FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 5, 2013

HIBBING TACONITE COMPANY, Contestant,	:	CONTEST PROCEEDING
	:	Docket No. LAKE 2013-236-RM
v.	:	Citation No. 8665985; 1/4/2013
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent,	:	Hibbing Taconite Company Mine ID: 21-01600
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2013-406-M A.C. No. 21-01600-314860-01
v.	:	
HIBBING TACONITE COMPANY, Respondent.	:	Mine: Hibbing Taconite Company

DECISION

Appearances: Barbara Villalobos, Office of the Solicitor, Chicago, Illinois and James Michael Peck, Mine Safety and Health Administration, Duluth, Minnesota, for Petitioner;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me on a notice of contest filed by Hibbing Taconite Company and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hibbing, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. Hibbing operates the Hibbing Taconite Company mine located in St. Louis County, Minnesota. These cases involve one 104(d)(1) citation. The parties presented evidence and testimony at a hearing in Minneapolis, Minnesota on September 25, 2013.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hibbing Taconite Company is a large mine operator located in St. Louis County, Minnesota. The parties stipulated at hearing that Hibbing is engaged in mining operations that

affect interstate commerce, is the owner and operator of the mine, is subject to the jurisdiction of the Mine Act, and that the Commission has jurisdiction in this matter. Jt. Ex. 1. The parties further agreed that the penalties, as proposed, will not impair Hibbing's ability to continue in business. The history of assessed violations, Sec'y Ex. 12, accurately reflects the history of violations at this mine.

MSHA inspector Thaddeus Sichmeller has been a mine inspector since 2003 and is trained as an accident investigator. On January 4, 2013, Sichmeller traveled to the mine to conduct an inspection and as a result issued Citation No. 8665985, pursuant to section 104(d)(1) of the Act, to Hibbing for an alleged violation of section 56.14105 of the Secretary's regulations.[1] The cited standard reads as follows:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105. The citation described the alleged violative condition, in pertinent part, as follows:

> A miner was working on the placement of guards on the head and tail ends of the Green Pellet conveyor . . . . [The miner was] working on placement of the pulley guards while the conveyor was in operation and was exposed to the hazard of accidental contact of the moving machine parts.

Sichmeller determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of $6,458.00 has been proposed for this violation.[2]

Hibbing contests the fact of violation, and the inspector's findings regarding significant and substantial, unwarrantable failure, and negligence. Any failure to provide detail on each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

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[1] Sichmeller originally issued the citation under section 56.12016. Prior to hearing, the Secretary moved to modify the cited standard to section 56.14105. The motion was granted.

[2] The citation also indicates that the mine was in the process of placing guards after receiving citations earlier in the week, and that the welder was instructed by management to place the guards in the manner he did, resulting in the unwarrantable failure designation.

i. The Violation

In 2010, MSHA gave notice to the taconite facilities that tail pulleys and other parts of conveyors would require guards and instructed the mines to begin the process of installing the guards. Hibbing began to install guards but, while conducting an inspection of the Hibbing Taconite mine in January, 2013, Inspector Sichmeller observed a number of areas along a conveyor that had not been properly guarded. As a result, he issued a number of guarding citations. One of the citations, No. 8665977, was issued for an unguarded tail pulley on the Line 3 Conveyor. The tail pulley on the Line 3 Conveyor was located alongside an elevated walkway with a handrail and toe guard. The handrail, which was located between the walkway and conveyor, was approximately four feet tall, with a mid-rail approximately twenty inches off the ground.

The inspector, in issuing the guarding citation, determined that a pinch point existed and that a miner walking on the elevated walkway near the conveyor would fall or come into contact with the moving parts of the conveyor and be pulled in. The moving machine parts were about twenty inches from the walkway. In order to abate the guarding citation, the mine decided that, to prevent contact with the conveyor, a guard would be placed on the walkway handrail.

On January 4, 2013, Sichmeller traveled to the tail pulley area and observed evidence to suggest that someone had been installing mesh guards along the open areas of the handrail. Sichmeller observed guarding material affixed to the handrail, welding leads, and a cart nearby with the mesh guarding material. Sichmeller questioned the miner who had just completed the welding and learned that the job was undertaken without shutting down the conveyor. Moreover, the miner informed Sichmeller that the assignment had been given to him by a supervisor. After questioning the miner, Sichmeller met with Tim Angelo, the pellet plant operations manager, members of the safety department, and others, and explained that he was issuing a violation for failing to lock and tag out the conveyor while conducting maintenance.

