as required by 50 C.F.R. § 622.10(b)(1)(iii): (a) bolt cutters; (b) a dipnet; (c) a cushioned surface; and (d) two types of mouth openers/gags. (AR. at 271). The ALJ considered "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require" as well as NOAA's Penalty Policy, (AR. at 801-57), and assessed a penalty of \$5,000 against the Plaintiffs jointly and severally. (AR. at 270-80).

Plaintiffs filed a Motion for Reconsideration, (AR. at 284-93), which the ALJ denied. (AR. at 312-18). Plaintiffs then filed a Petition for Administrative Review with the NOAA Administrator pursuant to 15 C.F.R. § 904.273(a). (AR. at 319-32). The Administrator determined that Plaintiffs had "not identified any significant factual or legal errors in the ALJ's liability findings" and denied the Petition for Administrative Review. (AR. at 395-98). On September 6, 2016, Plaintiffs filed their Complaint in this Court seeking review of the ALJ's civil penalty assessment pursuant to 16 U.S.C. § 1858(b).

III. STANDARD OF REVIEW

A. Summary Judgment

Ordinarily, summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). In cases involving judicial review of agency action, however, the district court acts as an appellate tribunal and “the entire case on review is a question of law.” Brinkllys v. Johnson, 175 F. Supp. 3d 1338, 1349 (M.D. Fla. 2016) (quoting Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C.Cir. 2001)). In such cases, “[s]ummary judgment is the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review.” Id. at 1350 (quoting CS–360, LLC v. U.S. Dep’t of Veterans Affairs, 101 F.Supp.3d 29, 32 (D.D.C. 2015)). Thus, “the court does not look at whether there is a genuine issue of material fact, but instead turns directly to the question of the validity of the challenge.” Malladi v. Brown, 987 F. Supp. 893, 922 (M.D. Ala. 1997), aff’d sub nom. United States v. Ponder, 150 F.3d 1197 (11th Cir. 1998) (citing Good Samaritan Hosp., Corvallis v. Mathews, 609 F.2d 949, 951 (9th Cir.1979))

B. Administrative Procedures Act

The MSA provides that civil penalties for violations of the Act may be set aside only “if they are not found to be supported by substantial evidence, as provided in section 706(2) of [the Administrative Procedure Act (“APA”).” 16 U.S.C. § 1858(b) (referring to 5 U.S.C. § 706(2)). “[S]ubstantial evidence” means “more than a mere scintilla.”

Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. Nat'l Labor Relations Bd., 305 U.S. 197, 229 (1938)). “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. The substantial evidence standard is “highly deferential” to the agency’s findings of fact. Todorovic v. U.S. Attorney Gen., 621 F.3d 1318, 1323 (11th Cir. 2010); see also Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 705 (1980). Thus, “[t]he substantial evidence standard limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighting the evidence.” DeKalb Cty. V. U.S. Dep’t of Labor, 812 F.3d 1015, 1020 (11th Cir. 2016) (quoting Stone & Webster Constr., Inc. v. U.S. Dep’t of Labor, 684 F.3d 1127, 1132 (11th Cir. 2012)).

Legal conclusions are generally reviewed *de novo*, however courts give deference to agencies’ interpretations of the statutes and regulations they administer. DeKalb Cty., 812 F.3d at 1020. Here, the ALJ’s opinion was affirmed on an administrative appeal by the NOAA Administrator, making it the “final determination” of the agency. R. at 395-97; see Raniolo v. Comm’r of Soc. Sec., 464 F. App’x 836, 837 (11th Cir. 2012) (deferring to an ALJ’s interpretation of a statute when the ALJ’s decision was affirmed by the Commissioner of Social Security); Pac. Ranger, LLC v. Pritzker, 211 F. Supp. 3d 196, 208, 213-14 (D.D.C. 2016) (noting that when the NOAA Administrator affirmed an ALJ decision, it became the final action of the agency and warranted deference on interpretations of NOAA regulations). When deciding issues of law, courts owe “substantial deference to an agency’s interpretation of its own regulations.” Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). Therefore, the ALJ’s interpretation of a regulation in this case “must be given controlling weight unless it is plainly erroneous

or inconsistent with the regulation.” Id. (quotation marks and citation omitted) Judicial review is based on the administrative record filed in this case. See United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-15 (1963); 16 U.S.C. § 1858(b) (requiring the agency to file a certified copy of the administrative record to guide the district court’s review of an MSA penalty assessment).

