FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-3577 / FAX: 303-844-5267

October 1, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-193-M A.C. No. 04-04149-338834
v.	
NORDIC INDUSTRIES, INC., Respondent	Parks Bar Quarry

DECISION

Appearances: Randy Cardwell, Conference & Litigation Representative, U.S. Department of Labor, Vacaville, California, and Isabella Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford & Johnson, Sacramento, California, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Nordic Industries, 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 "Mine Act"). The parties presented testimony, documentary evidence, and closing arguments at a hearing held in Sacramento, California. Three section 104(a) citations were adjudicated at the hearing. Nordic Industries operates the Parks Bar Quarry, a crushed stone operation, in Yuba County, California.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8702904

On October 23, 2013, MSHA Inspector Roshan L. Gulati issued Citation No. 8702904 under section 104(a) of the Mine Act, alleging a violation of section 56.11012 of the Secretary's safety standards. (Ex. G-2). The citation alleges that there was a 2 foot wide opening on the screen access platform in the Baxter Plant that was not adequately guarded to prevent a person from falling through the opening. The citation states that a chain was installed to prevent travel through the opening but the latch was broken so the chain offered no protection. The citation further states that a maintenance crew member enters the area once a week.

Inspector Gulati determined that an injury was unlikely to occur but that an injury could reasonably be expected to result in lost work days or restricted duty. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.11012 mandates, in part, that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." 30 C.F.R. § 56.11012. The Secretary proposed a penalty of $100.00 for this citation.

Discussion and Analysis

The basic facts are not in dispute. Inspector Gulati testified that when he started his inspection on October 23, 2013, none of the four plants at the quarry were operating but an employee was loading customer trucks. (Tr. 12-13). He started his inspection at the Baxter Plant. He walked up the stairway next to the screen to the landing at the top. When he reached the top, he noticed that there was a gap in the handrails around the landing. (Tr. 14-15). The gap was about 2 feet wide. There was a chain attached at the top of the vertical post for the handrail on one side of the opening but the latch hook was missing on the vertical post on the other side. (Tr. 16). As a consequence, the chain could not be fastened between the two vertical posts to provide a visible warning of the hazard. It appeared to the inspector that a hook was present in the past but that it had broken off. *Id.* He said the break did not appear to be fresh because it was not shiny. Inspector Gulati testified that this condition "could create a hazard for [a] person to fall through this unprotected opening." (Tr. 15; Ex. G-3 at 2).

Inspector Gulati testified that there was no other way to access the shaker screen, which was locked out at the time of his inspection. The drop-off from the landing to the chute for the screen was about 3 feet. (Tr. 17). Although the chain could not be strung across the cited opening, there were steel plates across the bottom of the opening. (Tr. 18; Ex. G-3 at 3). These plates were attached to the chute and extended up above the middle rail of the adjacent handrails. They directly abutted the landing. One plate was about 18 inches high and the other 24 inches high. (Tr. 19). Inspector Gulati testified that a miner will travel to the landing once a week to check on the condition of the screen and the handrails. (Tr. 19-20). Miners would also go to the landing to perform routine maintenance as needed.

Inspector Gulati believes that the cited condition violated section 56.11012 because the top chain, "which subs as a handrail," was not "functional at the time of [the] inspection." (Tr. 21). He determined that the landing at the top of the stairway was a "travelway" because employees "did access this place during operation for workplace examination and during maintenance." (Tr. 22). The inspector considered the violation to be obvious. (Tr. 23).

Richard Hamilton, the foreman at the Parks Bar Quarry, testified that the landing at the top of the stairway next to the shaker screen is a work platform that is used to "gain access to the screen, the shaker deck, for maintenance and inspection." (Tr. 76). He said that there was no other reason for a miner to be on this platform. Miners do not walk or travel on this platform to get from one place to another. (Tr. 78-79). The plant is always locked out and tagged out when performing these functions and the chain would need to be unlatched from one side while performing this work. (Tr. 76). He had never noticed that the latch was broken on one side and believed it occurred a few days prior to the inspection. (Tr. 77). The plant was locked out for

several days preceding the day of Inspector Gulati's inspection so a pre-operational examination was not performed. (Tr. 78). Hamilton believes that the steel plates on the side of the "rip rap chute" prevented a miner from falling off the platform. (Tr. 78).

The principal issue raised by Nordic Industries concerns the definition of "travelway" as used in the safety standard. Travelway is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. Nordic Industries contends that the platform at the top of the stairway was not a travelway because it was not a walk or way regularly used and designated for persons to go from one place to another. A miner would only travel to the platform to perform work.