Sichmeller took photographs, Sec'y Ex. 3, which show the conveyor line and guard. The guard consisted of wire mesh which had been affixed to the walkway side of the handrail. Sec'y Ex. 3-3 shows the puck that protruded from the conveyor which Sichmeller explained could catch someone on the walkway and pull them into the pulley. It is twenty inches from the mesh guards that were being installed to the tail pulley in the photograph. Sichmeller saw a hazard of falling into the belt while walking or working on the walkway or hitting the protruding pucks and being pulled into contact with the moving machine parts.

Craig Borbiconi, a welder, who has worked at the mine 29 years and was installing the guards when the citation was issued. On the morning of January 4th, Steve Seykora, along with Mike Ouke, assigned Borbiconi the task of installing guards. Borbiconi reviewed the assignment and decided to install a guard similar to that on the other rails along the walkway. He located the cart that contained the wire mesh material needed to construct the guards and traveled to the area to install the guards. He took two pieces of mesh, cut one near the drum area, and carried it to the handrail where he kneeled down, placed the mesh up against the opening, flipped down his welding mask, and tacked the wire mesh in place. Borbiconi then pushed up the welding mask

so that he could see before beginning the next phase of the guard installation. After tacking the mesh into place, he snipped off the top of the mesh to fit it to the railing.

Borbiconi testified that he walks through this area routinely, as do other miners, and assumed that, since he was on the walkway with the handrail between him and the conveyor, there was no need to shut down the conveyor. The walkway has toe boards and a handrail with two bars, one in the middle and one on top. Borbiconi did not believe he was exposed to the hazard of the moving parts of the conveyor.

After finishing welding the mesh guards in place, Borbiconi began grinding, and it was during this activity that the inspector appeared and began to question him about the job. Borbiconi told the inspector that he thought it was safe to install the guards as he had done. He believed that, because he was in a safe area, the conveyor could remain in operation as he worked. As Borbiconi installed the mesh, he had no indication that he might stumble into the conveyor belt because both the mesh and handrail were between him and the belt. A number of Hibbing witnesses agreed with Borbiconi that the area was safe and that miners safely walk along this walkway with the handrail each day. While Borbiconi does sometimes lock/tag out equipment, he didn't think it was necessary to do so for this job. When he does need to de-energize and lock out the equipment, he contacts the foreman or operations office and asks to have the equipment shut down. He has no problem getting the conveyor shut down and locked out when he deems it necessary.

While there is no dispute that the conveyor was in operation and that it had not been shut down, locked or tagged out, Hibbing argues that, since the wire mesh guard was being placed on the rail next to the conveyor, and not directly on the conveyor, the conveyor was not required to be shut down. Specifically, Hibbing argues that the rails, which were being worked on, are not "machinery or equipment" and, therefore, the standard is not applicable to this situation and there was no need to shut down the conveyor.

The Secretary, on the other hand, argues that a violation existed and working on the railing adjacent to the moving conveyor is included in the meaning of the standard. The Secretary alleges that the welder was on the walkway next to the moving conveyor while working and he could slip and fall into the moving parts. For the reasons that follow, I find that the violation occurred as alleged, but I do not find enough evidence to demonstrate that the violation was S&S, or the result of an unwarrantable failure or high negligence on the part of the mine.

In *Walker Stone Co. Inc.*, 19 FMSHRC 48 (Jan 1997); *aff'd* 156 F.3d 1076 the Commission defined the terms "repairs" and "maintenance" in the context of section 56.14105 as follows:

> The term "repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend ... to restore to a sound or healthy state: renew, revivify ...." *Webster's Third New International Dictionary, Unabridged* 1923 (1986). The term "maintenance" has been defined as "the labor of keeping

> something (as buildings or equipment) in a state of repair or efficiency: care, upkeep ..." and "[p]roper care, repair, and keeping in good order." *Id*. at 1362; *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968).

Id. at 51.

