

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 07 2018

SIMS CRANE,

Contestant

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

CONTEST PROCEEDING

Docket No. SE 2017-0097
Mine I.D. 08-00981

Mine: Wingate Creek Mine

DECISION AND ORDER

Appearances: W. Ben Hart, W. Ben Hart & Associates, Tallahassee, Florida for
Contestant

Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado for Respondent

Before: Judge McCarthy

This case is before me after the Commission reopened and remanded a Notice of Contest of Withdrawal Order under Section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act or the Act) for further proceedings pursuant to the Act and the Commission's Procedural Rules. See 29 C.F.R. §§ 2700, 2700.22; *Sims Crane*, 39 FMSHRC ___, No. SE 2017-97-RM (July 7, 2017).¹

I. STATEMENT OF THE CASE

The alleged violation at issue in this proceeding is imminent danger Order No. 8823572. Order No. 8823572 was issued on September 23, 2015 by MSHA Inspector Robert Peters in conjunction with 104(a) Citation No. 8823573 after Peters witnessed truck driver William Nasrallah exit a mobile crane's cab area and walk forward across the left front fender without using handholds or fall protection. *Sims Crane*, 39 FMSHRC 116, 120-121 (Jan. 2017) (ALJ). Order No. 8823572 alleged that walking across the fender without fall protection presented an imminent danger. Citation No. 8823573 alleged a significant and substantial violation of 30 C.F.R. § 56.15005 for the same conduct. The Secretary filed a Petition for the Assessment of

¹ I have construed the Contestant's August 1, 2017 "Application for Vacation, Modification, or Termination," as a Notice of Contest.

Civil Penalty for Citation No. 8823573 under section 105(d) of the Act, which Sims Crane (Contestant) properly contested. *Id.* at 116. The proceeding was assigned to Docket No. SE 2016-0081.

The Secretary does not assess a civil penalty for a 107(a) order, and such orders are not included in the Secretary's Petition for the Assessment of a Civil Penalty. The Contestant averred that it contested Order No. 8823572 in conjunction with its contest of the Secretary's proposed penalty for 104(a) Citation No. 8823573 because Order No. 8823572 was referenced by number in the text of the Citation. *Id.* at 119 n.4. During pre-hearing proceedings in Docket No. SE 2016-0081, it became apparent that Contestant had failed to file a Notice of Contest to contest Order No. 8823573 as required by the Commission's procedural rules. 29 C.F.R. § 2700.22; *see also* 30 U.S.C. § 817(e)(1); *Sims Crane*, 39 FMSHRC 116, 119 n.4 (Jan. 2017) (ALJ).

A hearing was held in St. Petersburg, Florida, on November 14, 2016. During the hearing, the parties offered testimony and documentary evidence regarding both Citation No. 8823573 and Order No. 8823572, and the record was left open to allow the Contestant to submit evidence supporting its argument that it properly contested Order No. 8823572 as required by the Commission's procedural rules. *See, e.g.*, Tr. 11, 24, 54-56; *see also* 29 C.F.R. § 2700.22. Pursuant to the Commission's procedural rules governing simplified proceedings, the parties presented closing arguments in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e).²

On December 19, 2016, Contestant filed with the Commission a motion seeking to reopen imminent danger Order No. 8823572, which had become a final order of the Commission pursuant to section 107(e)(1) of the Mine Act, 30 U.S.C. § 817(e)(1).

On January 13, 2017, this tribunal issued its Decision and Order in Docket No. SE 2016-0081.³ As relates to Order No. 8823573, this tribunal found the following:

² In this decision, "Tr. #" refers to the hearing transcript, "Jt. Ex. #" refers to joint exhibits, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the Contestant's exhibits. Jt. Ex. 1, P. Exs. 1-10, and R. Exs. 1-14 were received into evidence at the hearing.

