

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th St., Suite 443
Denver, CO 80202-2500
Office: (303) 844-5266/Fax: (303) 844-5268

December 23, 2013

THE DOE RUN COMPANY,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. CENT 2013-334-RM
	:	Citation No. 8684827; 03/04/2013
v.	:	
	:	Mine: Buick Mine/Mill
	:	Mine ID: 23-00457
	:	
	:	Docket No. CENT 2013-369-RM
SECRETARY OF LABOR,	:	Citation No. 8676770; 03/25/2013
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Sweetwater Mine/Mill
Respondent.	:	Mine ID: 23-00458

DECISION

Appearances: R. Henry Moore, Jackson Kelly, Pittsburgh, PA, for Contestant
Susan J. Willer and Leigh Burleson, U.S. Department of Labor, Office of
Solicitor, Kansas City, MO, for Respondent

Before: Judge Simonton

This case is before me on a Notice of Contest filed by The Doe Run Company (“Doe Run”), pursuant to section 101 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Act” or “Mine Act”). On March 13, 2013, Doe Run filed a Motion to Expedite requesting an expedited hearing, which I granted. A hearing was held on April 18, 2013 in St. Louis, Missouri. The parties’ post-hearing briefs are of record.

I. ISSUES FOR ADJUDICATION AND DISPOSITION

The sole issue for adjudication is whether the failure to provide chairs or other blocking devices for the hoists at Doe Run's Buick and Sweetwater mines is a violation of 30 C.F.R. § 57.16017, which requires chairs or other suitable blocking when the stretching or contracting of hoist ropes could create a hazard. For the reasons stated below I find no violation of the standard and **VACATE** the citations at issue.

II. FINDINGS OF FACT

A. Stipulations

The parties entered the following as joint stipulations at the April 18, 2013 hearing:

The Respondent produces lead-zinc ore from its underground mine operations, and these mining operations affect interstate commerce. Therefore, Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et. seq.*, and the Administrative Law Judge has jurisdiction over the disputes in these consolidated matters.

With respect to Docket No. CENT 2013-334 RM, the parties stipulated that:

1. The Doe Run Company is, and has been at all relevant times to the inspection, the owner and operator of the Buick Mine/Mill, Mine ID no. 23-00457, located in Iron County, MO.
2. The Buick Mine is a mine as that term is defined by the Act.
3. On March 4, 2013, the Mine Safety and Health Administration ("MSHA") inspected The Doe Run Company's Buick Mine/Mill.
4. MSHA Inspector Michael Marler was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.
5. MSHA issued a Section 104(a) Citation, No. 8684827, to The Doe Run Company on March 4, 2013, alleging a violation of 30 C.F.R. § 57.16017
6. The Section 104(a) Citation No. 8676770 has not been terminated.
7. The subject Citation was properly served by a duly authorized representative of the Secretary upon Contestant's agent on the date and place stated in the Citation, and may be admitted into evidence for the purposes of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.
8. The hoist mechanisms at the Buick Mine/Mill are manually controlled. An operator in a control room controls the movement of the hoist and the positioning of the conveyance at a landing.

9. The hoist at the Buick Mine has been in place for approximately 40 years. Doe Run has never been cited under 30 C.F.R. §57.16017 at the Buick Mine.
10. The Buick Mine/Mill hoist system is a friction, or Koepe, hoist where the wire ropes pass over a drum from the conveyance to a counterweight. The Buick hoist has four wire ropes.
11. The shaft at the Buick Mine is approximately 1145 feet deep at 4 Level and 1235 at 5 level.
12. All wire rope stretches in use to some degree.
13. The MSHA Assessed Violations History accurately reflects the history of Doe Run's Buick Mine/Mill for two years prior to the date of the contested Citation.

With respect to Docket No. CENT 2013-369 RM, the parties have agreed to the following stipulations:

14. The Doe Run Company is, and has been at all relevant times to the inspection, the owner and operator of Sweetwater Mine/Mill, Mine ID No. 23-00458, located in Reynolds County, MO.
15. On March 25, 2013, MSHA inspected The Doe Run Company's Sweetwater Mine/Mill.
16. MSHA Inspector Lawrence Sherrill was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.
17. MSHA issued a Section 104(a) Citation No. 8676770 to The Doe Run Company on March 25, 2013, alleging a violation of 30 C.F.R. 57.16017.
18. The Section 104(a) Citation No. 8676770 has not been terminated.
19. The subject Citation was properly served by a duly authorized representative of the Secretary upon Contestant's agent on the date and place stated in the Citation, and may be admitted into evidence for the purposes of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.
20. The hoist mechanisms at the Sweetwater Mine/Mill are manually controlled.
21. The Sweetwater Mine/Mill hoist system is a double drum hoist.
22. The shaft at the Sweetwater Mine is 1486 feet deep from the collar to the shaft bottom.
23. The hoist at the Sweetwater Mine has been in place for approximately 40 years. Doe Run has never been cited under 30 C.F.R. § 57.16017 at the Sweetwater Mine.
24. The MSHA Assessed Violations History accurately reflects the history of Contestant's Sweetwater Mine/Mill for two years prior to the date of the contested Citation.

25. The cited standard, 30 C.F.R. § 57.16017, was promulgated at 50 Fed. Reg. 4082 (Jan 29, 1985). A predecessor standard, 30 C.F.R. § 57.16-17, was promulgated on 34 Fed. Reg. 12517 (July 31, 1969), with follow-up on August 17, 1979. MSHA has not addressed either standard in any policy document, including the Program Policy Manual. The Federal Register documents contain little discussion of the standard's requirements.
26. The exhibits offered by Contestant and Respondent are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein. The parties stipulate that the exhibits may be admitted into evidence.
27. The Doe Run Company currently uses chairs in its loading and unloading processes at the Brushy Creek Mine/Mill and at the Fletcher Mine and Mill.