I find that the evidence establishes that the cited area was a travelway, as that term is defined by the Secretary at section 56.2 and that Nordic Industries violated the cited safety standard. It is clear that the platform was not a pedestrian walkway through the plant, but miners walked across the platform to get to the screen for maintenance. As Hamilton testified, the platform was used to "*gain access to* the screen, the shaker deck, for maintenance and inspection." (Tr. 76) (emphasis added). Although Hamilton testified that there would be no reason for a miner to be upon the platform other than to perform maintenance, he admitted that there were no barricades at the bottom of the stairs to prevent a miner from accessing the platform. (Tr. 76, 86-87). Thus, a miner could walk up to the platform to visually inspect the screen or to provide assistance during maintenance and the chain would not be present to provide a warning or protection. I find that the steel plates at the bottom of the opening did not supply the needed protection and, indeed, could present a tripping hazard.

I find that the gravity was low. Hamilton testified that company policy requires that the screen be locked and tagged out before anyone walks up to the platform. (Tr. 76, 79). I credit this testimony. The violation presented a stumbling hazard. As the inspector determined, the most likely injury would be cuts, lacerations, or fractures. (Tr. 23). The likelihood of an injury was low. The company's negligence was low. The plant had been shut down for several days at the time of the inspection and a pre-operational examination had not been performed. The violation was not obvious given the company's safety policies.

I **MODIFY** Citation No. 8702904 to reduce the gravity and negligence to low. A penalty of $100.00 is appropriate for this violation.

B. Citation No. 8702905

On October 23, 2013, Inspector Gulati issued Citation No. 8702905 under section 104(a) of the Mine Act, alleging a violation of section 56.11001 of the Secretary's safety standards. (Ex. G-5). The citation alleges that safe access was not provided to the operator of a John Deere excavator. Two of the four foot holds upon both sides of the excavator were bent. The citation alleges that the condition created a fall hazard, which could result in injuries.

Inspector Gulati determined that an injury was unlikely to occur but that any injury could reasonably be expected to result in lost work days or restricted duty. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.11001

mandates that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. Prior to the hearing, the Secretary filed an unopposed motion to amend the penalty petition to allege, in the alternative, a violation of section 56.14100(b). That safety standard provides that "[d]effects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). The Secretary proposed a penalty of $100.00 for this citation.

Discussion and Analysis

Inspector Gulati testified that the cited footholds on each side of the excavator were bent inward or twisted upward. (Tr. 24-26; Ex. G-6, at 2-3). This condition created a slipping, tripping, and falling hazard. (Tr. 26). Inspector Gulati was testified that if a miner tried to use one of the damaged footholds, he could slip because it would not provide 3 inches of toe clearance. (Tr. 59). The inspector was especially concerned that the equipment operator could slip while dismounting the equipment. (Tr. 55). The second foothold on each side was not damaged, but they were a little over 33 inches above ground level. (Tr. 58). Foreman Hamilton told the inspector that the footholds frequently become damaged during normal operations. (Tr. 30).

Inspector Gulati determined that the cited condition was unlikely to result in an injury because there were handholds available. (Tr. 32). He determined that the operator's negligence was moderate because the condition was obvious. (Tr. 33). He believed that the footholds were damaged "some time back." (Tr. 54).

Hamilton testified that the footholds had been in the same condition cited by the inspector since 2007. (Tr. 80). He does not believe that the bent footholds presented a safety hazard. *Id.* No miner had been injured while ascending or descending the excavator. (Tr. 81). He is the principal operator of the excavator and he had never been concerned for his safety while entering or exiting the excavator's cab. (Tr. 80; Ex. R-6).

Nordic Industries argues that the test to be applied here is whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action." (Tr. 97-98). It argues that the evidence establishes that the footholds could still be used and that anyone accessing the excavator would be able to maintain three points of contact. Consequently, a reasonably prudent person would not believe that the cited conditions created a hazard to miners.

The Commission has held that, under the reasonably prudent person test, "the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). The Commission stated in *Ideal Cement Co.*, "the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person,

familiar with the protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed in that "particular factual setting[]." 12 FMSHRC 2409, 2415-16 (Nov. 1990). Therefore, with respect to a broadly worded safety standard, if a reasonable person with knowledge of the particular facts, including facts peculiar to the mining industry, would recognize the existence of a defect constituting a hazard requiring corrective action within the purview of the applicable regulation, the operator has sufficient notice of the standard.

Both section 56.11001 and 56.14100(b) are broadly worded safety standards. I find that a reasonably prudent person would conclude that the bent footholds were a defect on the excavator that affected safety. I also find that a reasonably prudent person would conclude that Nordic Industries did not maintain a safe means of access to the cab of the excavator, which was a working place. The risk of injury will be particularly notable when a miner is descending from the cab of the excavator.