I find that the placement of the guard amounted to "maintenance." The inspector determined that the tail pulley was not properly guarded and issued a citation to reflect that finding.[3] In essence, while the conveyor and tail pulley were in operation, they were not being maintained in a safe state. To rectify the situation, and abate the guarding citation, the mine decided to guard the tail pulley by way of installation of a guard on the handrail, so as to maintain the conveyor in a safe state. The concern that prompted the issuance of the guarding citation was the hazard of a miner getting caught in the conveyor. That same hazard existed at the time Borbiconi began installing the guarding. Borbiconi's actions were meant to bring the conveyor and tail pulley into a safe state of repair and compliance.

Further, contrary to Hibbing's argument, I accept the Secretary's interpretation and find that that the standard contemplates the installation of the guards on the handrail next to the conveyor and tail pulley, even if the handrails are not directly attached to the conveyor. Sichmeller testified that that the guards are an integral part of the conveyor. In *Climax Molybdenum Co.*, 30 FMSHRC 886 (Aug. 2008) (ALJ), Judge Manning addressed a somewhat similar issue. There, the mine operator had been cited for a violation section 57.14105[4] where miners were cleaning the inside walls of a chute with a scaling bar while the conveyor was in operation. The operator argued that, even if the act of scraping the chute could be considered "repairs or maintenance," there was no violation because the chute did not have any moving parts, and the only moving parts were that of the conveyor, which was not being maintained or repaired. In finding that the Secretary's regulation contemplated maintenance of the chute, the judge noted that the chute was "an important part of the conveyor system" and an "integral part of the entire process." *Id*. at 897; *See U.S. Steel Group, Minnesota Ore Operations*, 15 FMSHRC 1153 (June 1993) (ALJ).

Just as the judge in *Climax* found that the chute was an "important" and "integral" part of the conveyor system, I find that the guard that was being attached to the handrail was an integral part of the conveyor system at the Hibbing Taconite mine. Absent the guard, which was in sufficiently close proximity to the moving machine parts, the conveyor and tail pulley would not have been in compliance, the guarding citation would not have been abated, and, presumably, any operation of the conveyor would have resulted in a failure to abate order shutting down the conveyor. If Hibbing's interpretation were accepted, miners would be able to work in close proximity to moving machine parts in order to abate the hazard of entanglement in unguarded moving machine parts as long as there is no physical connection between the guard and the conveyor. This result and narrow interpretation of the Act would not be "consistent with the

[3] The mine initially contested the guarding citation, but eventually accepted it as issued. Unpublished Decision Approving Settlement dated September 25, 2013.
[4] Section 57.14105 is an identical standard applicable to underground metal and nonmetal mines.

safety promoting purposes of the Mine Act." *Walker Stone Co. Inc.v. Sec'y of Labor*, 156 F.3d 1076, 1082 (10th Cir. 1998). Accordingly, I find that the placement of the guards on the handrail amounted to maintenance of the conveyor system. Given that there is no dispute that the conveyor was not shut down at the time the guard was being installed, I find that the Secretary has established a violation of section 56.14105.

ii. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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 in question will be of a reasonably serious nature.

I have already found that there was a violation of the mandatory standard. I further find that a discrete safety hazard existed as a result of the violation, that the danger of entanglement in moving machine parts while conducting maintenance or repairs. However, I find that the Secretary has not satisfied the third element of the *Mathies* formula. Specifically, I find that the Secretary has not established that the failure to shut down the conveyor when working on the opposite side of the hand rail was reasonably likely to result in an injury.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained that "the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.'" The Commission "emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial." *Id*. (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984)).

It is important to distinguish the exposure associated with the violation from that which was associated with the guarding violation that prompted Borbiconi to be in the area attaching the guard. Here, the hazard was entanglement in moving machine parts while conducting repairs

or maintenance, in an area along the walkway, whereas the hazard associated with a guarding violation was the general threat of entanglement in moving machine parts in any area near the pinch point.

While it is true that a miner would be seriously injured if they fell into the belt while conducting maintenance or repairs in the area, even with other safety devices in place, the Secretary has not demonstrated that it is reasonably likely for that to occur. There was little to no discussion on the Secretary's part regarding the level of exposure to the hazard or how an individual would come in contact with the moving machine parts, other than the fact that there was a puck protruding. The Secretary did not put forth sufficient evidence as to, among other things, why an individual in the area conducting maintenance or repairs with the conveyor running, would fall over or through the handrail, from what height they would fall, and into what area of the conveyor. Given the lack of evidence, I find that the Secretary has not established the necessary level of exposure under this element of the *Mathies* test to sustain an S&S violation.

