

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

January 14, 2016

THYSSENKRUPP ELEVATOR
AMERICAS,

Contestant

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Respondent

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Petitioner

v.

THYSSENKRUPP ELEVATOR
AMERICAS,

Respondent

CONTEST PROCEEDINGS

Docket No. WEST 2015-033-RM
Citation No. 8830994; 09/09/2014

Docket No. WEST 2015-034-RM
Citation No. 8830997; 09/09/2014

Lyons Cement Plant
Mine ID 05-00344 A9233

CIVIL PENALTY PROCEEDING

Docket No. WEST 2015-234-M
A.C. No. 05-00344-367349 A9233

Lyons Cement Plant

DECISION

Appearances: Michelle Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary;
Paul Waters, Esq., Waters Law Group, Clearwater, Florida, for ThyssenKrupp Elevator Americas.

Before: Judge Manning

These cases are before me upon notices of contest filed by ThyssenKrupp Elevator Americas (“TKE”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against TKE 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 and documentary evidence at a hearing held in Denver, Colorado, and filed post-hearing briefs. Two section 104(a) citations were adjudicated at the hearing. TKE is an independent contractor that was performing work at the Lyons Cement Plant operated by Cemex, Inc. (“Cemex”) in Boulder County, Colorado. For the reasons set forth below, I vacate both citations.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

On September 9, 2014, MSHA Inspector Kathleen Gearity¹ issued two citations under section 104(a) of the Mine Act as a result of conditions she observed at an elevator in Cemex's Lyons Cement Plant.

The first citation, Citation No. 8830994, alleges a violation of section 56.20011 of the Secretary's safety standards, and asserts that TKE had disabled the elevator door interlock system in order to perform maintenance, left the mine property for the day, and failed to leave a sign or barricade in place to warn persons of the ongoing work on the elevator. The citation alleges that the elevator door opened easily, the cabinet lighting was on, and the bottom of the elevator car was about 21 inches from floor level of the landing. A piece of skirting had been installed by TKE to minimize fall exposure. The citation states that personnel in the area would have been unaware of the fall hazard and exposed to a dangerous and preventable situation.

Inspector Gearity determined that a fatal injury was reasonably likely to occur, that the violation was of a significant and substantial nature ("S&S"), that one person would be affected, and that TKE's negligence was moderate. Section 56.20011 states that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required." 30 C.F.R. § 56.20011. The Secretary proposed a penalty of \$243.00 for this alleged violation.

The second citation, Citation No. 8830997, alleges a violation of section 56.14105 of the Secretary's safety standards, and asserts that TKE had disabled the elevator door interlock system in order to perform maintenance, left the mine property for the day, and not locked out the power or blocked the machinery against hazardous motion, which created a hazard to person unaware of the ongoing maintenance. The citation alleges that the door opened easily, the cabinet lighting was on and, while TKE stated that it had three other systems in place, including the inspection switch, the bypass switch, and the elevator stop switch that should prevent unintended movement of the elevator car, the system was electrically energized and exposed personnel in the area to a hazard.

Inspector Gearity determined that an injury was unlikely to be sustained, but that any injury could reasonably be expected to result in lost workdays or restricted duty. Moreover, she found that the alleged violation was non-S&S, affected one person, and that TKE's negligence was moderate. Section 56.14105 states that "[r]epairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to

¹ Inspector Gearity has been an MSHA inspector since 2007. (Tr. 15). Prior to working with MSHA she was employed at a safety consulting company, which helped employers comply with the Occupational Safety and Health Act and the Mine Act. (Tr. 16).

the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.” 30 C.F.R. § 56.14105. The Secretary proposed a penalty of \$100.00 for this alleged violation.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all the evidence.