³ Regarding the alleged violation in Citation No. 8823573, the Secretary argued that Nasrallah's travel across the fender wheel well, approximately seven feet above the paved road, without maintaining three points of contact, constituted a violation of 30 C.F.R. § 56.15005. *Sims Crane*, 39 FMSHRC 116, 120 (Jan. 2017) (ALJ). The Secretary also alleged that the violation was S&S, highly likely to cause permanent disabling injury to one person, and the result of Respondent's moderate negligence. *Id.* at 116-117. This tribunal found that the Secretary failed to "establish by a preponderance of the evidence that there was a reasonable likelihood that Nasrallah would fall from the crane as he briefly took three steps" while walking on the three-foot wide fender with a slip-resistant surface. *Id.* at 126. This tribunal also found that the violation was not the result of Sims Crane's negligence because the Secretary failed to establish that Sims Crane knew or should have known of Nasrallah's violation, Sims Crane trained its employees to maintain at least three points of contact during access or egress of mobile equipment, and MSHA's Policy

Order No. 8823572 was issued by MSHA inspector Robert Peters under section 107(a) of the Act, in conjunction with Citation No. 8823573, the single citation at issue in this proceeding. Although the parties' stipulations reference this Court's jurisdiction over Order No. 8823572, the Commission's records contain no indication that Respondent timely filed its Notice of Contest within 30 days of the receipt of Order No. 8823572, as required under the Commission's procedural rules. *See* Commission Procedural Rule 22, *Notice of contest of imminent danger withdrawal orders under section 107 of the Act*, 29 C.F.R. § 2700.22. The record was left open after hearing to permit Respondent to submit such evidence. Tr. 57, 154-55. In an e-mail to my attorney advisor on November 28, 2016, Respondent argued that it had contested Order No. 8823572 at the same time it contested the proposed penalty assessment for Citation No. 8823573 because the Order was referenced by number in the text of the Citation. However, the Commission's procedural rules provide that Notices of Contest regarding imminent danger orders must be filed with the Commission within 30 days of the termination of the order. *Id.* Even assuming that contesting the Petition for the Assessment of Civil Penalty for Citation No. 8823573 was sufficient to also contest Order No. 8823572, MSHA did not receive Respondent's Notice of Contest regarding the proposed penalties for Citation No. 8823573 until December 23, 2015. *See* Ex. A, *Sec'y of Labor's Petition for the Assessment of Civil Penalty*, Docket No. SE 2016-0081. Since Order No. 8823572 was terminated on September 23, 2015, Respondent should have filed its Notice of Contest by October 23, 2015. P. Ex. 6. Despite the parties' stipulations to the contrary, I find that Respondent never timely filed its Notice of Contest regarding Order No. 8823572, and I consequently lack jurisdiction over that Order. I therefore decline to address Order No. 8823572 in this Decision and Order.

Sims Crane, 39 FMSHRC 116, 119 n.4 (Jan. 2017) (ALJ).

Contestant filed a Petition for Discretionary Review of that Decision and Order on February 13, 2017. The Commission granted Contestant's Petition on February 22, 2017. Docket No. SE 2016-0081 is still pending before the Commission.

On July 7, 2017, the Commission issued an order reopening and remanding Order No. 8823572 for further proceedings. *Sims Crane*, 39 FMSHRC ___, slip op. at 7, No. SE 2017-97-RM (July 7, 2017). The proceeding was assigned to Docket No. SE 2017-0097-RM. The Commission held that reopening the final order was appropriate under Federal Rule of Civil Procedure 60(b)(1) because the Contestant clearly expressed its understanding that it had properly contested the imminent danger order, the Secretary of Labor's affirmative endorsement of the Contestant's misunderstanding fostered this mistaken belief, and the confluence of circumstances constituted an extraordinary mistake. *Sims Crane*, 39 FMSHRC ___, slip op. at 4-7, No. SE 2017-97-RM (July 7, 2017).

Information Bulletin No. 10-04 references standards that allow the use of two points of contact for support on walkways. *Id.* at 126-27.

This reopened proceeding was assigned to me on July 10, 2017. I stayed the proceedings in Docket No. SE 2017-0097 pending the Commission's decision in Docket No. SE 2016-0081. As it has been more than a year since this proceeding was stayed, I now issue the following Decision and Order.

