FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 26, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2010-365-M A.C. No. 04-05632-203553
v.	:	
NORTH COUNTY SAND & GRAVEL, INC., Respondent	:	Mine: Roadrunner No. 32

DECISION

Appearances: Pamela Mucklow, Esq., & Timothy J. Turner, Esq., on brief, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; C. Gregory Ruffennach, Esq., Washington, D.C., for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against North County Sand & Gravel, Inc. pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in San Bernardino, California. The parties filed post-hearing briefs and Respondent filed a post-hearing reply brief.

North County operated the Roadrunner No. 32 mine in San Bernardino County, California. Citation No. 7980681 was adjudicated at the hearing. The Secretary proposed a total penalty of $5,961.00 for the citation. For the reasons set forth below, the likelihood of an injury alleged in the citation is modified from highly likely to reasonably likely, the gravity is modified from fatal to permanently disabling, and the negligence is modified from reckless disregard to high. In all other respects, the citation is affirmed.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 16, 2009, MSHA Inspector Steven Soderburg issued Citation No. 7980681 under Section 104(d)(1) of the Mine Act, alleging a violation of Section 56.15005 of the Secretary's safety standards. The citation states that the mine president and owner, Mike LaPaglia, did not wear fall protection when he was standing on top of the motor cover of a Roadrunner 450 portable track cone crusher. (Ex. G-9). The top of the motor cover was 58 inches above a travelway on the crusher, and 11 feet above the hard-packed ground. *Id.* Inspector Soderburg determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was

S&S,[1] the operator acted with reckless disregard, and one person was affected by the violation. Section 56.15005 of the Secretary's regulations requires, in pertinent part, that "[s]afety belts and lines shall be worn when persons work where there is danger of falling. . . ." 30 U.S.C. § 56.15005.

The Secretary originally proposed a penalty of $35,500.00 for this citation under MSHA's special assessment regulation. *See* 30 C.F.R. § 100.5. Subsequent to that assessment and prior to the filing of post-hearing briefs, the Secretary amended the proposed penalty to $5,961.00 in response to North County's motion to strike the specially assessed penalty. On July 30, 2013, I issued an order regarding Respondent's Motion to Strike and the Secretary's Motion to Amend the Penalty Proposal, which is incorporated herein by reference. *North County Sand & Gravel, Inc.*, 35 FMSHRC ____, 2013 WL 4648488 (July 30, 2013).

A. Summary of Evidence

Inspector Soderburg testified that as he drove his vehicle onto mine property he observed the president and owner of North County, Michael LaPaglia, standing on top of the engine cover of a portable cone crusher. (Tr. 27). The machine was running and vibrating, no handrails were installed, and LaPaglia was not wearing any fall protection. (Tr. 120-21). Upon seeing LaPaglia atop the machine, the inspector parked his van approximately 50 yards from the crusher, walked toward it about 25 yards, took a picture, and then walked about 15 yards closer to it. (Tr. 28; Ex. G-1). About 10 yards from the site, he took another picture. (Tr. 28; Ex. G-2). Inspector Soderburg stated that he did not yell at LaPaglia to step down because he was concerned that doing so would startle LaPaglia and that the noise of the machine would have prevented LaPaglia from hearing him. (Tr. 28).

Inspector Soderburg noted that LaPaglia appeared to use a remote control device to operate the machine while he was standing upon it. (Tr. 32). He did not know how long LaPaglia had been atop the crusher. *Id*. When the inspector was about 10 yards from the machine, after he took the second picture, he motioned for LaPaglia to get down from the machine. (Tr. 32-33). LaPaglia then immediately came down from the machine and turned it off. (Tr. 32-33, 50, 104). In order to get down from the machine, Inspector Soderburg testified that LaPaglia turned around, took a step back, stepped down onto a cover about two feet below,

[1] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

stepped down to a control panel platform, walked to the back of the machine, and climbed down a ladder attached to the machine. (Tr. 35). Inspector Soderburg presumed that LaPaglia got on top of the machine in the same way. (Tr. 35-36). He stated that the machine had a platform provided on the other side from which one could safely observe the size of the rock coming off of the return belt, without the need for a person to be where LaPaglia stood. (Tr. 43-44, 47).