The Commission has held that a violation of the MSHA's guarding standard requires a "reasonable possibility of contact and injury" that includes "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all "relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct" must be considered. *Id.*

The same principles apply with respect to this citation. As a result of inattention, fatigue, and environmental factors such as bad weather, a miner may slip and fall while exiting the cab because he was unable to maintain a good foothold regardless of maintaining three points of contact. The miner could easily sustain scrapes, bruises, or more serious injuries. As Inspector Gulati recognized, such an event was not reasonably likely. I find the Secretary established a violation of both safety standards, but I base my decision upon a violation of section 56.14100(b). The gravity was only moderately serious.

I find that the violation was the result of Respondent's low negligence. I credit the testimony of Hamilton that at least one of the footholds was damaged since 2007, soon after Nordic Industries purchased the excavator. (Tr. 80). Hamilton normally operates the excavator and he credibly testified that he never had any difficulty accessing the cab or exiting the cab and that he never slipped while doing so. *Id.* Hamilton genuinely believed that the excavator was safe to operate in the cited condition and his belief was not unreasonable under these circumstances. (*See e.g.* Ex. R-6)

I **MODIFY** Citation No. 8702905 to reduce the negligence to low. A penalty of $100.00 is appropriate for this violation.

C. Citation No. 8702906

On October 23, 2013, Inspector Gulati issued Citation No. 8702906 under section 104(a) of the Mine Act, alleging a violation of section 56.14130(i) of the Secretary's safety standards.

(Ex. G-7). The citation alleges that the lap portion of the seatbelt on a Caterpillar wheel loader was not maintained in functional condition and replaced when necessary to assure proper performance. Specifically, the citation alleges that the 2 ¾ inch strap on the left side of the driver was badly frayed over a length of about 4 inches and also contained cuts, holes or nicks. It states that more than 50% of the webbing across its width was damaged and worn out.

Inspector Gulati determined that an injury was reasonably likely to occur and that an injury could reasonably be expected to be fatal. He determined that the operator's negligence was moderate and that one person would be affected. Section 56.14130(i) states, in part, that seat belts on wheel loaders "shall be maintained in functional condition and replaced when necessary to assure proper performance." 30 C.F.R. § 56.14130(i). The Secretary proposed a penalty of $263.00 for this citation.

Discussion and Analysis

Inspector Gulati testified that when he examined the left side of the lap belt he saw that it was "very, very badly nicked." (Tr. 34, 36-39; Ex. G-8 at 3-5). He saw "holes," "longitudinal cuts," and a "vertical tear across the bridge of that strap." (Tr. 34). He characterized the belt as "very badly worn out." (Tr. 34). Inspector Gulati determined that the conditions he observed violated section 56.14130(i) because the seatbelt "was not replaced in spite of the fact that it was severely frayed, nicked, had holes, [and] had cuts, both longitudinally and across the width of the belt." (Tr. 42).[1]

Inspector Gulati was advised by Hamilton that the loader had not been subjected to a pre-operational examination because the loader arrived at the mine site about a week earlier and was never used. (Tr. 39). Hamilton also told the inspector that it was "available for use to top off the customer trucks." *Id.* The loader was not tagged out. (Tr. 41). Because the vehicle had not been used at the mine, Inspector Gulati gave Nordic Industries an opportunity to perform a pre-operational examination upon the loader before he inspected it. Inspector Gulati did not start his inspection of the loader until he was told that the pre-operational exam was completed. (Tr. 40-41).

The inspector was concerned that if Nordic Industries continued to use the loader with the damaged seatbelt, the belt would fail during a serious accident. (Tr. 42). He cited a document entitled the "Operator Restraint System for Off-Road Work Machines" produced by SAE International, which recommends that seat belts be immediately replaced if the belt strap is "nicked or frayed." (Tr. 45; Ex. G-9 at 4).

Inspector Gulati determined that the violation was S&S because, with all the holes, nicks, and cuts, the strength of the strap was compromised. The "minimal width of the strap" would not hold a miner in the event of an accident. (Tr. 46). An injury would likely be fatal. *Id.* He determined that Respondent's negligence was moderate because he gave the operator the opportunity to discover the violation during the pre-operational examination. (Tr. 47).

[1] I credit Inspector Gulati's description of the damage to the belt and his photographs depicting the damage. (Tr. 34-39; Ex. G-8 at 3-5). Respondent's photo was taken after the belt was removed from the vehicle. (Ex. R-7).