B. Summary of Evidence

Cemex’s Lyons Cement Plant is located along a river which flooded during the fall of 2013² and caused damage to the plant and, as relevant to this case, to all the elevators for the homogenizing silo at the plant. (Tr. 17). The elevator at issue was outside the silo. The elevator and its controls suffered damage while underwater and the elevator had been out of service since the flood, as had all the elevators for the silo. (Tr. 17, 44, 80, 131). In lieu of the elevator, Cemex employees had been using stairs and ladders to access the silo. (Tr. 104)

On September 9, 2014, William Trammell,³ an elevator mechanic for TKE, and Joshua Miller⁴, an apprentice mechanic for TKE, were at the plant working to repair the subject elevator. (Tr. 77). The two of them had been working on elevators at the plant for approximately one and a half to two weeks. (Tr. 77, 113, 132). None of the elevators on site had been working since the 2013 flood. (Tr. 103).

On September 9, Trammell and Miller installed a toe guard on the subject elevator. (Tr. 83-84). The toe guard is a piece of roughly 12 gauge sheet metal that extends downwards from the floor of the elevator car and acts as a safety device to fill the hole below the car when the floor of the car is above the floor of a landing. (Tr. 84). According to Trammell, the toe guard is supported by two braces behind the sheet metal, can hold 200 pounds of force, covers the entire width of the opening, and is required to extend approximately 42 inches below the bottom of the elevator car. (Tr. 84, 115, 119-120; Sec’y Ex. 3 photo 2). Trammell explained that he is roughly 220 pounds and, after installing the guard, he tested it by pushing against it. (Tr. 116).

² The flooding that occurred in Colorado during the fall of 2013 was an historic event and was a national news story. The town of Lyons was isolated as a result of the flooding and residents were evacuated by the National Guard. Jordan Steffen, *Colorado floods: Lyons residents rescued by National Guard*, DENVER POST (Sept. 13, 2013), http://www.denverpost.com/breakingnews/ci_24087700/colorado-floods-lyon-residents-rescued-by-national-guard. Many other Front Range communities in northern Colorado were severely flooded and major state highways and rail lines remained closed for months.

³ Trammell has been a mechanic in the elevator industry for 34 years and with TKE for over five years. (Tr. 75). He repairs elevators when they break down, and modernizes elevators to bring them to code, or upgrades elevators based on what a customer wants. (Tr. 75-76).

⁴ At the time of hearing Miller was a mechanic for TKE, but, at the time in question, Miller was in the fourth year of his apprenticeship to become an elevator mechanic. (Tr. 121).

After completing their work for the day, Trammell and Miller placed their tools in the elevator car and raised the car such that the floor of the elevator was above the floor of the first floor landing, leaving roughly a 12-14 inch gap between the bottom of the toe guard and the floor of the landing. (Tr. 85; Sec'y Ex. 3 photo 2). The floor of the elevator pit was approximately 5 feet below the opening. (Tr. 103). Both Trammell and Miller testified that, in raising the car and creating the gap, they made sure that they left the car low enough so that there would be no hazard. (Tr. 85, 88, 123-124). Trammell felt that falling through a vertical gap of 12 inches was not a reasonable possibility. (Tr. 103). Trammell explained that, when someone opened the elevator door, the first thing they would see would be the light on the platform, the support structure for the floor of the elevator car, and the toe guard right in front of them. (Tr. 88). He further explained that they also positioned the car this way to get their tools off of the landing and into an area that was out of the way and not accessible to individuals who may otherwise be inclined to take the tools, or mess with the electrical parts, including the newly installed control box in the car. (Tr. 84-85, 87, 111, 112). Trammell explained that another reason they positioned the car that way was because they were having problems with the interlock and door. (Tr. 92, 112). The interlock device on the first floor door of the elevator, which normally holds the hoistway door closed when the elevator is not at a floor, was not properly functioning and had been temporarily disabled by TKE.⁵ (Tr. 78, 86, 92). Trammell testified that, had he not disabled the interlock, the elevator door would have locked since the car was not at ground level, and it would have required Miller or him to climb on top of the car roof, which would have been very difficult, to get the door open when they returned the following day. (Tr. 86-88, 92).

While Trammell and Miller did have barricades available and used them to block off the area when they were working, they did not leave them up when they left that day because the elevator door was closed, the position of the elevator car blocked access, and the barricades could have blown away given that the area was very windy. (Tr. 102, 113).