B. Factual Background and Testimony

The citations at issue involve hoists at two mines owned and operated by the Doe Run Company: the Buick Mine and the Sweetwater Mine.

The Buick Mine: Citation No. 8684827

The Buick Mine is located in Iron County, Missouri, and is conjoined with other Doe Run mines. Tr. 25. The mine is a room and pillar lead mine, in which the lead is blasted and crushed underground and then transported to the surface, where it is milled into the final product. Tr. 26-27. The mine has a production shaft, a man and material shaft, and a number of ventilation shafts. Tr. 26-27. The hoist at issue in this case is in the man and materials shaft, which is 1200 feet deep and has four landings, known as "shaft stations." Tr. 26-27. This hoist is used by men to ride up and down at the beginning and end of their shifts, and is also used to convey supplies. Tr. 28. The "cage" on the hoist is a large platform, similar to an elevator, that is approximately eight feet wide and twelve feet long with gates on both ends of the cage. Tr. 28. It is manually operated by an operator known as a "hoist man" remotely from the control building. Tr. 29.

The hoist at the Buick mine is a friction hoist, which means it is a counter-weighted hoist system where cables run up over a power drum and back down to a counter-weight. Tr. 29. The counter-weight maintains the ropes in tension as the hoist moves. On the hoist at the Buick mine, there are four steel wire ropes lifting the side of the cage, each approximately an inch and a quarter in diameter. Tr. 29-30. At issue in these dockets is whether this hoist, as well as the hoist at Doe Run's Sweetwater Mine, should have been supplied with chairs or other blocking devices. As explained at the hearing, a "chair" as used in this context is a mechanical device on the shaft that limits the movement of the cage, and maintains it in one spot. Tr. 32.

The issue of chairing in Doe Run's mines first arose when MSHA inspector Michael Marler visited the Buick Mine in December 2012 and again in March 2013. Inspector Marler has 25 years of experience as an inspector with MSHA as well as prior experience in the field, including

jobs overseeing the production of equipment at limestone quarries and working at Pea Ridge Iron Ore. Tr. 20-22. At the time of the hearing, Marler had conducted close to 1000 inspections, and had inspected Doe Run's Buick Mine approximately 14 times. Tr. 22-23.

Marler testified that during the inspection, he spoke with a forklift operator (also known as a "nipper"), Mr. Richard Mann, about how Mann had been stuck on the cage hoist while trying to drive off of it in a small forklift. Tr. 38-39. Marler testified that Mann told him he couldn't get the small loader to back off the cage after he drove onto it. Tr. 38-39. It wouldn't climb over the step that was created when the cage was below the level. He made a couple attempts to get the fork truck off the cage and he finally bumped back over the step and got off the cage. Tr. 38-39. Marler testified further that Mann first told him that the cage was spotted seven inches below the level landing and when he drove onto the cage it moved an additional inch making an eight inch difference between the cage and landing. Tr. 62, 66.

After his conversation with Mann, Inspector Marler met with mine management in order to discuss the incident. Tr. 41. At the time of the discussion, he was not sure that there was a violation, since he was uncertain as to whether chairs could or could not be used on this type of hoist. Tr. 41. Chairs are not normally used with friction hoists, since there is a possibility of creep in the drum that could throw off indicators. Tr. 41-42. In addition, MSHA's own guidance states that chairs should be omitted whenever possible, and are not recommended for use on friction hoists. Tr. 56.

However, Marler ultimately wrote citation number 8684827 at issue in this case on his return visit in March. Exhibit G-1. Marler testified about several other blocking mechanisms that could be used instead of chairs, as detailed in Exhibit G-6, which contains several sketches of chairs and other blocking devices. Tr. 46; Exhibit G-6. Although the guidance in G-6 suggests clamping as an alternative to chairs, Marler later testified that this applied to steel shaft guides, which the hoist system at Buick does not have. Tr. 56-57.

With respect to the citation, Marler testified that he felt one person, the forklift operator, would likely be affected by the condition, and that it was unlikely to cause an injury because of the mine's long history of safely operating this hoist. Tr. 48. This particular mine had been inspected four times a year since 1977, and no one had brought up the hoist issue prior to Inspector Marler's visit in December 2012. Tr. 52-53. When asked specifically about the hazard involved with Mann's difficulty in backing the forklift off the cage, Marler testified that the hazard was Mann being "thrown off the fork truck. He may possibly turn the truck over if he doesn't hit the station squarely with both wheels." Tr. 40. In contrast to the testimony of other witnesses at the hearing, Marler maintained that he did not actually see the December incident involving forklift operator Richard Mann, but instead stated that Mann described the incident to him and that he never saw the forklift or the loads in question. Tr. 54-55.

The mine foreman at Buick, Jeffrey Gibson, also testified as to his recollection of the December incident at the Buick hoist. Gibson had worked at Buick in various positions for 19 years, and prior to his time at Buick, had 11 years of mining experience with another company. Tr. 143. Gibson testified further that over his 31 years of mining experience, he had been given

a lot of training on identifying hazards, including annual refresher training and training sessions a few times a year. Tr. 151-152.

