FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 13, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2016-0081 A.C. No. 08-00981-397299
v.	
SIMS CRANE, Respondent	Mine: Wingate Creek Mine

DECISION AND ORDER

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

W. Ben Hart, W. Ben Hart & Associates, Tallahassee, Florida for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act"). This docket involves a single 104(a) citation charging Respondent, contractor Sims Crane ("Respondent"), with an alleged violation of 30 C.F.R. § 56.15005 at mine operator Mosaic Company's ("Mosaic') Wingate Creek Mine.

A hearing was held in St. Petersburg, Florida, on November 14, 2016. During the hearing, the parties offered testimony and documentary evidence.[1] Pursuant to the Commission's procedural rules governing simplified proceedings, the parties presented closing arguments in lieu of submitting post-hearing briefs. 29 C.F.R. § 2700.108(e).

The issues presented are whether Respondent violated the cited standard, and if so, whether the S&S, gravity, and negligence designations were appropriate, and what civil penalty should be assessed. For the reasons discussed below, I modify Citation No. 8823573 to reduce

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

the likelihood of injury or illness from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to reduce the level of negligence from "moderate" to "low." I assess a penalty of $100.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

The Mine Act describes an S&S violation as one "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)(1). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury... but rather on the effect of the hazard if it occurs"). A violation is S&S if, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S 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 in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).[2] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation also considers the length of time that the violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued, without any assumptions regarding

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[2] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[3]

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Penalty Criteria

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider six statutory criteria set forth in section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's

[3] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g., Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criteria. *Spartan Mining*, 30 FMSHRC at 723. My independent penalty assessment for Citation No. 8823573 is set forth below.

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

A. Stipulations of Fact and Law

The parties have stipulated to the following:

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

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to § 105 of the Act.

3. The citation and imminent danger order at issue in this proceeding were properly served upon Sims Crane as required by the Mine Act.[4]

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

4. The citation and imminent danger order at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.

5. Sims demonstrated good faith in abating the violation.

6. The penalties proposed by the Secretary in this case will not affect the ability of Sims to continue in business.

7. Sims was at all time relevant to this proceeding engaged in mining activities at the Wingate Creek Mine located in or near Myakka City, Manatee County, Florida.

8. Sims' mining operations affect interstate commerce.

9. Sims is an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Wingate Creek Mine (Federal Mine I.D. No. 08-00981) where the contested citation and imminent danger order in this proceeding were issued.

10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation and imminent danger order.

Jt. Ex. 1.

B. Citation No. 8823573

Citation No. 8823573 was issued on September 23, 2015 by MSHA inspector Robert Peters, who observed the allegedly violative practice as he was driving to the mine site to conduct an inspection. Tr. 33. Peters arrived at the Wingate Creek Mine around 8:20 a.m. Tr. 33. As he drove toward the mine's administrative offices, he observed truck driver William Nasrallah loading a Tadano crane onto a lowboy used to remove the crane from the mine site. Tr. 33, 122. Specifically, Peters first saw Nasrallah near the cab of the crane, as if Nasrallah had just exited the cab. Tr. 34-35; P. Ex. 5 at 2. Peters then saw Nasrallah walk from the cab area forward across the left front fender of the crane. Tr. 33, 35; P. Ex. 5 at 4.

Peters pulled his vehicle over to the side of the road, parked, exited his vehicle, and approached Nasrallah at the crane. Tr. 38. As Peters was parking, Nasrallah descended from the front of the crane to the ground using the stepped ladder at the front left side of the crane. Tr. 114; R. Ex. 8. Although Peters did not see Nasrallah's descent to the ground, Nasrallah testified that his normal procedure for exiting the crane involved crossing over the left front fender and descending via the stepped ladder at the front of the crane, rather than using the rung ladder immediately below the cab. Tr. 38, 114; *see also* P. Ex. 5 at 3, 4; R. Ex. 11.