IV. DISCUSSION

Plaintiffs contend that this Court should overturn the findings of the Administrative Law Judge (hereinafter “ALJ”) because the Judge’s findings were erroneous, frivolous, and not supported by competent and substantial evidence. (Dkt. 10 at 1). Plaintiffs also argue that the ALJ did not consider relevant evidence in the form of photographs. (Dkt. 10 at 2). Based on the testimony of Officer Ruane, Scalone, Castro and Stillwell, the ALJ found by a preponderance of the evidence that the vessel did not have on board bolt cutters, two types of mouth gags or mouth openers, a cushioned surface, and a dipnet. (AR. at 264 – 270). In making these determinations, the ALJ found the Plaintiffs in noncompliance with 50 C.F.R. § 622.10(b)(1)(iii).

Importantly, Plaintiffs do not contest that they were unable to produce the required Sea Turtle Mitigation Gear to Officer Ruane. In fact, Plaintiffs explicitly state that they did not produce the necessary gear to Officer Ruane during the February 16th inspection of the F/V Miss Stephanie by the Coast Guard. This concession comes in both a written acknowledgement and an oral concession. During the initial hearing before the ALJ the Agency proffered the Fisheries Violation Report signed by Scalone as an exhibit. (TR. at 213). This form contained Scalone’s signature indicating that Scalone would get the F/V

Miss Stephanie into compliance for any return trips. (TR. at 213). The Report signed by Scalone also indicated that five pieces of the Sea Turtle Mitigation Gear were missing, although it is disputed whether this language was included before or after Scalone signed his name. (TR. at 213). Besides signing the form acknowledging the F/V Miss Stephanie was not in compliance, Scalone also testified under oath that he did not know where the sea turtle mitigation gear was located at the time of the inspection. (TR. at 173). Based on the signature of Scalone on the Fisheries Violation Report and Scalone's testimony, this Court can conclude that Scalone was not able to produce the gear to Officer Ruane during the inspection.

Second, in Plaintiffs' request for relief the Plaintiffs seek to refute the credibility findings of the ALJ and urge this Court to reverse the ALJ's credibility findings. This Court is not empowered to substitute its credibility finding for those of the ALJ. As the Eleventh Circuit has made clear, "a clearly articulated credibility finding with substantial supporting evidence in the record will not be disturbed by a reviewing court." Foote v. Chater, 67 F. 3d 1553, 1564 (11th Cir. 1995). In the case at hand, the ALJ has clearly articulated the basis for the credibility findings and supported these findings with substantial evidence.

The ALJ first discusses in detail the credibility of Officer Ruane and his testimony. The ALJ begins by analyzing Officer Ruane's testimony regarding the "checklist" used during the boarding and inspection of the F/V Miss Stephanie. (AR. at 263 – 264). Officer Ruane testified that during the inspection of the F/V Miss Stephanie on February 16 he used the checklist and "went line-by-line and asked the master for each of these items." (TR. at 40 – 41). The ALJ found that Officer Ruane testified specifically and consistently with respect to his observations regarding each item listed on the checklist. (AR. at 263).

The ALJ also found that Officer Ruane's testimony was consistent with the length of time of the inspection, which Scalone testified lasted approximately 45 minutes. (AR. at 263). The ALJ also considered Scalone's testimony, finding Scalone's testimony inconsistent in regard to Officer Ruane's inspection. Specifically, the ALJ cited Scalone's testimony that "I don't recall if he expressly said 'I need to see this, this, and this.'" (AR. at 264). Taking into account the consistency of Officer Ruane's testimony, the inconsistency of Scalone's testimony, the uncertainty of his recollection and other corroborating facts, the ALJ found Officer Ruane's testimony reliable and credible.

After establishing the credibility of Officer Ruane, the ALJ then discussed in detail the arguments of the Parties pertaining to each individual disputed piece of the Sea Turtle Mitigation Gear. The ALJ first addressed the bolt cutters required by 50 C.F.R. § 635.21(c)(5)(i)(J). At the hearing Scalone testified that bolt cutters would have been produced during the inspection had Officer Ruane allowed Scalone to confer with Castro, the other crewman on board the F/V Miss Stephanie. (AR. at 264). Scalone and Castro both testified that the bolt cutters were located in a tool box that was stored under the bunks. (AR. at 264). Scalone offered into evidence a photograph of the contents of the toolbox, including the bolt cutters. (AR. at 264). Based on the photograph offered by Scalone and Castro, the ALJ determined that even if the bolt cutters were offered during the inspection, they would not have met the requirements of the regulations. (AR. at 265). In making this determination, the ALJ cited 50 C.F.R. § 635.21(c)(5)(i)(J) which establishes "minimum design standards" for the bolt cutters. (AR. at 264 – 265). Specifically, the minimum design standards state that the bolt cutters must be 17 inches in total length with four-inch blades. After looking at the photograph offered by Scalone,

the ALJ determined that the blades of the bolt cutters were very short and could not be four inches long; thus, the vessel failed to have on board bolt cutters complying with the applicable regulations. (AR. at 265).