Gibson described the hoist and cage generally, and discussed two photographs of the hoist at the Buick mine and the shaft landing, noting that the hoist had gates that prevented movement of the hoist every time they were open, minimizing the miners' exposure to the moving hoist. Tr. 144; Exhibits R-1A, R-1B. He testified that on December 3, 2012, he accompanied Inspector Marler on his inspection of the Buick mine. Tr. 145. He testified further that during this inspection, they walked up to the hoist and observed forklift operator Richard Mann trying to drive off the hoist in the forklift. Tr. 145. According to Gibson, as Gibson and Marler approached the cage, it was coming up from the surface underground, and the cage was spotted a little bit low at the landing. Tr. 146. He testified, "as Richard drove the forklift on the cage to get the mine supplies loaded off, the front tires actually dropped a little bit on to the cage. He pulled in, picked up the load. As he backed up to exit off the cage with the load, the tires actually spun between the difference of what the cage level was and the landing level was. So he pulls up little bit and again puts it in reverse, hit it a little bit harder, jumped out and proceeds out." Tr. 146.

Gibson said he did not notice the cage drop noticeably when Mr. Mann pulled onto it with the forklift, noting that there were only very light loads on the cage at the time. Tr. 147. In general, he testified that the fact the forklift operator had to back up once and try to get off the cage again had nothing to do with the stretching of the cables, because the movement of the forklift and lifting of the load on the cage did not result in any changes in the location of the hoist. He stated that he had only seen the wire stretch with very heavy loads, in the range of 15,000 pounds, which is the heaviest load the Buick mine had ever placed on the cage. Tr. 153. He also testified that it was impossible for there to have been an 8-inch gap between the cage and the shaft landing as Mr. Marler had suggested, as it would have been physically impossible for the forklift to come off at all. Tr. 62, 153. This is due to the fact that the Caterpillar forklift in use that day only has approximately 6 and a half inches of ground clearance, and that the front forks only had roughly 3 and a half or 4 inches of ground clearance. Tr. 158. Further, there is a hydraulic cylinder and a mast connecting the forks that runs between the forks that are lower than the forks. Thus, even with a 3 or 4 inch gap the forklift would have probably been unable to clear the landing at all. Tr. 158.

Gibson did not believe a hazard existed at the Buick mine, and noted that immediately after Inspector Marler had witnessed the incident, the forklift operator asked the inspector if everything was okay, and Marler replied that it was. Tr. 148. At the time Inspector Marler also asked if there had ever been chairs on the hoist, and Gibson told him that there had not. Tr. 148. The next morning, Marler came back to finish the inspection and noted that the lack of chairs may be problematic and that he would look into whether chairs were needed. Tr. 149.

Gibson testified that as he observed the event, he did not see anything about the operation of the forklift within the hoisting cage that indicated a hazard. Tr. 151. He noted that if the spotting had been off, Mann could have called the hoist man and asked him to recalibrate, which the hoist operator can do remotely. Tr. 150. In fact, Gibson had seen situations in which the

cage had to be repositioned in order for someone to get off, in which case the person on the cage had simply called the hoist man and asked him to reposition. Tr. 160-61. In his opinion, the difficulty Richard Mann experienced getting the forklift onto the landing was due to the wetness of both the cage floor and the level landing. Tr. 158-159.

Richard Mann also testified about his experience operating the forklift during the incident on December 3, 2012. Tr. 162. Mann had worked at Buick for over nine years and was permanently assigned to “nipping,” which means that his job entails continually loading and unloading supplies off the hoist. Tr. 163. Prior to his time at Doe Run, he had 10 years of mining experience, including in the safety department at other mines in the area. Tr. 163-64. He testified that on December 3, 2012, they had spotted the cage and needed to unload a blue crate with “UPS type supplies” off of the cage. Tr. 164. He got the Caterpillar forklift, which is considerably smaller than the machine he normally uses, and when he drove onto the cage he noticed it was spotted about an inch and a half to two inches below the landing. Tr. 164. When he picked up the box and backed off the cage, the tires spun a bit against the landing during his first attempt to exit. Tr. 164. Then, he inched up and backed off again, slightly faster, which allowed him to come up off of the cage and on to the landing. Tr. 164. He testified that he did not notice the cage move when he pulled the forklift on to the cage, and did not feel in any way at risk when backing off. Tr. 165. In addition, he did not feel like the forklift would tip in any way, or that he would shift within the forklift. Tr. 174.

Mann also testified about the different types of forklifts used at the mine, and noted that on the day in question, he was using the Caterpillar forklift, which is smaller than the one he normally uses. Tr. 166. When asked about some of the heavier loads he works with on the hoist, he described the loading of Anfo containers, which weigh between 4200 and 4500 pounds each. Tr. 167. Up to two Anfo containers are placed on the cage at a time. Tr. 167. Mann stated that when unloading these containers, the forklift stays on the landing the entire time and merely picks up each Anfo container and backs it off of the cage. Tr. 167. In addition, he had never had a problem with the hoist jumping suddenly after removal of an Anfo container. Tr. 168. As another example of a heavier load, he described how a railcar would be transported underground using the hoist. Tr. 168. In that scenario, the railcar is the only thing that fits on the cage, so they will typically push it with the lift, with a cable attached to it. Tr. 168. When it is unloaded, they will attach the cable to the lift and pull the railcar off. Tr. 168. In both of these scenarios, the forklift operator does not drive the forklift onto the cage. Tr. 168.