Inspector Soderburg designated the citation as S&S. (Ex. G-9). He determined that an injury was highly likely to occur had he not instructed LaPaglia to come down from the top of the machine. (Tr. 58-59). He observed that the machine was running and vibrating, that LaPaglia was not wearing fall protection, that there were no handrails installed in the area of the machine upon which LaPaglia was standing, and that LaPaglia was 11 feet above the ground. (Tr. 59). In addition, LaPaglia was standing near the edge of the engine cover and it was windy that day. (Tr. 60). Had LaPaglia fallen from the engine cover, he could have fallen into the crusher, down in between the crusher and the front of the engine cover where there are moving machine parts, or 11 feet down to the ground below. (Tr. 54-55). Any of these falls could have resulted in fatal injuries. (Tr. 54-56).

The inspector designated the citation as an unwarrantable failure to comply with a mandatory safety standard.[2] (Tr. 62; Ex. G-9). He reached this conclusion because LaPaglia is the president and owner of the mine and is a competent trainer who instructs other miners in the use of fall protection. The inspector believed that it was obvious that a fall hazard was present, the condition posed a high degree of danger, and LaPaglia did nothing to abate the condition because he was the person who created it. (Tr. 63-64, 109-10). Inspector Soderburg also determined that the violation was the result of the operator's reckless disregard. (Tr. 64). He noted that LaPaglia is an experienced miner who was on top of the engine cover without fall protection in front of other miners. *Id.*

[2] The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc.*, 52 F.3d at 136. Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

LaPaglia testified that he was atop the crusher in order to observe its functionality before deciding whether to purchase it.[3] (Tr. 157, 174). The surface upon which he was standing was level, dry, free of loose materials, and had suitable traction. (Tr. 170). He testified that he has good balance and health and that he was not engaged in any lifting, bending, or other physical work while atop the machine. (Tr. 171-72). He only intended to be upon the machine for a short duration of time. (Tr. 174, 176). LaPaglia noted that the machine has since been outfitted with handrails around the area where he was standing when the citation was issued and that traction tape was added to the engine cover. (Tr. 158-59, 164; Exs. R-8, R-9).

LaPaglia testified that there are occasions when mine employees must work at heights, and the company had safety lines and belts available for use, including on the date of the inspection. (Tr. 148-49). In addition, the company trains its miners regarding its tie-off policy. (Tr. 149-50). However, there were no tie-off anchors or cables installed on the machine and he did not feel that fall protection was necessary. (Tr. 173-74).

B. Discussion and Analysis

The Secretary argues that section 56.15005 required LaPaglia to use fall protection at the location where he was standing because there was an inherent danger of falling. (Tr. 27, 120-21). Because LaPaglia was standing near the edge of the engine cover surface, the machine was running and vibrating, the surface was metal and slick, and there were no handrails, the Secretary contends that it was highly likely that a fall would result from the violation. (Tr. 58-60; Sec'y Br. 13, 15).

Respondent argues that no fall protection was required upon the machine and that the likelihood of LaPaglia falling was low. (Tr. 170-76; Resp. Br. 8-9). The condition of the machine – flat, dry, immobile, and free of loose materials – as well as LaPaglia's relatively still posture and good balance, suggest that there was no danger of falling at the cited location. (Tr. 170-72; Resp. Br. 10, 17). In addition, LaPaglia was only intended to be on the machine briefly. (Tr. 174, 176; Resp. Br. 9-10). Respondent argues that the duration of exposure to a fall hazard is relevant to determining whether a violation occurred and that the short duration here mitigates any violation of section 56.15005. (Resp. Br. 13-16).