The ALJ next discussed the Mouth Openers/Mouth Gags. The regulations require vessels to have on board at least two of seven types of mouth openers and gags. The seven types of mouth gags and mouth openers include a block of hard wood, a set of three canine mouth gags, a set of two sturdy dog chew bones, a set of two rope loops covered in hose, a hank of rope, a set of four PVC splice couplings, or a large avian speculum. 50 C.F.R. § 635.21(c)(5)(i)(L). Officer Ruane testified that he went through the checklist and read off examples of what was acceptable. (AR. at 265). Further, Officer Ruane also testified that Scalone showed him PVC pipe that was already being used for vessel operation and that he did not see any rope covered in hose, measuring 6 feet in length, or already rolled into a hank. (AR. at 265). In rebuttal, Scalone testified that Castro knew where the PVC pipe, wood, and rope was located. (AR. at 266). Further, Castro testified that there was PVC pipe and wood in the wheelhouse and there was rope on deck that was greater than 6 feet in length.

The ALJ addressed each of the contentions made in Scalone and Castro's testimony. Beginning with the PVC pipe, the ALJ found that Castro and Scalone's testimony that they carried PVC pipe on the vessel does not support a finding that the PVC pipe fell into compliance with 50 C.F.R. § 635.21(c)(5)(i)(L)(6), which requires four PVC splice couplings. (AR. at 266). Similarly, the ALJ found that Castro and Scalone's vague references to wood did not support a finding that the wood was in compliance with 50 C.F.R. § 635.21(c)(5)(i)(L)(1), which requires a smooth block of hard wood measuring

approximately 11 inches long by one inch thick. (AR. at 266). Based on the lack of testimony proving that the vessel had wood or PVC Pipe on board that complied with the appropriate regulations, the ALJ found by a preponderance of the evidence that neither complying wood nor complying PVC pipe was on the F/V Miss Stephanie. (AR. at 266).

The ALJ also addressed the presence of the mouth gags/mouth openers by discussing the hank of rope. Scalone and Castro offered a photograph into evidence depicting a looped segment of rope attached to the bulkhead in front of a dipnet. (AR. at 266). Scalone testified that the rope was probably a dock line measuring thirty feet long and a half inch thick. (AR. at 266). Scalone further testified that he would be able to fashion the rope into a hank if necessary. (AR. at 266). The regulations describe a hank as “A 6-foot lanyard of approximately 3/16-inch braided nylon rope may be folded to create a hank, or looped bundle, of rope. Any size soft-braided nylon rope is allowed, however it must create a hank of approximately 2-4 inches in thickness.” The ALJ determined that the rope depicted in the photograph offered by Scalone and Castro was not folded into a hank of approximately 2-4 inches at the time of inspection and, therefore, did not meet the requirements of the regulations which state that the rope must already be folded into a hank to properly serve its purpose. (AR. at 266). As such, the ALJ found that the F/V Miss Stephanie was not in compliance with regulations at the time of the inspection because the vessel did not have any mouth gags or mouth openers on board. (AR. at 266).

After discussing the testimony surrounding the mouth gags and mouth openers, the ALJ discussed the testimony relating to the cushioned surface. Based on the testimony of Castro and Scalone, the ALJ determined that neither man knew the life jacket

or life ring on the vessel could be used as a cushioned surface for a sea turtle and therefore, neither device would have been used as sea turtle mitigation gear. (AR. at 268 – 269). In making this determination, the ALJ cited Scalone's testimony that when asked by Officer Ruane to produce a cushioned surface, Scalone never pointed to the life jackets or the life ring. (AR. at 268). Further, the ALJ analyzed Castro's testimony in which Castro referred to a dipnet, then stated the remainder of the sea turtle mitigation gear including the PVC pipe, wood, pliers, and hook extractors were located in a cubby in the wheelhouse. (AR. at 268). Since the lifejackets were not stored in the cubby, but were strapped to the ceiling, the ALJ determined that Castro did not know the lifejackets could be used as a cushioned surface. (AR. at 268).

The ALJ also found issue with the life ring on board the F/V Miss Stephanie during the inspection. Even if Scalone had presented the life ring to Officer Ruane, the F/V Miss Stephanie still would not have been in compliance. Officer Ruane testified to seeing the life ring on the vessel. (AR. at 268). In his testimony, Officer Ruane explained that the life ring on board the F/V Miss Stephanie was significantly larger than the standard passenger tire required by 50 C.F.R. § 635.21(c)(5)(i)(F) and would not allow a sea turtle to be immobilized. (AR. at 268). Officer Ruane also testified that the life ring was not made of the correct material. (AR. at 268). Based on the testimony of Castro and Scalone, showing that they were not aware that life jackets could serve as cushioned services, and the testimony of Officer Ruane explaining the life ring on board the vessel did not comply with the applicable regulations, the ALJ found the F/V Miss Stephanie did not have a cushioned surface on board.