Mann also stated that had the cage been seven or eight inches below the landing as the inspector suggested, he would not have been able to get the forklift off the hoist at all. Tr. 169. Mann noted that in that situation it would have been necessary to have another piece of equipment drag the forklift off the cage or have contacted the hoist operator to raise the cage through the bell cord system and telephone the mine has in place to allow communication between loader operators and the hoist man. Tr. 169-70. Mann testified that he had been loading and unloading supplies at Buick for four and a half years, and had never had an instance where he couldn't get off the cage, or it dropped suddenly. Tr. 170. He did state that the landing area around the cage is usually slick since it is made of solid steel decking. Tr. 170. Additionally, he felt that if he had used the larger forklift, the Selleck, which was normally in use, he would have

had no trouble getting off the cage and would not have noticed the difference between the level of the cage and the landing. Tr. 170-71.

The hoist operator at the Buick mine, Mr. Steve Harris, also testified. Harris has worked on the hoist at Buick for two years, and as hoist operator, he runs man trips and supplies in and out of the mine. Tr. 175-176. He has over 12 years of experience as a hoist operator. Tr. 176. Harris discussed exhibit R-1J, a picture of the control panel on the Buick hoist that allows him to move the cage. Tr. 177. To ensure that the controls are accurate and the hoist is lining up with the landing, Harris synchronizes the cage off a set point as often as temperature and usage conditions require. Tr. 178-79. Harris testified that there were several different options available for miners on the hoist to communicate with the hoist operator, including bell signals, telephone, radio, and a camera. Tr. 179-80. Harris stated that if the cage is spotted too low, the forklift operator at the shaft only has to send a simple signal to the hoist operator in order to have the cage raised to the appropriate level. Tr. 180. On December 3, 2012, Harris was the hoist man during the incident in question and testified that he did not think there was a problem, and was not made aware of one. Tr. 181. He also added that, in his experience operating hoists, installing chairs and letting a hoist rest on them actually causes the cage to jump a few feet if the brake is not released slowly enough, although with controlled operation this should not happen. Tr. 181, 186.

William Courtney, the maintenance supervisor at the Buick mine, also testified. Courtney has been general maintenance supervisor at Buick since 2009, and his duties include maintenance of all parts of the mine, including the hoist. Tr. 191. Overall, Courtney has approximately 37 years of experience as a maintenance supervisor. Tr. 191. Courtney testified that he supervised the employees at Buick that inspect the hoist, and that inspections were conducted on a regular basis weekly. Tr. 192. Every 14 days, they would perform additional measurements to check the ropes for shrinkage. Tr. 192-93. Courtney discussed the safety features on the hoist, which includes an overspeed device, and over travel limit switch, and a jam conveyance that will kill power and set the brakes if the hoist drum is turning without the ropes moving. Tr. 194.

Courtney also testified in detail about how the mine checks for ropes that exhibit too much stretch, and the criteria they use for taking a rope out of service. Buick performs nondestructive tests on their ropes at this hoist once every six months, where measurements of rope diameter are taken with a dial caliper. Tr. 195-196. These tests are performed by an outside contractor, Evergreen, who submits reports to Buick. Exhibit R-3B; Tr. 196. Courtney did admit that it is impossible to completely eliminate rope stretching and contraction from a hoist system. Tr. 204. In order to determine whether a rope should be taken out of service due to stretching and contraction, Courtney stated that they look at the LMA numbers in the report and take a rope out of service if it is close to 10%.¹ Tr. 196. Similar 6-month nondestructive, 14 day, and seven day inspections are performed on the hoist at Sweetwater. Tr. 197.

¹ "LMA" was defined in the testimony of the Secretary's expert Michael Snyder, who stated that "LMA" is a measure of the changes in the metallic area of a wire rope, and thus, serves as an indicator of broken or damaged wires. Tr. 111.

Courtney also discussed the size of the loads placed on the hoist at Buick mine, and noted that although the maximum load for the hoist is 25,000 pounds, the most they load onto the hoist is a few Anfo containers, which weigh 7000 pounds total. Tr. 198. For larger loads, they typically use the hoist at West Fork. Tr. 198. He also stated that the only time chairs were ever used on the hoist at Buick was under a previous owner, when all four hoist ropes were changed at the same time. Tr. 199-200. When they change the ropes at Buick, they are changed one at a time. Tr. 200. Courtney testified that in general, he did not believe chairs were necessary on this hoist, and that he had not noted any close calls involving stretching of hoist ropes that would necessitate the use of chairs. Tr. 200-202. He also stated that the expense of installing chairs on this hoist would be astronomical, and that there is never significant movement from the hoist ropes. Tr. 200-202. He emphasized that the mine has never had an incident in which the hoist jumped up or dropped during loading or unloading that could be attributable to stretching or contracting of the ropes. Tr. 202.

Doe Run also presented testimony by Don Moore, who has been the Buick mine's safety specialist for the past four to five years. Tr. 209. As safety specialist, he makes routine audits, conducts safety lessons and meetings, performs inspections, and generally accompanies the company's inspectors. Tr. 209. His experience includes training personnel on the safe use of equipment, including forklifts. Tr. 210.

Moore testified that on the day of Marler's inspection, he met with Marler after he had witnessed the incident at the hoist. Tr. 211. Moore stated that Marler had told him he would talk to other people at Doe Run and with MSHA personnel about the incident at the cage, and that Marler told him he would "issue [Doe Run] a citation and see if we get it resolved." Tr. 211. Moore testified that he talked to mine personnel about the incident, and accompanied Mr. Snyder and Mr. Marler on their visit to the mine on a later date. Tr. 211. He did not think that the fact that Mann had to bump his forklift over the lift had anything to do with the stretching and contracting of the hoist ropes, nor did he think it presented a significant safety hazard. Tr. 211. He noted that the cage at issue supports a lot of weight, and the weight of the forklift and the items it was carrying that day was not significant compared to the maximum capacity of the cage. Tr. 212. Further, Moore stated that no miners had ever raised any safety issues indicating possible hazardous stretching of the rope hoist system. Tr. 212.