Trammell did not pull the elevator's electrical disconnect in the mechanical room before leaving. (Tr. 94). He explained that they had already put in place the new elevator controller, wired it up, begun the process of adjusting the car for automatic operation and, given all of the computer equipment involved during the adjusting procedure, there was the potential that cutting power would delete all of the important programming information, thereby requiring him to start over the adjusting procedure. (Tr. 78, 94-95). Part of the adjusting phase involves making sure the elevator car lines up with the door openings in the elevator shaft. According to Trammell, this volatile information was stored in the elevator's CPU and pulling the main disconnect could potentially delete the information. (Tr. 94). However, he did trip multiple switches in the controller in the mechanical room, including the run/stop switch, the inspection switch, and two door switches, as well as the hoistway access and car door bypass switches. (Tr. 95, 105). He explained that the run/stop switch in the controller opened the safety circuit and "shut off all things" and, as a result, the elevator would not have moved. (Tr. 96). The tripping of the run/stop switch activated the high tension jaws of the rope gripper, which physically clamped the rope and prevented the car from moving. (Tr. 91-92, 96). He further explained that the inspection switch in the controller, which he also tripped, disabled the buttons in the elevator car,

⁵ The door to the elevator was not designed like the doors on elevators in office buildings. It was a door like that on the outside of a building that you open using a handle.

as well as the call buttons on the landing. The controller that contained all of these switches was in the locked mechanical room for which only Trammell had a key. (Tr. 97, 105).

Given the switches he tripped, Trammell opined that, in order for anyone to get the elevator to move, they would have had to break open the lock to the mechanical room, flip the hoistway access and car door bypass switches, flip the run/stop switch, then gone outside to the key switch in the push button panel where they would have to put in a special key to run the elevator down. (Tr. 105-106). According to Trammell, he had the only key to the padlock on the mechanical room door, and only “elevator people” have the kinds of keys used in the key switch at the call button. (Tr. 99-100, 105). At hearing, when questioned by the court, Trammell stated that, in order for the elevator to move under these conditions, “something catastrophic, like the ropes braking(sic)” would have to occur, and that it made no difference whether the power to the controller panel was on or off in that instance. (Tr. 108-109).

By the time Trammell and Miller left the plant at 2:30 p.m. on the September 9, the controls in the elevator had been replaced, the motor had been changed out, the toe guard had been completely installed, and all of the interlocks, with the exception of the interlock on the door on the first floor, had been replaced, tested, and were functioning. (Tr. 80, 82-83, 128). The elevator still required adjusting; TKE was in the process of putting the elevator into automatic operation. (Tr. 78, 83). However, the elevator could not be turned over to the mine until an elevator inspector checked it to make sure all of the safety features worked. (Tr. 83).

On September 9, 2014, MSHA Inspector Kathleen Gearity was conducting an inspection of Cemex’s Lyons Cement Plant. (Tr. 16). Gearity traveled through the plant with a safety director from one of Cemex’s facilities in Texas. (Tr. 23-34). During the course of her inspection she examined the subject elevator on the outside of the homogenizing silo at the plant. Gearity was aware that TKE was engaged in fixing multiple elevators at the plant, however, by the time she inspected this elevator, the TKE personnel had already gone home for the day and were not present. (Tr. 18-20, 25-26).

The elevator door on the first level was located on a landing at the top of a small flight of stairs. (Tr. 20). According to Gearity, it was not obvious to her that an elevator was at the top of the steps. (Tr. 21). Gearity climbed the steps and opened the door. (Tr. 22, 48). When the door opened she observed that the elevator car was not level with the floor of the landing but the car was in a raised position and a gap existed below the car. (Tr. 23; Sec’y Ex. 3 photo 2). The light was on inside the elevator car. (Tr. 59). Gearity testified that she did not measure the gap, but, when questioned by the court regarding the language in the citation body that the car “was about 21 inches from floor level,” she stated that she probably used a tape measurer, but from a distance. (Tr. 52-53). Thereafter, she stated that she did not recall measuring it. (Tr. 54).