I find that the Secretary established a violation of section 56.15005. LaPaglia was upon an elevated surface that lacked handrails or other restraints. I credit LaPaglia's testimony that he only intended to be upon the engine cover for a short duration of time, that the surface was flat, that his balance was stable, and that if he fell, it would likely be to an intermediate point between the engine cover and the ground. However, those arguments speak to the gravity of the

[3] At the hearing, North County introduced evidence to show that it did not own the cone crusher and the Secretary introduced evidence to show that title had passed to North County before the citation was issued. I conclude that the question of ownership is irrelevant to the resolution of the issues in this case. Assuming North County did not own the crusher and could not therefore install handrails around the engine cover or anchors for attaching a lanyard, LaPaglia should have observed the operation of the crusher from a location that did not place him in danger of falling.

violation, discussed below, but do not absolve North County of liability for violating section 56.15005. The safety standard requires safety belts and lines "where there is a danger of falling" and I find that the Secretary established that such a danger existed. An informed, reasonably prudent person would have recognized that the danger of falling warranted the use of safety belts at that location given the lack of handrails. Indeed, a reasonably prudent person would not have stood at that location while operating the crusher due to the lack of handrails or any means to attach safety lines.

I also find that the Secretary established that the violation was S&S. The Secretary established the fact of violation and that inadequate fall protection creates a discrete safety hazard. The Secretary also proved that the cited conditions were at least reasonably likely to contribute to an injury. The parties agree that LaPaglia stood atop the engine cover without fall protection and the crusher did not have handrails where LaPaglia was standing. They also agree that the machine was running when Inspector Soderburg first saw LaPaglia. Respondent argues, and the Secretary does not dispute, that LaPaglia was operating a remote control while atop the crusher and was not performing physical labor or otherwise moving around. However, the parties presented conflicting evidence with respect to some of the facts. The Secretary argues that the machine was shaking, but LaPaglia testified that no rock crushing took place and the machine was relatively stable; the Secretary believes that wind gusts and silica dust made LaPaglia less stable on his feet, while Respondent denies that any such factors were present or relevant.

Respondent argues that if LaPaglia lost his balance, he would not have fallen to the ground but to an intermediate surface between the engine cover and the ground. (Resp. Br. 12; Resp. Reply Brief 3). Further, Respondent maintains that even if one were to fall into the crusher itself, there would not be a serious injury as the miner could escape without coming into contact with moving machine parts. (Tr. 207-08, Resp. Br. 18-19).

I find that it is reasonably likely that LaPaglia's position atop the crusher would have contributed to a serious injury. Although he was only planning to be on the crusher for a brief period of time, his presence there contributed to the likelihood of injury. The Secretary, in his post-hearing brief, noted that "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." (Sec'y Br. 11-12, citing *Cold Spring Granite Co.*, 26 FMSHRC 119, 123 (Feb. 2004), quoting *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983)). I credit LaPaglia's testimony that LaPaglia was not engaged in any manual labor but I find that the violation was reasonably likely, although not highly likely, to contribute to an injury. I credit the testimony of Inspector Soderburg that LaPaglia was standing near the edge of the engine cover, the crusher was vibrating, and it was a relatively windy day.

I find that the most likely injury that would result from a fall was either a permanently disabling injury or an injury that would result in lost workdays or restricted duty. A fatal injury was certainly possible, but not as likely as a lesser injury. The likelihood of an injury and the

type of injury often depend upon the length of a potential fall.[4] The Secretary argues that the surface on which LaPaglia stood was 11 feet from ground level and that a fall to the ground was most likely. I conclude that the evidence establishes that LaPaglia would likely have fallen to an intermediate surface a few feet below where he stood. Although fatal injuries are possible from such a height, less severe injuries are more likely. Additionally, the Secretary argues that if LaPaglia had fallen into the cone crusher, he would have received fatal injuries. Based upon the evidence presented at hearing, I find that it was unlikely that he would have fallen into the crusher. Accordingly, permanently disabling injuries or injuries resulting in lost work days or restricted duty would reasonably result from a fall from the top of the engine cover. Broken bones, sprains, or other more serious injuries were more likely than a fatal injury.