Finally, the ALJ discussed the arguments surrounding the dipnet. At the hearing Officer Ruane testified that he did not see a dipnet and that neither Scalone nor Castro showed him a dipnet. (AR. at 269). In rebuttal, Scalone offered photographs into evidence depicting a dipnet mounted to the starboard side of the bulkhead. (AR. at 269). Regardless of the photographs, the ALJ found that the dipnet was not located on the vessel given the small size of the vessel, the location of the dipnet as depicted in the photographs, and testimony of Officer Ruane that Ruane read off each specified item of sea turtle mitigation gear and looked all over the vessel. (AR. at 270). Further, the ALJ determined that had the dipnet been attached to the vessel, Scalone would have pointed it out to Officer Ruane. (AR. at 270).

Besides the inferences drawn from the testimony of Officer Ruane, the ALJ questioned the authenticity of the photographs proffered by Castro and Scalone. In spite of the photographs, the ALJ found that neither Scalone, Stillwell, nor Castro provided evidence that a dipnet meeting the specific requirements contained in the regulations was onboard the F/V Miss Stephanie at the time of the inspection. (AR. at 270). The ALJ credited Officer Ruane's testimony over the photographs and offered a reasonable basis for doing so.

Plaintiffs' ask this Court to second guess the above listed findings of the ALJ. Even if the Court were permitted to second guess the findings of the ALJ, which it is not, second guessing would not warrant reversal of the resulting violation or fine. As demonstrated, the ALJ explained reasons for discounting the evidence and those reasons are sound. Further, even if the gear was on the vessel at the time of the inspection, the regulations call for the gear to be readily available to assist in the disentanglement of an endangered

sea turtle. Gear hidden in boxes under bunks, gear not readily producible by the captain, and gear in use by the vessel in other important and vital purposes, such as PVC pipe attached to other instruments and life vests required for use by the crew and passengers, does not qualify. Therefore, this Court will not disturb the findings of the ALJ.

Plaintiffs also contend that the ALJ's findings must be vacated because Plaintiffs' due process rights were violated. Due process claims can either be substantive or procedural. McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994). Plaintiffs have not cited a procedural due process claim nor have Plaintiffs cited a substantive due process claim.

Substantive Due Process protects those rights that are fundamental. Id. The Supreme Court has deemed that most of the rights enumerated in the bill of rights are fundamental, as well as certain un-enumerated rights such as the right to privacy, the right to marry, the right to have children, the right to direct the education and upbringing of one's children, the right to marital privacy, the right to use contraception, the right to bodily integrity, the right to abortion, and the right to refuse unwanted lifesaving medical treatment. Id.; Washington v. Glucksberg, 521 U.S. 702, 720 (1997). When asserting a Substantial due process claim, petitioners are required to assert a "careful description" of the fundamental liberty being infringed upon. Washington, 521 at 721. Plaintiffs in the instant case have not asserted any fundamental right, much less given a careful description of the right infringed upon. Instead, Plaintiffs assert broad claims of deprivation of due process and state that "there is no standard that would be fair to petitioners when a coast guard officer chooses to lie and deprive citizens of fundamental due process rights." (Dkt. 1). Based on Plaintiffs' failure to explicitly state and describe

an infringement of Plaintiffs' fundamental rights, this Court finds that the Plaintiffs were not deprived of their substantial due process rights.

Similarly, Procedural Due Process entitles an individual to notice and a hearing before state action deprives him or her of a liberty or property interest. Cryder v. Oxendine, 24 F.3d 175, 177 (11th Cir. 1994). The fundamental requirement is the person being deprived of their interest have an opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Plaintiffs have had an opportunity to be heard in the present case. Plaintiffs had the opportunity to be heard at the initial hearing in front of the ALJ and have had the opportunity to challenge the citation, which Plaintiffs have availed themselves of at every stage of the case, including here on appeal. As such, this Court finds that Plaintiffs were not deprived of procedural due process rights.

V. CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Plaintiffs' Motion for Summary Judgment, (Dkt. 10), is **DENIED**.
2. Defendants' Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment, (Dkt. 12), is **GRANTED**.
3. The Clerk is directed to enter **FINAL JUDGMENT** in favor of Defendants.
4. After entry of final judgment, the Clerk shall terminate any pending motions and **CLOSE** this case.

DONE and **ORDERED** in Tampa, Florida, this 27th day of November, 2017.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

Any Unrepresented Person