The Sweetwater Mine: Citation No. 8676770

The Sweetwater mine is located in Reynolds County, MO, and is a "standalone" mine, unconnected to the other Doe Run mines in the area. Tr. 75-76. The materials mined at Sweetwater include lead, zinc, and copper. Tr. 76. There are several shafts in the mine, and the main shaft is the number two shaft, which is used for moving men and materials and is the subject of this case. Tr. 77. The hoist in the number two shaft is a manually operated drum type hoist, with just one wire that attaches to the cage. Tr. 79-80.

Inspector Lawrence Sherrill testified at the hearing regarding his inspection of Doe Run's Sweetwater mine in March 2013. Sherrill has been an inspector for 15 years and has over 30

years of experience in the mining industry, including some time working for Doe Run's predecessor company. Tr. 72-74. At the time of the hearing, he had inspected the Sweetwater mine 7 times on regular inspections and once to conduct a complaint investigation. Tr. 74.

On March 25, 2013, Sherrill visited the Sweetwater mine with the intent of checking whether Sweetwater had complied with the chairing standard cited at Buick. Joint Stip. No. 15; Tr. 77-78. Although no particular incident had occurred at the hoist at the Sweetwater mine, Inspector Sherrill issued a citation because he saw they had not provided chairs on the hoist despite the issuance of a citation at the Buick mine. Tr. 78, 82. He noted that it was possible with a drum hoist to use chairs, and that in fact, he believed this particular mine used to have chairs at the shaft landing. Tr. 83.

Sherrill testified that he observed materials being loaded and unloaded from the hoist, though he did not see any loads that he would consider really heavy. Tr. 83-84. He also testified that he interviewed mine employees Rick Smith, Mike Gore, and Vince Mertzluffd, who told him that when heavy objects were moved down the shaft, it would stretch the ropes somewhere in the neighborhood of a foot and a half to two feet. Tr. 84.

The forklift operator involved with the December 2012 incident at the Buick mine, Steven Harris, testified that he had also worked at the Sweetwater mine as a hoist operator for 18 months back in 2002. When asked specifically about the possibility of hoist movement in excess of one foot due to cable stretching at the Sweetwater Mine, Harris stated that he had never observed that type of movement during active loading operations. Tr. 187. Further, Harris confirmed that when moving heavy loads, they hang loads in the cage with cable, such that no one is ever in the cage during heavy hoisting. Tr. 189-90.

Doe Run presented the testimony of Vincent Mertzluffd, the maintenance supervisor on the surface of the Sweetwater Mine. Tr. 215. He had held this position since 2003, and his duties include maintenance of equipment on the surface and the mill, which included maintenance of the hoist. Tr. 215. He stated that he was familiar with the hoist since it had been there when he first started at the mine in 1976, and had seen it when the mine was under the supervision of other companies as well as Doe Run. Tr. 216. Similar to the one at Buick, the hoist at the Sweetwater mine has several safety features, such as an overspeed device and over travel limit switch, to prevent unanticipated movement of the hoist. Tr. 216-17. Mertzluffd described in detail how the mine moves heavy objects, such as a locomotive, underground. Tr. 219- 20. When transporting very heavy objects, he stated that they remove the cage completely and use the standalone hoist to lift material. Tr. 220. Importantly, they remove the man cage portion, the part that someone would travel on, and install an overhead crane that is used to raise and lower the equipment. Tr. 220. No one is ever on the hoist when very large equipment is being loaded or unloaded, and further, it would be impossible for a forklift to be on the hoist at the same time because there would be no room for one. Tr. 226. Instead, the equipment is usually on a skid and pushed into the loader. Tr. 225.

Mertzluffd also testified that when Sherrill came to inspect the mine, he did not inspect the hoist at all, but rather wrote a citation simply based off of the conversation he had. Tr. 221. Contrary to Sherrill's testimony, Mertzluffd testified that he never told the inspector anything about the hoist sinking one and a half to two feet. Tr. 221-22. While he did tell the inspector that there used to be chairs on the hoist, he had not mentioned how those chairs were used, and at trial, he testified that they use chairs for the sole purpose of testing the safety dogs on the hoist.² Tr. 241-42. Similarly to the other mine personnel that testified, Murtzluffd stated that in his 30 years at the mine, he had never seen or been told of an issue with the hoist dropping down or raising up when supplies were unloaded. Tr. 223

Expert Testimony regarding the Sweetwater and Buick Mines

The Secretary also presented the testimony of Mr. Michael Snyder, a mining engineer with the Approval and Certification Center for MSHA, where he conducts nondestructive wire rope testing for MSHA. Tr. 102-104. He testified that he had visited both mines because he had become aware of the violation issued at the Buick mine, where he conducted visual inspections of the hoist. Tr. 124. He watched the loading and unloading of the hoist and tried to get a sense of the types of loads that were being put on the cage. Tr. 124. He noted that the incident with the forklift at the Buick Mine seemed like it would be a hazard to him, although he had not observed any other violations at the mine based on the condition of the ropes. Tr. 126-127. In fact, he confirmed that during the time he visited the mine, he did not see anything out of the ordinary that would cause him to be alarmed. Tr. 135-136. He did not observe the loading and unloading of any equipment, and at no point during his visit did see anyone put a forklift or loader on the hoist. Tr. 137-138. He also testified about abatement options at the mine, noting that there was a chairing system in place at the Sweetwater Mine, and further, that while the chairing system would not be applicable to a friction hoist like the hoist at the Buick mine, other clamping mechanisms would be appropriate alternatives to chairs. Tr. 129-30.