Based on his observation of Nasrallah walking from the cab area of the crane over the front fender to the front of the crane, Peters issued Citation No. 8823573 alleging a violation of 30 C.F.R. § 56. 15005, based on the following practice:

> Truck driver, William Nasrallah, was observed by this Inspector working where there was a danger of falling. He was not using any fall protection. The RT 481 crane had been loaded on a low-boy trailer for transport. The truck driver was observed leaving the cab of the crane and walking across the top of the wheel fender of the crane. He was not using any hand-holds or other type of fall protection. There was a danger of falling 7 feet to the paved road. The truck driver exited the crane to the ground. There was an exit/access ladder provided at the crane cab area which the driver could have used to exit the crane to the ground. Distance walked without fall protection was 7 to 8 feet in length. This condition was a factor that contributed to the issuance of imminent danger order 8823572. Therefore no abatement time was set.[5]

P. Ex. 3.

The citation was terminated when the Wingate Creek Mine safety representative informed Peters that Nasrallah had been "instructed on the use of fall protection on mobile equipment when required." P. Ex. 3; Tr. 61. The Secretary alleges that the violation was S&S, highly likely to cause permanently disabling injuries to one person, and the result of Respondent's moderate negligence. P. Ex. 3. The Secretary proposed a penalty of $270. P. Ex. 2.

1. The Technical Violation in Citation No. 8823573 Was Not S&S and Was Unlikely to Cause Permanently Disabling Injuries to One Miner.

The Secretary requests that I affirm Citation No. 8823573, as written, and assess the Secretary's proposed penalty of $270. Tr. 26-27. Respondent disputes the fact of the alleged violation and requests that I vacate the citation. Tr. 27. In the alternative, Respondent challenges the Secretary's gravity and negligence designations. Resp't Pre-hearing Rpt. 2.

In Commission proceedings, the Secretary must prove his allegations by a preponderance of the evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). The Commission has explained that "[t]he burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence."" *Id.* (citing *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998), *quoting Concrete Pipe and Prod. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993)).

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[5] Nasrallah's undisputed testimony indicates that the crane was manufactured by Tadano. Tr. 122. Although the text of Citation No. 8823573 indicates that the crane was an "RT 481," that particular model number does not correspond with any of the current production models nor the discontinued production models listed on Tadano's website. *See* https://tadanoamerica.com/ (last accessed Jan. 13, 2017).

In applying the Commission's *Mathies* factors, I must first determine whether the practice cited by Peters constitutes a violation of 30 C.F.R. § 56.15005. Section 56.15005 provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." 30 C.F.R. § 56.15005.

Peters testified that he observed Nasrallah walk from the cab of the crane across the left front wheel well fender towards the crane's valve bank, a distance of between six and seven feet. Tr. 36, 39, 51; P. Ex. 5 at 1. The top of the fender wheel well where Nasrallah crossed was seven feet above the ground, which included the height of the lowboy. Tr. 43; *see also* R. Ex. 3 (MSHA Program Policy Letter indicating that compliance with OSHA's standard requiring fall protection for work surfaces 6 feet or more above a lower level may also satisfy the requirements of section 56.15005). Nasrallah's undisputed testimony indicates that he was not using fall protection. Tr. 120. While Peters testified that he would not have issued a citation had he observed Nasrallah maintaining three points of contract with the crane as he crossed over the fender, there were no handholds available for Nasrallah's use while he moved across the fender between the cab and the valve area. Tr. 42, 49-50, 63; P. Ex. 5 at 1; R. Ex. 12; *see also* R. Ex. 1 (Mosaic's Mobile Crane Program requiring that personnel maintain three points of contract when accessing and egressing mobile cranes); R. Ex. 4 (clarification to Mosaic's Mobile Crane Policy requiring "access and egress at the designated access points while maintaining [three] points of contact"). Nasrallah confirmed that the configuration of the handrails on the crane did not allow him to hold onto the handrails during a portion of his travel across the fender wheel well. Tr. 133, 136. The Secretary thus argues that Nasrallah's travel across the fender wheel well without maintaining three points of contact constitutes a violation of section 56.15005.