II. PRINCIPLES OF LAW

Under section 107(a) of the Act, if an MSHA inspector “finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from” the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). An imminent danger exists whenever “the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” 30 U.S.C. § 802(j); *see also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *E. Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted)). For an imminent danger order to issue under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* Although the Commission has cautioned against narrowly construing imminent danger to include only immediate threats, there must be some degree of imminence to support an imminent danger order. That is, a hazard must be impending so as to require the withdrawal of miners. *Island Creek Coal Co.*, 15 FMSHRC at 345.

An inspector's issuance of a 107(a) order is reviewed under an abuse of discretion standard, meaning that a judge “must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.” *Wyoming Fuel*, 14 FMSHRC at 1291 (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)); *see also Knife River Construction*, 38 FMSHRC 1289, 1291 (June 2016). The Secretary must prove, by a preponderance of the evidence, “that the inspector reasonably concluded, based on information that was known or reasonably available to him at the time the order was issued, that an imminent danger existed.” *Knife River Construction*, 38 FMSHRC at 1291 (internal citation omitted). The Commission has recognized that “a judge is not required to accept an inspector's subjective perception that an imminent danger existed, but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed.” *Id.*

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Sims Crane is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to § 105 of the Act.
3. The citation and imminent danger order at issue in this proceeding were properly served upon Sims Crane as required by the Mine Act.
4. The citation and imminent danger order at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.
5. Sims demonstrated good faith in abating the violation.
6. The penalties proposed by the Secretary in this case will not affect the ability of Sims to continue in business.
7. Sims was at all time relevant to this proceeding engaged in mining activities at the Wingate Creek Mine located in or near Myakka City, Manatee County, Florida.
8. Sims' mining operations affect interstate commerce.
9. Sims is an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Wingate Creek Mine (Federal Mine I.D. No. 08-00981) where the contested citation and imminent danger order in this proceeding were issued.
10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation and imminent danger order.

Jt. Ex. 1.

B. Order No. 8823572

Order No. 8823572 was issued on September 23, 2015 by MSHA inspector Robert Peters, who observed the allegedly dangerous practice as he was driving to the mine site to conduct an inspection. Tr. 33. Peters arrived at the Wingate Creek Mine around 8:20 a.m. Tr. 33. As he drove toward the mine's administrative offices, he observed truck driver William Nasrallah loading a Tadano crane onto a lowboy trailer in preparation for removing the crane from the mine site. Tr. 33, 122. Specifically, Peters first saw Nasrallah near the cab of the crane, as if Nasrallah had just exited the cab. Tr. 34-35; P. Ex. 5 at 2. Peters then saw Nasrallah walk from the cab area forward across the left front fender of the crane. Tr. 33, 35; P. Ex. 5 at 4.

Peters pulled his vehicle over to the side of the road, parked, exited his vehicle, and approached Nasrallah at the crane. Tr. 38. As Peters was parking, Nasrallah descended from the front of the crane to the ground using the stepped ladder at the front left side of the crane. Tr. 114; R. Ex. 8.

After observing Nasrallah walking from the cab area of the crane over the front fender to the front of the crane, Peters issued Imminent Danger Order No. 8823572 based on the following practice:

Truck driver, William Nasrallah, was observed on top of the fender of the crane number RT 481. The crane had been loaded on a low-boy trailer for transport. The driver was observed leaving the cab of the crane, walking across the top of the wheel fender to exit the crane to ground level. The driver was not using any handholds or alternate means of fall protection[.] There was a danger of falling 7 feet to the road pavement. There was an exit/access ladder at the cab area which could have been used to exit the crane to the ground level. This confirms an oral imminent danger order issued to William Nasrallah, truck driver, at 0820 hours on this date.⁴

P. Ex. 6. Peters first issued the order orally to Nasrallah after Nasrallah descended from the crane. The order was likewise terminated at the same time at 8:21 a.m., when Nasrallah descended to the ground. P. Ex. 6; Tr. 58-69.

C. Peters' Conclusion that an Imminent Danger Existed was Not Objectively Reasonable.

The Secretary argues that Nasrallah's travel across the crane's wheel fender presented an immediate danger of falling that would result in a permanently disabling injury, and Order No. 8823572 should therefore be upheld. Tr. 39, 43, 52. Respondent argues that Nasrallah's ingress and egress procedure was in compliance with MSHA requirements and the manufacturer's recommendations, and therefore did not present an imminent danger. Tr. 27-29.