However, Snyder also testified that a possible abatement method for the forklift incident would be to use a larger forklift. Tr. 133. He also acknowledged notes in the record, written by Inspector Marler, which stated "if a larger weight than that, West Fork shaft is used." Tr. 132, Gov't Exhibit 17. This supports the prior testimony of William Courtney, who stated that for heavy loads, the Buick mine would use a different shaft and avoid some of the issues the cited standard seeks to prevent. Tr. 132.

The special projects coordinator for the Buick mine, Michael Reed, also testified about his knowledge of the hoists and Sweetwater and Buick mines. Tr. 229. As special projects coordinator, he performs varied tasks, described as building power lines and substations, as well as "various large unusual electric installations." Tr. 229. He also serves as an internal consultant

² A safety dog is a device that will grab the guide rails in the event of a rope failure. Tr. 241. In order to test the safety dogs you must essentially let the rope go slack in order to simulate rope failure. Only in this special instance are chairs used to support the cage. Tr. 241-42. The one set of chairs left at the Sweetwater hoist is used only for this purpose. Tr. 243.

for the hoist ropes, and is called in if there is an electrical issue or if they are considering retiring a wire rope. Tr. 230. Reed has a Bachelor of Science degree in electrical engineering and a Master's degree in engineering management, as well as experience in this field at a variety of mines since 1974. Tr. 230-32.

Reed testified as to the workings of a friction hoist, and stated that Doe Run has three friction hoists, none of which are equipped with chairs. Tr. 233. Further, he noted that the shafts at the Doe Run mines are shallow by world standards and thus, there is less potential for stretching. Tr. 233. While all wire ropes stretch and contract, the amount of stretching depends on temperature conditions and the load. Tr. 234. Like Moore and Mertzluffd, Reed explained that in the context of the maximum capacity of the hoist system, the small Caterpillar forklift carrying a small load is insignificant compared to what the ropes can handle. Tr. 237. Like Doe Run's other witnesses, he did not believe that the stretching and contracting of the ropes had anything to do with the incident involving Mann and the forklift. Tr. 235. While people have come to him from time to time regarding issues with the ropes and hoist, he has never had anyone report significant movement in the range of 1.5 to 2 feet. Tr. 239-40. Reed again emphasized that when very heavy loads are moved, they use the procedures described by other witnesses to eliminate the need for any worker to be in the cage. Tr. 244. The company also has a policy that states no one should ride in the cage with anything that they cannot pick up with their hands and carry. Tr. 244-45.

III. APPLICABLE LAW

30 C.F.R. Section 57.16017

Citation Nos. 8684827 and 8676770 were each issued for a violation of 30 C.F.R. § 57.16017, which states:

Where stretching or contraction of a hoist rope could create a hazard, chairs or other suitable blocking shall be used to support conveyances at shaft landings before heavy equipment or material is loaded or unloaded.

After researching the Commission Record, it appears a violation of this regulation has never been adjudicated by a Commission ALJ. Furthermore, the Federal Register provides little guidance as to the intent and further meaning of this standard. Joint Stip. at 4.

However, both the MSHA Hoisting Glossary and the Mine Bureau Hoist Inspection manual describe the appropriate manner for using chairs in hoist-ways. Exhibit G-5: Exhibit G-6. The MSHA Glossary states that chairs should not be used under normal conditions, but should be used when necessary to control specific loading and unloading stresses. Exhibit G-5, 2. The Mine Bureau Hoist Inspection Manual states that chairs are not common in the United States, but are used when needed to prevent sudden unsafe load shifts. Exhibit G-6, 2.

The Commission has provided guidelines for evaluating issues of first impression as follows:

The language of a regulation ... is the starting point for its interpretation. Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded.

In determining the meaning of regulations, the Commission ... utilizes traditional tools of (statutory) construction, including an examination of the text and the intent of the drafters. In a plain meaning analysis, a provision at issue must be considered in the context of the language and design of the Secretary's regulations as a whole.

Cannelton Industries, Inc., 26 FMSHRC 146, 150-51 (March 2004) (internal citations omitted)

Thus, using Commission guidelines regarding statutory construction and considering MSHA's own hoist inspection procedures, I make the following basic findings regarding 30 C.F.R. § 56.16017. 30 C.F.R. § 56.16017 states that chairs or other suitable blocking shall be used "where stretching or contraction of a hoist rope could create a hazard." Thus, I find that chairs are not a mandatory safety feature on rope hoist systems unless the stretching or contraction of the hoist ropes could create a hazard. Furthermore, I find that the routine stretching and contraction of hoist ropes due to ordinary use and changes in weather conditions is *not*, in itself, a hazard that requires the application of 30 C.F.R. § 56.16017 to all rope hoist systems. To hold otherwise would render the regulations explicit reference to potential hazards superfluous and meaningless. This finding is consistent with MSHA's own policy guidelines that chairs should not be installed in a hoist-way unless necessary to control specific loading and unloading stresses. Exhibit G-5,2 ; Tr. 56.

Furthermore, as the statute concerns heavy equipment loading and unloading at shaft landings, I find that the hazards covered by the statute are most properly described as hazards created by unexpected load shifts, unbalanced loads, and possibility of caught-between and struck by accidents. Exhibit G-6, 2.