Respondent argues that Nasrallah's egress procedure was in compliance with both MSHA's requirements and with the manufacturer's recommended egress methods. Tr. 28. Robert Berry, Respondent's safety director and the supervisor responsible for Respondent's fall protection training and evaluation, testified that Sims Crane employees are trained to access and egress mobile equipment, including cranes, using at least three points of contact. Tr. 97-100; *see also* R. Ex. 1 (Mosaic's Mobile Crane Program requiring that personnel maintain three points of contract when accessing and egressing mobile cranes); R. Ex. 4 (clarification to Mosaic's Mobile Crane Policy requiring "access and egress at the designated access points while maintaining [three] points of contact"). Berry testified that Respondent's training program relies, in part, on MSHA's Policy Information Bulletin No. P10-04 ("PIB No. 10-04"), which "provides information on providing safe means of access, fall prevention, and fall protection to miners operating, conducting maintenance or service activities, or accessing work platforms of self-propelled mobile equipment," such as the Tadano crane at issue here. Tr. 122; R. Ex. 2. MSHA published PIB No. 10-04 on June 16, 2010, in response to equipment manufacturers' request for "clarification of MSHA's requirement for fall protection on mobile equipment." *Id.* at 2. It was distributed to MSHA program policy holders, mine operators, independent contractors, special interest groups, and miners' representatives. In addition to providing specific examples of precautions that may reduce the potential for slip and fall accidents on mobile equipment, PIB No. 10-04 notes that "equipment manufacturers may be providing safe access, fall prevention, and fall protection by complying with ISO 2867, "Earthmoving Machinery—Access

Systems. . . ."'"[6] Inspectors are permitted to use equipment-specific documentation of ISO certification in considering whether operators are providing safe access, fall prevention, and fall protection.

ISO 2867, referenced in PIB No. 10-04, specifies criteria for "access systems" on mobile earth-moving equipment. R. Ex. 5. An access system is a "system provided on a machine for entrance to and exit from an operator, inspections, or routine maintenance platform from and to the ground." *Id.* at 1.[7] Although ISO 2867 generally requires three points of contact for primary access systems, it permits two points of contact for certain types of systems:

> [p]roper placement of components of the access system shall permit and encourage a person to use three-point support while ascending, descending, or moving about the access system, when more than 1 m above the ground. *Two-point support is acceptable for stairs, stairways, walkways, and platforms.* Three-point support should be used for all ladder systems. Track shoe and track pad surfaces are accepted as access steps if the three-point support is provided.

Id. at 4 (emphasis added).

A walkway is any "part of an access system that permits walking or moving between locations on the machine." *Id.* at 3. Respondent argues that the fender wheel well was intended to serve as a walkway to move from the crane's cab to the front of the vehicle, consistent with the requirements of ISO 2867. The top of the fender is three feet wide and also coated with an anti-skid material to prevent slipping, thus suggesting that the manufacturer intended it to be used was a walkway. Tr. 124; *see also* R. Ex. 10 (MSHA Program Policy Letter indicating that slip-resistant surfaces can reduce mobile equipment slip and fall accidents).[8]

Berry also testified that Mosaic's training program relies, in part, on the requirements of the ISO general standards for cranes, ISO 11660, which have been incorporated by reference into the Occupational Health and Safety Administration's ("OSHA") regulations. Tr. 102-103; R. Ex. 7 (ISO 11660-1:2008(E): Cranes: Access, Guards, and Restraints, Pt. 1); *see also*

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[6] The International Standards Organization ("ISO") is an "independent, non-governmental international organization" that "develop[s] voluntary, consensus-based, market relevant International Standards." International Standards Organization, http://www.iso.org/iso/home/about.htm (last accessed Jan. 13, 2017).

[7] I interpret this definition as encompassing systems providing access to or egress from the machine for the purposes of operation, inspection, and maintenance.

[8] Although Peters estimated that the fender was 20 inches wide, he admitted he did not take a measurement. Tr. 75. Both Berry and Nasrallah testified that the fender is approximately three to three-and-a-half feet wide. Tr. 99, 125. I credit the testimony of Berry and Nasrallah, particularly because they are more familiar with the surface and because Peters gave an estimate and did not take a measurement.

29 C.F.R. § 1926.1423 (OSHA regulation governing fall protection, promulgated under Subpart CC: Cranes and Derricks in Construction). ISO 11660 divides crane access systems into two categories: Type 1 and Type 2. Type 1 access is "designed for use without personal protective equipment." Type 2 access is "access for which some characteristics of Type 1 access are not provided . . . [and] *may* require the use of personal protective equipment. R. Ex. 7, at § 4.1(a)-(b) (emphasis added). Berry testified that after receiving citations for employees walking on the deck of earth-moving equipment without fall protection,

> [Mosaic] took the ISO standard to MSHA and said earthmoving equipment[,] if you're going to access from the ground to the crane, from the controls to the ground, Type 1 access is all you have to use . . . . [I]n [section] 4.2 [of ISO 11660] . . . they talk about access and egress and you have to use three points of contact when you're climbing on and off the crane but when you're walking across the deck of the crane, you don't have to have—it's impossible to have three points of contact when you're walking across the deck of the crane. So the manufacturer said, okay. We got to make a nonskid surface so that we can prevent you from slipping while you're going from point A to point B to get off the crane.