The Secretary argues that because LaPaglia was the president of North County and a certified trainer at the mine and he violated the standard in plain view of other miners, the violation was the result of reckless disregard and was an unwarrantable failure to comply with a mandatory safety standard. (Tr. 62-64, 109-10; Sec'y Br. 16-18). The Secretary believes that LaPaglia was aware of the requirements of the standard, but purposely chose to ignore them. (Sec'y Br. 17-18). North County argues that LaPaglia's conduct was neither negligent nor the result of an unwarrantable failure. It does not believe that a reasonably prudent person would have recognized a danger of falling. (Resp. Br. 10, 19-20). In addition, Respondent has fall protection available to its miners when it deems its use appropriate, the alleged violation was not extensive, the duration of exposure was brief, the mine had not been cited for this standard before, and even if there was a violation, LaPaglia was not aware of it. (Tr. 21-23). Respondent contends that all these factors together suggest that MSHA's designations of reckless disregard and unwarrantable failure are excessive.

I find that the Secretary did not establish that the violation was the result of North County's reckless disregard, but that it was an unwarrantable failure to comply with the safety standard. The determination of whether conduct is "aggravated" in the context of unwarrantable failure is made by considering all the facts and circumstances of a case. The violative condition existed for a short time, as LaPaglia testified that he was only going to be atop the crusher for several minutes and the Secretary did not introduce any evidence to the contrary. The unwarrantable failure analysis also looks at the extent of the violative condition. LaPaglia was the president and owner of the mine and is the primary person to whom other miners look for guidance and direction. While there is nothing to suggest that this violation was a regular occurrence, LaPaglia's status as a supervisor supports a finding of an unwarrantable failure determination. Because supervisors are held to a high standard of care, a supervisor's involvement in a violation is an important factor in an unwarrantable failure determination. The mine had not received any citations for a similar violation in the preceding 15 months and the operator was not put on notice that greater efforts were necessary for it to comply with the fall

[4] *See e.g. Great Western Electric Co.*, 5 FMSHRC at 843 (a miner's "position twelve feet above the ground presented a substantial height from which to fall"); *Molton Co., LP*, 31 FMSHRC 427 (Mar. 2009) (ALJ) (finding an S&S violation where a miner was working without fall protection seven feet from the surface below); *Laramie Cnty. Road & Bridge*, 17 FMSHRC 902, 905-06 (June 1995) (ALJ) (finding an S&S violation where a miner was working without fall protection eight to twelve feet from the surface below).

protection standard. I find that the preponderance of the evidence establishes that when LaPaglia operated the cone crusher from atop the engine cover he demonstrated aggravated conduct that was greater than ordinary negligence. His actions were the result of a serious lack of reasonable care but were thoughtless rather than reckless. As the president and owner of North County, LaPaglia should have known better than to put himself in such a precarious position.

Whether LaPaglia realized that he violated the safety standard at the time, it is evident that he was on top of a raised surface without fall protection or handrails. The Secretary argues that LaPaglia knew about the violation and simply did not care. However, there is no evidence to support that position and I find it more likely that LaPaglia violated section 56.15005 without realizing it at the time. The inspector's unwarrantable failure determination is affirmed but I reduce the negligence attributable to the operator from "reckless disregard" to "high."

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. North County's history of previous violations is set forth in Exhibit G-19. During the period between January 16, 2008 and April 15, 2009, North County had a history of three paid violations, none of which were designated S&S, and none of which alleged a violation of section 56.15005. Respondent was a small operator with only a few employees at the Roadrunner No. 32 Mine at the time of the violation. North County owns several other small sand and gravel operations in the area that employ a total of about 20 employees. (Resp. Br. 25). The instant violation was abated in good faith. There was no proof that the penalty assessed in this decision will have an adverse effect upon Respondent's ability to continue in business. The gravity and negligence findings are set forth above. Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $3,500.00 for this violation. I make special note of the operator's small size and history of previous violations.

III. ORDER

For the reasons set forth above, Citation No. 7980681 is **AFFIRMED** as a significant and substantial violation of section 56.15005 that was the result of North County's unwarrantable failure to comply with the safety standard. I have reduced the negligence and gravity of the violation as discussed above. North County Sand & Gravel, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $3,500.00 within 30 days of the date of this decision.[5]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

[5] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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