Thus, in order to sustain a violation of 30 C.F.R. § 56.16017, the Secretary must show that an operator failed to provide chairs or other suitable blocking where the stretching or contraction of hoist ropes increased the likelihood of unexpected load shifts, unbalanced loads and possibility of caught-between, or struck by accidents.

IV. ANALYSIS OF EVIDENCE

Factual Conflicts and Witness Credibility

I find that the conflicts between the inspectors' and the mine personnel's testimony should largely be resolved by giving credence to the recollection of Doe Run personnel. Central to this finding is the fact that the inspector at Buick, Michael Marler, denied ever witnessing the December "incident" at the Buick mine, but rather, testified that forklift operator Richard Mann told him about the incident. Tr. 61-62. This is troubling because several eyewitnesses to the incident, and most notably, the forklift operator himself, later testified in detail as to their recollection of the incident from a first-person, on the ground perspective. Their detailed accounts of the hoist operation on that day are internally consistent and describe exactly how and why the incident occurred.

In particular, Mr. Mann's recollection of the events of that day, including his perception of the "hazard" and its causes, are credible. Further, the mine personnel's collective accounts convincingly explain why chairs were not appropriate given the minimal amount of rope stretching that may occur, and most importantly, why providing chairs to prevent rope stretching would have not changed anything with respect to the incident that was the basis for the citation. In contrast, inspector Marler's contention that he did not observe the incident runs directly contrary to the testimony of several more credible witnesses, and further, the citation he wrote based not on his knowledge but on interviews with others, holds little weight in this analysis.

Similarly, Inspector Sherrill based his issuance of the citation at Sweetwater off of his observations of routine activity and his interviews with three employees of the mine, including Mr. Mertzluffd. After hearing the testimony of other witnesses that have worked at Sweetwater and actually observed the loading and unloading of a variety of loads on the hoist, I find it likely that any employees Sherrill spoke with that told him the ropes may stretch one to two feet were most likely describing heavy loads, loads that are subjected to different procedures when moved down the shaft. Tr. 84. As I will discuss, these heavy lifting procedures eliminated the possibility of cable stretch endangering a miner, and thus, eliminated any need to provide chairs.

I also give very little weight to evidence from the testimony of wire rope expert Michael Snyder, because the activities he observed at the mine were not similar to the "incident" that prompted the issuance of the citations in question. Tr. 137. Further, he did not observe any conditions out of the ordinary, and despite being given the opportunity to do so, did not ask mine personnel to load the hoist with a forklift or any heavy material so that he could observe the rope stretching under conditions that might lead to a hazard. Tr. 137-38.

I also rely on the credible testimony of mine personnel regarding the physical dimensions of the forklift in finding that inspector Marler's allegation of an 8 inch gap at the loading shaft is highly unlikely. Mine Foreman Gibson testified that, given the less than 6 inch ground clearance of the forklift itself, and the less than 4 inch clearance below the forks, it was physically impossible for the gap between the cage and the shaft landing to be 8 inches and have the forklift leave the cage at all. Tr. 157-158. Forklift operator Mann similarly testified an 8 inch gap would have required using a separate piece of equipment or cage repositioning in order to

remove the forklift from the cage in such a situation. This further puts inspector Marler's testimony in question, since it is undisputed that the forklift, after backing up and attempting to clear the cage the second time, was in fact able to exit onto the shaft landing without any assistance. Tr. 62, 68, 146. Given Foreman Gibson's credible and corroborated testimony regarding the dimensions of the forklift and explanation of how wet conditions contribute to wheel slippage, I find that the hoist was likely spotted no more than 2-3 inches too low at the time of the December incident. Tr. 157-159; 170.

Findings-

The stretching and contraction of the wire ropes at Doe Run's mines did not create a hazard

The cited standard clearly states that chairs should be used *when stretching or contracting of a hoist rope* could create a hazard. In this instance, the Secretary did not meet his preponderant burden of proof in showing that a hazard could have been created because of the stretching of the hoist ropes at either mine. I find that the December 2012 "incident" that led to the citation issued at Buick (and indirectly, the citation at Sweetwater) was the result of several factors, including the slickness of the metal surface, the spotting of the cage and the size of the forklift used that day, but the stretching of the hoist ropes did not contribute to the difficulty Forklift Operator Richard Mann had with backing the forklift off the cage. Tr. 170-71, 202.

While both Mann and Mine Foreman Gibson admitted that Mann had some difficulty exiting the cage on his first attempt, the reasons they identified for the difficulty were not the stretching of the wire rope, and certainly would not be remedied by equipping the shaft with chairs. They testified that the landing was made of steel decking, which was always slick, causing some slippage on the wheels of the forklift. Tr. 170, 159. In addition, the cage was spotted a few inches lower than the landing, and part of the difficulty Mann experienced had to do with him negotiating the difference in spotting. It is also reasonable to conclude that had the gap been due to rope stretching, the cage would have most likely moved when the forklift was driven from the cage on to the landing; it did not. Tr. 147.

Notably, Inspector Marler himself admitted that the difference between the hoist and the shaft landing could have been entirely the result of spotting, and not the stretching of the ropes. Tr. 68. He also stated that the problem would not have occurred if the nipper had been using a larger forklift, or if the hoist operator had positioned the cage higher, which suggests that any hazard perceived by the Inspector had nothing to do with the stretching of ropes or the mine's decision not to provide chairs. Tr. 69-70. This severely weakens the validity of the citation, as the cited standard specifies that the cause of the hazard created should be the stretching or contracting of the wire rope. *See* 30 C.F.R. § 57.16017. Yet, as noted, even the inspector who wrote the citation admitted the incident could have occurred without *any* stretching or contraction. Tr. 68.