There was a sheet metal toe guard which extended down from the floor of the car. (Tr. 23). Gearity opined that the toe guard “would not withstand the fall of force of a human being[,]” but conceded that, at the time of the inspection, she did not know what the toe guard was made of, thought it might have been rubber, and did not push on it. (Tr. 23, 31, 48-49). Gearity observed that the toe guard did not extend all the way from the floor of the elevator car to the floor of the landing. As a result, an opening existed below the toe guard which, according

to Gearity, presented a hazard where a worker could step into the opening without realizing that the car was not where it was supposed to be, and go under the elevator car, and potentially into the elevator pit. (Tr. 28, 31-32). Gearity did not measure the depth of the pit, but estimated it at 6 to 8 feet. (Tr. 28, 56). Gearity took note of a contract laborer in the area who did not speak English and may not have been aware of the condition since there were no warning signs to prevent people from entering the area. (Tr. 27-28). She noted his “diminutive” size and how he could have fallen through the opening. (Tr. 27-29).

Gearity testified that the hazard was not obvious when the door was closed, but agreed that the hazard was immediately obvious once the door was opened. (Tr. 32). According to Gearity, there were no warning signs or barricades to stop a miner from opening the door and exposing themselves to the hazard behind the door. (Tr. 22). She testified that she was aware of a fatality at another Cemex mine where a contract employee had opened an elevator door where there was no elevator car and fallen to his death through the opening. (Tr. 26-27; Sec’y Ex. 7). She initially explained that the consequence of falling into this opening would be a broken leg, sprain, or fracture, and added that an individual would not have to fall all the way into the pit to sustain those types of injuries. (Tr. 28). Later in her testimony she explained that she determined that a fatal injury was likely to occur. (Tr. 28, 39).

Gearity recognized that people at the plant knew that the elevators were being worked on. However, she opined that personnel may not have known if the elevators were online or offline. (Tr. 30, 45). She also agreed that the safety director who worked for Cemex in Texas traveled with her and was aware that the elevators were being repaired. (Tr. 46). Based on her observations, Gearity issued Citation No. 8830994 to TKE for a violation of section 56.20011 for failing to have a sign or barricade in place to warn of a hazard. She determined that the condition was S&S. (Tr. 39).

Gearity also noticed that the light in the raised car was on. (Tr. 59, 72). According to Gearity, the 110 volt system for the light and the 480 volt system for the elevator motor were on. (Tr. 72). While work was not being done at the time, since the TKE personnel were gone, she believed that maintenance was ongoing. (Tr. 60). Gearity testified that when she first went to the mechanical room, there was a lock on it and no key was available. (Tr. 62). When she returned to the elevator the next day, Trammell had returned and unlocked the mechanical room. She discovered that the switch gear unit that drove the electric motor for the elevator was on and had not been de-energized. (Tr. 34-35; Sec’y Ex. 3 photo 4). Gearity testified that she was concerned that, while TKE personnel had moved the car so that it could not be accessed by anyone, they had failed to disable the power to the elevator and, as a result, there was a possibility of movement. (Tr. 37). Further, she stated that she had concerns about repairmen working on an energized elevator. (Tr. 38). Gearity didn’t know what systems had been replaced in the elevator. (Tr. 37). Gearity testified that TKE told her they were in the testing phase. (Tr. 38). Gearity conceded that she was not sure how TKE could have effectively blocked the car against motion and that, normally, equipment comes with a “pin” or “block” that can be activated to prevent something from moving. (Tr. 72). She acknowledged that the switches may have worked perfectly fine to block the car, but that with power going to them, “if any of them did fail, there was potential that the car could move.” (Tr. 73). Based on her observations, Gearity issued Citation No. 8830997 to TKE for a violation section 56.14105 for failing to de-

energize the elevator and block it against motion while performing maintenance. (Tr. 36, 66; Sec'y Ex. 4). Gearity designated the citation as non-S&S because it was unlikely that that the elevator would move because no one had access to the control room or switches besides the TKE personnel. (Tr. 39, 70-71). Gearity did not find any unguarded electrical hazard near the elevator that someone could have been exposed to. (Tr. 69).