Tr. 102-103; R. Ex. 7 at § 4.2.2; *see also* R. Ex. 5 at 4 ("All surfaces of the access system used for walking, stepping, or crawling (including any device or structural component thereof used as part of an access system) shall be slip-resistant."). ISO 11660 allows Type 1 access to control stations and starting equipment, and for maintenance more frequent than once per month. R. Ex. 7 at § 4.2.2. Thus, Respondent argues that the method by which Nasrallah dismounted the crane was an ISO 11660 permissible Type 1 access system that did not require three points of contact. Tr. 101, 103.

I find persuasive Respondent's argument that Nasrallah's egress procedure complied with the requirements of ISO 2867, which allows two points of contact on walkways, and with ISO 11660, which permits access designed for use without personal protective equipment. Respondent, however, has offered no evidence suggesting that MSHA has ever referenced ISO 11660 in its regulations or policy interpretations. Tr. 105. Accordingly, I cannot conclude that compliance with IS0 11660 has any bearing on the fact of the violation alleged in Citation No. 8823573. Moreover, while PIB No. 10-04 allows inspectors to use documentation of ISO 2867 compliance in considering whether operators are providing safe access, the PIB also explicitly requires *operators* to provide the required documentation to verify that their mobile equipment complies with ISO 2867. R. Ex. 2 at 2. Although Berry credibly testified that ISO 2867's requirements allow non-skid or anti-slip surfaces on walkways where three-point contact is not possible, Respondent has provided no documentation to show that the Tadano crane at issue in Citation No. 8823573 has been certified as complying with ISO 2867. Tr. 103. As indicated by Berry's testimony regarding the incorporation of PIB No. 10-04 and ISO 2867 into Respondent's training policies, Respondent is familiar with and relies on both of those documents to provide a safe working environment for its miners. Notwithstanding Respondent's familiarity with these documents, Respondent failed to produce evidence of certification at the hearing, despite MSHA's clear statement that operators must provide "documentation to verify that their

equipment is ISO 2867 certified."[9] R. Ex. 2, at 2. In the absence of such certifying documentation, I reject Respondent's argument that Nasrallah's egress procedure complied with MSHA's recommendations in PIB No. 10-04. I therefore find that a technical violation occurred, as alleged, in Citation No. 8823573.

Step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy,* 38 FMSHRC at 2038.

The first part of step two of the clarified *Mathies* test requires identifying the hazard. *Id.* As the Commission explained, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id.* The clear purpose of section 56.15005 is to prevent falls. I therefore define the hazard contributed to by the violation as miners falling as they walk across the wheel well from the cab to descend to the ground. Tr. 42, 52.

Having determined that Nasrallah's failure to use fall protection to cross the left front fender of the crane presents a falling hazard, I now consider whether "there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed." *Newtown Energy*, 38 FMSHRC at 2037. In the context of Citation No. 8823573, I must determine whether Nasrallah's failure to use fall protection or handholds is reasonably likely to lead to a fall. I note that, under Commission precedent, "[t]he question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations." *Manalapan Mining Co.*, 18 FMSHRC 1375, 1382 (Aug. 1996) (Comm'rs Holden and Riley, plurality) (*citing Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (Feb. 1991); *U.S. Steel Mining Co.*, 7 FMRHC 11125, 1130 (Aug. 1985). I also consider conditions on a mine-wide basis. *Id.* (citing *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (Aug. 1994)).

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[9] I also note that the Commission has concluded that the regulatory interpretations set forth in Program Information Bulletins represent the "considered exercise of the Secretary's policy making authority" and have therefore granted them *Auer* deference. *Small Mine Development*, 37 FMSHRC 1892, 1899 (Sept. 2015) (*citing Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deference to an agency interpretation of an ambiguous regulation is warranted when it "reflect[s] the agency's fair and considered judgment").