The fact that the stretching of hoist ropes was not the cause of a hazard, and that chairs were an inappropriate requirement in this context, is further evident in light of both parties' suggestions for abatement. Inspector Marler himself stated that chairs are not widely used in the United States at all, and particularly not on friction hoists. Tr. 56-57. He also noted that one of

his suggested alternatives, clamping, was not an appropriate solution for this hoist because it did not have steel shaft guides. Tr. 57. The government's witness Mike Snyder, Mine Foreman Gibson, and Forklift Operator Mann all confirmed that if the larger Selleck forklift had been used as opposed to the smaller Caterpillar one, Mann would have been able to negotiate the gap between the landing and the hoist in one attempt without any difficulty. Tr. 133, 159, 170-171. In addition, Gibson, Harris, and Mann all confirmed that Mann had several options for communicating to Harris that the cage needed re-positioning, which again would have eliminated any perceived hazard without the use of chairs. Tr. 150, 156-157, 169-170, 180. This confirms that chairs were not an appropriate way to address the situation, and thus, that the cited standard does not apply in this case.

In addition, I find that the December 2012 "incident" at issue did not present a hazard. All testimony presented concurs that forklift operator Mann was completely uninjured and Mann testified that he never felt unsafe, shifted around in the lift, or felt the forklift become unstable in any way while exiting the hoist. Tr. 174. I also find Inspector Marler's identification of the event as a "hazard" less than credible because he claimed numerous times to base his citation only off of a conversation he had with Forklift Operator Mann, yet Mine Foreman Gibson and Forklift Operator Mann both testified that he was in fact present, and further, Gibson stated that Marler told Mann at the time that everything was alright. Tr. 38-40, 54, 65-66, 145-146, 148, 157, 171.

With respect to whether the stretching of the wire ropes *could* possibly create a hazard, I find that Doe Run's policies and the safety mechanisms on both hoists prevent this possibility. The Secretary focused repeatedly on the fact that one cannot completely eliminate stretching and contracting out of wire ropes, a fact stipulated to by Doe Run. Tr. 204, 213. However, the Secretary did not show how such stretching could actually create a hazard at either one of the two mines based on the December 2012 "incident" or any other observed circumstances. The employees from each mine were credible when testifying that stretching of the ropes had never been of such magnitude as to cause a hazard. Tr. 202, 239. To support this assertion, they noted the multitude of safety options the mines were equipped with to prevent sudden movement, and most importantly, they described procedures used to transport "heavy loads" (as the cited standard contemplates) that did not involve any miner being put in the path of a hazard from rope stretching. Tr. 225-226.

The maintenance supervisor at Buick, William Courtney, described in detail the various safety mechanisms on the hoist that could be used in the event of a hazard. Tr. 194. The hoists at both mines are equipped with an overspeed device, an over travel limit switch, and a jam conveyance that will kill power and set the brakes if the hoist drum is turning without the ropes moving. Tr. 194, 216-17. These mechanisms made it unlikely that the hoist would move suddenly, which is confirmed by Doe Run's clean safety record with respect to the hoists. Joint Stip. at 9, 23. With respect to the spotting problems in particular, both Harris and Mann mentioned the communication options available to signal the hoist operator for hoist repositioning. Tr. 169-70, 179-80. Had Mann felt he could not safely make it to the shaft landing, he could have easily used the bell cord system to direct the hoist operator to recalibrate the hoist before entering the cage and starting unloading operations.

The cited standard specifically applies to heavy loads, and I find that Doe Run's procedures for the hoisting of heavy loads are such that stretching cannot create a hazard. These procedures, which were described in detail by workers at both mines, prevent miners from entering the hoist when heavy loads were being moved up and down the shaft. A crucial aspect of Doe Run's procedures, and one that eliminates Inspector Sherril's express concern regarding potential tip-over hazards, is the fact that miners themselves are not in the shaft when heavier objects such as locomotives or large cable spools are lowered into the shaft. Tr. 84; 189-90. It is also Doe Run's policy that no one can ride in the cage with anything they can not pick up in their hands and carry. Tr. 244-45. The cited standard requires chairs in situations where wire rope stretching due to heavy loads presents a hazard to miners. However, the described procedures at both mines for heavy loads prevent such a hazard from occurring, because even if there is stretching, miners are never on the hoist when it occurs. Further, the incident upon which the citations were originally based did not involve heavy loads. Thus, it is unlikely that chairs would have been used even if they were provided for heavy loads as the cited standard contemplates.

For the reasons above, I find that there was not any hazard present at either the Buick or Sweetwater Mine due to the stretching and contracting of wire ropes. Thus, Doe Run was not required to provide chairs or other blocking mechanisms for the hoists at issue in these dockets at the Buick and Sweetwater mines.

V. ORDER

Accordingly, Citation Nos. 8684827 and 8676770 are **VACATED** and this case is **DISMISSED**.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (via certified mail)

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1340
401 Liberty Avenue, Pittsburgh PA 15222

Susan J. Willer, Esq., US Department of Labor, Office of the Solicitor
2300 Main Street, Suite 1020 Kansas City, MO 64108

Leigh Burleson, Esq., US Department of Labor, Office of the Solicitor
2300 Main Street, Suite 1020 Kansas City, MO 64108