In addition to the Secretary failing to establish the third element of the *Mathies* test, I find that Hibbing set forth compelling evidence regarding the lack of exposure. Borbiconi credibly testified that he felt safe when installing the guards while the conveyor was running. He was outside the handrail, the welding leads were against the toe board and did not present a tripping hazard, and he was handling a large sheet of fairly rigid wire mesh that would not have been able to fit through the gap in the handrails while he was on his knees tacking it to the handrail. While Borbiconi may have worn a mask that limited his visibility while tacking the mesh to the rail, I credit his testimony that he only has the helmet down while actually making the weld, and not while traveling or otherwise moving on the walkway. Other than Borbiconi's work installing the guard, the record reflects no other evidence of miners maintaining or repairing equipment or machinery in the subject area. The extremely limited exposure that Borbiconi may have experienced in the few seconds before he made his first tack weld makes it less than "reasonably likely" that an incident would occur that resulted in an injury. I find that the Secretary has failed to establish the third element of the *Mathias* test and, accordingly, find that the violation is not significant and substantial designation.

iii. Unwarrantable Failure and Negligence

Citation No. 8665985 was originally issued as a 104(d)(1) "unwarrantable failure," "high" negligence citation. In order to sustain a 104(d)(1) "unwarrantable failure" citation, the Secretary must establish that the violation was of an S&S nature. 30 U.S.C. § 814(d)(1). Here, as set forth above, the Secretary failed to establish that the violation was S&S. Accordingly, the Secretary's "unwarrantable failure" finding is not substantiated and therefore the violation is modified to a 104(a) citation. Further, while Inspector Sichmeller designated the citation as being the result of "high" negligence, for the reasons set forth below, I find that Hibbing was only "moderately" negligent.

Sichmeller indicated that he based his negligence determination on his finding that Borbiconi's supervisor had instructed Borbiconi to install the guards and the supervisor had come down to the area with Borbiconi and knew, or should have known, that Borbiconi did not

de-energize the conveyor prior to installing the guard. Further, the guarding citation issued the prior day made the mine aware of the hazardous condition and the need to install guards due to the possibility of accidental contact with the moving machine parts.

Steve Seykora, who has been a supervisor for 23 years and is currently the maintenance coordinator at the pellet plant, along with Mike Ouke, the fill-in foreman on the day the citation was issued, assigned the welding job to Borbiconi. Ouke showed Borbiconi the area of the plant where he would be working on the day the citation was issued. Borbiconi had been in the area many times and he, like many miners, used the stairway and elevated walkway daily when traveling to and from the balling area. Based upon his familiarity with the area, and the fact that a railing protected walkers from the conveyor, Borbiconi did not see a need to lock and tag out the conveyor. Seykora did not discuss shutting down the conveyor with Borbiconi, and didn't believe there was a need to do so. However, if Borbiconi had asked to have the conveyor shut down, Seykora would have assisted and followed the procedure for shutting it down.

Each witness for the mine indicated their belief that the elevated walkway was a safe area, and that work could be done on the walkway side of the handrail with no danger of contacting the conveyor. I find that the Borbiconi, as well as the supervisor who had assigned Borbiconi to do the work, had a reasonable good faith belief that there was no need to lock and tag out the conveyor prior to beginning work on the guard. It was not entirely obvious that the conveyor needed to be shut down, nor did any supervisor neglect their duty in failing to shut it down. It was a routine assignment for Borbiconi in an area where he and everyone else felt safe. Given these mitigating factors, I find the negligence to be moderate.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> (1) The operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone*

Co., 5 FMSHRC 287, 292 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] … [of] the Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. Sec'y Ex. 12. The mine is a large operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of for the violation are discussed above. The operator demonstrated good faith in abatement. Based on my findings set forth above and the criteria in section 110(i), I assess a penalty of $2,000.00 for Citation No. 8665985.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess a penalty of $2,000.00. Hibbing Taconite Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $2,000.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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