When Trammell and Miller arrived at the mine the following day they measured the gap from the bottom of the toe guard to the floor of the landing as being 12.5 inches. (Tr. 86, 122-123). At hearing, Miller testified that, when he spoke with Gearity that day she described the hoistway as being "completely open" with the elevator car above her head. (Tr. 125). Miller was shocked by the inspector's comment since he had installed the toe guard the previous day. (Tr. 125). Miller opined that, because the inspector was wearing sunglasses at the time she examined the elevator the previous afternoon and given that it was late in the day and the toe guard was black, it was probably difficult for the inspector to see the guard. (Tr. 126). At hearing, Gearity testified that she may have been wearing glasses at the time, but they did not hinder her ability to perceive the condition of the elevator. (Tr. 148).

Roughly three weeks before the hearing in this matter, David Spence,⁶ a branch manager for TKE, traveled to the plant to take various measurements of the subject area. (Tr. 130, 135, 142). Spence and a service technician from Cemex, using photographs taken by the inspector, attempted to position the elevator car in the hoistway as close to possible to where the car was on the day the citations were issued. (Tr. 133). Spence explained that, in order to do so, he looked at the photograph and saw that the elevator platform was in line with the bottom of the window on the door. (Sec'y Ex. 3 photo 2; Tr. 134). Relying on the picture as a reference point, he then positioned the car so that the elevator platform was as close as possible to the same location. (Tr. 134). After doing so, he measured the vertical height of the opening between the landing platform and the bottom of the toe guard as being 14 inches. (Tr. 136; TKE Ex. 8). Spence also measured the depth of the pit from the landing as being approximately 5 feet. (Tr. 139).

C. Citation No. 8830994

I find that the Secretary did not establish a violation of section 56.20011. The cited standard requires that operators place barricades or post warning signs on all approaches to non-obvious hazards. 30 C.F.R. § 56.20011. There is no dispute that neither barricades nor warning signs were placed in the area of the elevator. However, the question remains whether the condition of the elevator presented a hazard and, if so, whether the hazard was obvious. For reasons that follow, I find that the Secretary did not establish that a hazard existed and that, even if the condition did present a hazard, I find that any hazard was immediately obvious.

I find that the Secretary has not met her burden of establishing that a hazard existed. The Secretary alleges that the raised elevator car created a hazard in the form of an opening below the toe guard that miners could fall into. While the inspector testified regarding the size of the opening, I decline to credit her measurements. At hearing, the court questioned the inspector as

⁶ Spence has been in the elevator industry for eleven years, and worked as a branch manager for TKE for three and a half years. (Tr. 130).

to how she arrived at that measurement. (Tr. 53). While the inspector stated that she did not stand close to the opening, and opined that she probably measured it from a distance, she could not remember whether she took a measurement at all. Conversely, TKE's witnesses offered credible evidence regarding the size of the opening. Specifically, Miller testified that the day after the citation was issued, he measured the gap before the car was moved and determined that the opening was only 12.5 inches.⁷ Moreover, Miller's measurement is bolstered by the later measurement taken by Spence who, using the Secretary's own photographs, repositioned the elevator car so as to attempt to replicate the location of the car at the time the citation was issued in order to take a number of measurements. Spence clearly articulated his methodology for why he repositioned the car where he did. After repositioning the car he measured the opening below the toe guard as being roughly 14 inches.