Considering the totality of circumstances surrounding the technical violation in Citation No. 8823573, I do not find that Nasrallah was reasonably likely to fall from the fender above the left wheel well. Although Nasrallah admitted that he did not have access to a handrail when crossing over the front left fender, the fender's estimated length of six or seven feet indicates that he only took two or three steps without three points of contact. Tr. 114, 124. As noted previously, the top of the fender (where Nasrallah did not have three points of contact) is three feet wide and covered with anti-skid material. Tr. 124; *see also* R. Ex. 10 (MSHA Program Policy Letter indicating that slip-resistant surfaces can reduce mobile equipment slip and fall accidents). Although Peters opined that a person readying a crane for transport could stumble at any time, the Secretary presented no testimony or evidence regarding wet weather conditions or likely tripping hazards. Tr. 44. I therefore find that the Secretary did not establish by a preponderance of the evidence that there was a reasonable likelihood that Nasrallah would fall from the crane as he briefly took three steps while passing over the three-foot wide fender on a slip-resistant surface.

In conclusion, I have found that a technical violation of section 56.15005 occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. While that violation did contribute to a discrete safety hazard of falling, I have found that the Secretary did not establish by a preponderance of the evidence that the fall hazard created by the violation was reasonably likely to occur. I therefore find that the violation of section 56.15005 in Citation No. 8823573 was not S&S, and was unlikely to result in permanently disabling injuries to one person.

2. The Technical Violation in Citation No. 8823573 was not the Result of Respondent's Negligence.

In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Although the Secretary originally alleged that the violation in Citation No. 8823573 was the result of Respondent's moderate negligence, after the presentation of Respondent's case in chief, the Secretary suggested in his closing argument that the violation was the result of the Respondent's high negligence. Tr. 149-50. Respondent disputes the Secretary's negligence designation. Resp't Prehearing Rpt. 2.

Peters testified that he designated the violation of section 56.15005 as moderate negligence because Nasrallah was not a supervisor and was working alone without direct supervision. Tr. 53. The Secretary failed to establish that Respondent knew of should have known of the violation by Nasrallah. Berry testified that Sims Crane employees are trained to access and egress mobile equipment, including cranes, using at least three points of contact. Tr. 97-100; *see also* R. Ex. 1 (Mosaic's Mobile Crane Program requiring that personnel maintain three points of contract when accessing and egressing mobile cranes); R. Ex. 4 (clarification to Mosaic's Mobile Crane Policy requiring "access and egress at the designated access points while maintaining [three] points of contact"). Berry also testified that Respondent's training program includes MSHA's PIB No. 10-04, which references ISO 2867. R. Ex. 2 at 2. ISO 2876, in turn, explicitly allows the use of two-point support on walkways. R. Ex. 5 at 4. I therefore find that

the Secretary failed to establish that the violation was the result of any negligence on the part of the Respondent. In fact, had Respondent produced the required documentation that the crane was ISO certified, I would not have found any violation under MSHA's own guidance, and this litigation may have been avoided.

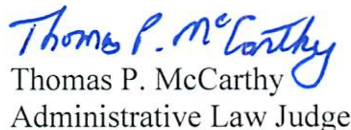
3. Penalty Assessment

The Secretary proposed a penalty of $270 for Citation No. 8823573. The parties have stipulated that the penalty proposed by the Secretary in this case will not affect the ability of Respondent to continue in business, and that Respondent abated the violation in good faith. Jt. Ex. 1, Stips. Nos. 5 & 6. Respondent is a small, independent contractor. *See* Ex. A, *Sec'y of Labor's Petition for the Assessment of Civil Penalty*, Docket No. SE 2016-0081. I have deleted the S&S designation and determined that the violation was unlikely to cause injury, and was not the result of Respondent's negligence. Section 56.15005 was not cited in either of the two citations Respondent received in the fifteen months prior to the issuance. Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, I assess a penalty of $100.

IV. ORDER

For the reasons set forth above, Citation No. 8823573 is **MODIFIED** to reduce the likelihood of injury or illness from "highly likely" to "unlikely," to delete the significant and substantial designation, and to reduce the level of negligence from "moderate" to "no negligence."

Respondent, Sims Crane, is **ORDERED** to pay a total civil penalty of $100 within thirty days of the date of this Decision and Order.[10]



Thomas P. McCarthy
Administrative Law Judge

Distribution:

Daniel Brechbuhl, Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Denver, CO 80202

W. Ben Hart, W. Ben Hart & Associates, 2916 East Park Avenue, Tallahassee, FL 32301

/ccc

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