Hamilton testified that Nordic Industries replaces seatbelts when they become damaged or inoperable. (Tr. 83). He said that he felt rushed and intimidated during the pre-operational examination that day because the inspector stood a few feet away. (Tr. 84). Hamilton believes that before the loader was operated for the first time, the equipment operator would have performed a more thorough pre-operational examination and discovered the problems with the seatbelt. Hamilton testified that he would have shut down the loader until a new seatbelt arrived. Furthermore, he testified that the defective seatbelt did not present a hazard because that loader is only used to top off loaded trucks and its speed would not exceed five miles per hour. (Tr. 85). If there was an accident at that speed, the seatbelt would fully restrain the loader operator. (Tr. 86).

Nordic Industries argues that the Secretary did not establish a violation of the safety standard. More critically, it contends that the Secretary did not establish that the violation was S&S. The loader was delivered to the mine about a week before the inspection, was not used, and was not given a thorough pre-operational checkup. (Tr. 99). The operator would have replaced the seatbelt before it was put into service.

I find that the Secretary established a violation of the safety standard. The cited equipment was a wheel loader and the seatbelt was not replaced to assure proper performance. I credit the inspector's description of the damage as documented by his photographs. Nordic Industries cited three cases to support its position that the citation should be vacated: *Ammon Enterprises*, 30 FMSHRC 799, 813-14 (July 2008) (ALJ); *Ron Coleman Mining, Inc.*, 21 FMSHRC 935, 935-36 (Aug. 1999) (ALJ); *Buffalo Crushed Stone*, 16 FMSHRC 2154, 2161 (Oct 1994) (ALJ). Those cases are inapposite. In one case the inspector testified that the seatbelt would still function properly if the vehicle were involved in a rollover accident, in another the inspector said that the seatbelt would still function despite the damage to the belt, and in one case the citation was issued because the seatbelt was dirty and oil stained.

I find that the Secretary did not establish that the violation was S&S.[2] The violation created a discrete safety hazard. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would cause injury. A seatbelt protects the equipment operator from injury in the event of an accident and helps keep him in his seat when traveling over rough terrain. I credit the testimony of Hamilton that at the time of the August 2014

[2] 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). 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). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

hearing, the loader was only used on an occasional basis to top off large double bottom dump trucks that had been loaded using larger loaders. (Tr. 84-85). That was its intended use. As a consequence, assuming continued mining operations, the loader will travel in a flat area away from other traffic and it will not exceed a speed of five miles per hour. The hazard presented by the violation was that the loader operator would be injured in the event of an accident due to the condition of the seatbelt. I find that under the facts in this case it was unlikely that the seatbelt would fail to protect the equipment operator in an accident and, as a consequence, the violation did not contribute to the risk of an injury.[3] I find that the gravity of the violation was serious and that, while unlikely, a fatal injury was possible.

I find that Respondent's negligence was moderate. Nordic Industries was given the opportunity to perform a pre-operational check of the loader and its employees failed to inspect the seat belt. My negligence finding considers that the loader had not been used at the mine prior to this MSHA inspection.

I **MODIFY** Citation No. 8702906 to delete the S&S determination. A penalty of $100.00 is appropriate for this violation.

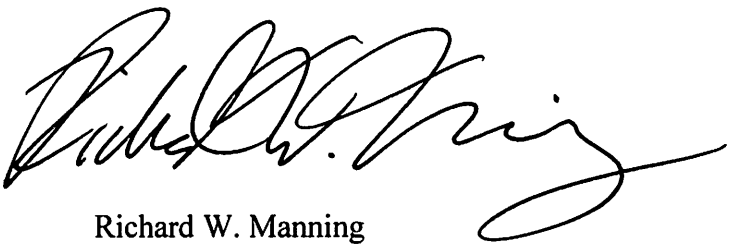
II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-12). Respondent was issued three citations in the 24 months prior to October 23, 2013, and only one of these citations was designated as S&S. Respondent is a small operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Respondent to continue in business. The gravity and negligence findings are set forth above.

[3] These facts are similar to *East Coast Limestone, Inc.*, 19 FMSHRC 761, 765-66 (April 1997) (ALJ). In that case, the seatbelt was severely damaged, but the cited loader traveled at speeds that did not exceed 10 miles per hour because it was only used to pick up material and dump it into the crusher. The judge modified the citation to delete the S&S designation.

III. ORDER

I **MODIFY** the citations for the reasons set forth above. Nordic Industries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $300.00 within 30 days of the date of this decision.[4]



Richard W. Manning
Administrative Law Judge

Distribution:

Randy L. Cardwell, Conference & Litigation Representative, Mine Safety & Health Administration, 991 Nut Tree Road, 2nd Floor, Vacaville, CA 95687 (Certified Mail)

Isabella M. Finneman, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Certified Mail)

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford & Johnson, 980 9th Street, Suite 1400, Sacramento, CA 95814 (Certified Mail)

RWM

[4] 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.