Peters first observed Nasrallah from about 15 yards away as he was driving onto the mine site. Tr. 33, 47. Specifically, Peters first saw Nasrallah near the cab of the crane, as if Nasrallah had just exited the cab. Tr. 34-35; P. Ex. 5 at 2. Peters then observed Nasrallah walk from the cab of the crane across the left front wheel well fender towards the crane's valve bank, a distance of between six and seven feet. Tr. 36, 39, 51, 78-79; P. Ex. 5 at 1, 4. Although Peters did not observe Nasrallah descend the stepped ladder at the front of the crane to reach the ground, Nasrallah testified that his normal procedure for exiting the crane involved crossing over the left front fender and descending via the stepped ladder at the front of the crane, rather than using the rung ladder immediately below the cab. Tr. 38, 114; *see also* P. Ex. 5 at 3, 4; R. Ex. 11. The top of the fender wheel well where Nasrallah crossed was seven feet above the ground, which included the height of the lowboy trailer. Tr. 43; *see also* R. Ex. 3 (MSHA Program Policy Letter indicating that compliance with OSHA's standard requiring fall protection for work surfaces 6 feet or more above a lower level may also satisfy the requirements of section 56.15005). Nasrallah's undisputed testimony indicates that he was not using fall protection. Tr. 120.

⁴ Nasrallah's undisputed testimony indicates that the crane was manufactured by Tadano. Tr. 122. Although the text of Order No. 8823572 indicates that the crane was an "RT 481," that particular model number does not correspond with any of the current production models nor the discontinued production models listed on Tadano's website. *See* <https://tadanoamerica.com/> (last accessed December 7, 2018).

When Peters first saw Nasrallah on top of the wheel fender without fall protection, he was concerned that Nasrallah would “misstep or trip and stumble” and consequently fall off the wheel well while crossing from the cab to the front of the crane. Tr. 36, 39, 42, 43, 51, 71, 72; P. Ex. 5 at 1, 4. Peters specifically identified the act of walking across the fender without fall protection as the imminent danger. Tr. 71. Peters testified that “anytime you’re walking in an area . . . you’re subject to . . . stumbling or making a small misstep,” especially because Nasrallah was presumably focused on his job and “he had everything on his mind except where he was.” Tr. 44.⁵ Peters further testified that Nasrallah’s position on top of the wheel fender was “a dangerous position to be in” because the fender was “just real narrow” and was not designed for use as a walkway. Tr. 42, 43, 52, 72. Peters estimated that the fender was about 20 inches wide, but he did not take a measurement. Tr. 43-44.

As the Commission has concluded, the Secretary must prove, by a preponderance of the evidence, “that the inspector reasonably concluded, *based on information that was known or reasonably available to him at the time the order was issued*, that an imminent danger existed.” *Knife River Construction*, 38 FMSHRC at 1291 (emphasis added). Peters first observed Nasrallah on the crane from about 15 feet away, walking across the fender without fall protection. Tr. 38-39, 47. Peters concluded that such circumstances presented a fall hazard, and he was concerned that Nasrallah might continue to work on the crane without fall protection. Tr. 39, 72. Accordingly, Peters immediately pulled over, parked his vehicle, approached the crane, and issued Order No. 8823572. Tr. 38, 69-71. Based on Peters’ observations from 15 yards away, I am inclined to conclude that Peters’ initial belief that an imminent danger existed was a reasonable one.

As noted, however, “a judge is not required to accept an inspector’s *subjective perception* that an imminent danger existed, but, rather, must evaluate whether it was *objectively reasonable* for the inspector to conclude that an imminent danger existed.” *Knife River Construction*, 38 FMSHRC at 1291 (emphasis added). At the time that Peters issued Order No. 8823572, his subjective perception was that Nasrallah had, without fall protection, walked across a narrow, 20-inch-wide fender that was not designed for use as a walkway. Tr. 42, 43, 52, 72, 78-79. I find that this subjective conclusion was not objectively reasonable because it failed to take into account information that was reasonably available to Peters at the time that he issued the order.

Peters’ conclusion that Nasrallah’s walk across the fender presented an imminent danger was based, in part, on his belief that the fender was “narrow” and only 20 inches wide. Tr. 42, 75. Robert Berry, Sims Crane’s safety director, testified that the fender was actually at least 36 inches wide, close to twice what Peters believed the width to be at the time he issued the order.⁶

⁵ Peters did not know what type of work Nasrallah was performing on the crane when he first observed Nasrallah as he was driving up to the mine site. When he first saw Nasrallah on top of the fender, he did not realize that Nasrallah was in the process of exiting the crane. Tr. 35, 39.

⁶ Although Peters estimated that the fender was 20 inches wide, he admitted he did not take a measurement. Tr. 75. Both Berry and Nasrallah testified that the fender was approximately three to three-and-a-half feet wide. Tr. 99, 125. I credit the mutually corroborative testimony of

Tr. 99. Moreover, the actual width of the fender constituted information that was reasonably available to Peters at the time he issued Order No. 8823572. He could have measured the width of the fender. Peters did, in fact, measure the fender's height from the ground, but declined to take a measurement of the fender's width. Tr. 43-44.

Peters also mistakenly assumed that the fender was not designed for use as a walkway, and that assumption figured prominently in his conclusion that Nasrallah's walk across the fender presented an imminent danger. Tr. 42, 43, 52, 72, 78-79. Both Berry and Nasrallah, however, credibly testified that the entire top surface of the crane, including the three-foot-wide fender, was coated with non-skid materials and was designed to be used as a walkway. Tr. 99, 124; *see also* R. Ex. 10; R. Ex. 12. As found in my Decision and Order in Docket No. SE 2016-0081, the presence of anti-slip material suggests that the manufacturer intended the surface for use as a walkway. *Sims Crane*, 39 FMSHRC 116, 123 (Jan. 2017) (ALJ). The fact that Peters took photographs of the truck after issuing Order No. 8823572 indicates that he had ample opportunity to examine the design and surface texture of the fender to determine whether it had, in fact, been designed for use as a walkway.⁷

In sum, I find that Peters' conclusion that Nasrallah's travel across the fender presented an imminent danger of falling was based on mistaken assumptions regarding the width of the fender and the intended design of the fender. Peters mistakenly assumed that the fender was only 20 inches wide and had not been designed for use as a walkway. Factually contrary information regarding the width of the fender and its design for use as a walkway was reasonably available to Peters at the time he issued the order. Had he chosen to do so, Peters could have measured the fender and examined the anti-slip surfacing before he issued the imminent danger order. I therefore find that the Secretary has not shown, by a preponderance of the evidence, that Peters' subjective conclusion regarding the imminent danger was objectively reasonable, because Peters did not take into account information that was reasonably available to him at the time the order was issued. *See Knife River Construction*, 38 FMSHRC at 1291 (“[A] Judge is not required to accept an inspector's subjective perception that an imminent danger existed, but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed.”). Rather, I find that Nasrallah's conduct of walking forward across the left front fender of the three to three-and-a-half-foot-wide, anti-skid coated surface without using handholds or fall protection could not reasonably be expected to cause death or serious physical harm within a short period of time. Accordingly, I conclude that Peters abused his discretion in issuing Order No. 8823572 because no imminent danger existed under an objective analysis that considers the totality of the circumstances.

Berry and Nasrallah, particularly because they are more familiar with the surface and because Peters gave an estimate and did not take a measurement.

⁷ On cross examination, Peters testified that the fact that the fender was covered in an anti-skid material “would have had no bearing on anything.” Tr. 73. This directly conflicts with his testimony that Nasrallah was in danger of falling because he was walking “in a place where it wasn't designed as a walkway,” and I therefore find no merit in his testimony that the anti-slip material would have had no bearing on his conclusion regarding whether or not Nasrallah's walk across the fender presented an imminent danger. Tr. 72.

IV. ORDER

For the reasons stated above, Order No. 8823572 is **VACATED**.

Thomas P. McCarthy
Thomas. P. McCarthy
Administrative Law Judge

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