The 12-14 inch height of the opening does not present a hazard. The Secretary argues that little should be made of the "supposed awareness of the non-functioning elevators," that human behavior can be erratic and unpredictable, and that the Commission takes into account ordinary human carelessness in interpreting standards. Sec'y Br. 7. I frequently affirm citations based on the unpredictable nature of human conduct. In this case, however, I find that the Secretary is attempting to stretch this concept beyond reason. The plant and the surrounding area had been subjected to a major flood. The elevators for the silo had not been functional for about a year. There is nothing else at the top of the elevator landing other than the door to the elevator itself. As a consequence, nobody would be walking by the elevator door on their way to another working place. It is highly unlikely that anyone would walk up the stairs to the landing since it was common knowledge that the elevators had not worked since the catastrophic flood. If someone did walk up onto the landing and opened door, the condition did not present a hazard. All but the bottom 12-14 inches of the opening was blocked by the structure supporting the floor of the elevator car and the substantial toe guard. I credit the testimony of TKE's witnesses that the toe guard would hold back anyone who attempted to walk into it. The allegedly hazardous scenarios presented by the Secretary, i.e., the toe guard being unable to support an individual who fell against it and a "diminutive" individual falling through the opening, are simply too farfetched. I find that the inspector's reliance on the fatality at another Cemex plant was misplaced. In that instance, unlike here, nothing blocked the doorway or could have alerted the miner to the presence of the hazard. Given what was behind the door, nobody would attempt to take another step. If someone believed that the elevator had been fixed, he would quickly discover, upon pushing the call button outside the elevator door, that the elevator was not in operating condition. A hazard was not present because (1) nobody, including a fatigued or confused employee or contractor, would walk up the stairs to the elevator landing and open the door because it was common knowledge that the elevator was out of service, and (2) if someone were to do so, the conditions present would not have presented a hazard to that person.

⁷ While the Secretary, citing page 123 of the transcript, argues that Miller repositioned the car after the citation was issued but before he measured the gap, I find that the Secretary has mischaracterized Miller's testimony. Sec'y Br. 7. Rather, I find that the cited testimony establishes that Miller was the one who positioned the car on September 9th before Trammell and he left the plant and the inspector issued the citation. Nothing in the testimony leads me to believe that he then repositioned the car before measuring the gap the following day.

Moreover, any hazard that was present was immediately obvious. Everyone knew that all the elevators at the silo were out of service and had been so for approximately a year. An employee would not open the door and then step into the 12-14 inch opening at the bottom because he or she would see that the elevator car was not in position. The inspector agreed that the hazard was obvious once the door was opened. (Tr. 32). The elevator buttons were not functioning. The conditions, as described above, were immediately obvious. The photographs admitted into evidence confirm the obviousness. (Sec'y Ex. 3 photo 2; TKE Ex. 1); *See Inland Steel Mining Co.*, 20 FMSHRC 760, 762-763 (July 1998) (ALJ) (Vacating a citation issued for an alleged violation of section 56.20011 based on photographic evidence of a hazard being "immediately obvious"). I find that the lack of warning signs or barricades did not create or contribute to a safety hazard.

Based on my findings above, Citation No. 8830994 is vacated.

D. Citation No. 8830997

I find that the Secretary did not establish a violation of section 56.14105. As both parties recognize, the pertinent requirements under the cited standard are threefold. First, the standard applies only when repairs or maintenance of machinery or equipment are being conducted. Second, the operator must ensure that the machinery or equipment is powered off. Third, the operator must ensure that the machinery or equipment is blocked against hazardous motion. In addition, the standard also provides an exception permitting machinery or equipment motion or activation to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion. 30 C.F.R. § 56.14105.

As evidenced by her testimony, the inspector was concerned with the conditions that existed after Trammell and Miller left the plant for the day on September 9. These are the conditions she observed at the time of her inspection. Inspector Gearity agreed that TKE had positioned the elevator car so that nobody could get into it. Specifically, she testified that "ThyssenKrupp had moved the car so that it could not be accessed by anyone, but by not disabling the power or de-energizing the equipment there [was] a possibility of movement." (Tr. 37). She was uncertain whether some of the water-damaged parts were still present and could potentially fail putting miners at risk.

I find that once Trammell tripped the run/stop switch in the control room, the elevator motor was effectively de-energized and the car was blocked against hazardous motion. The main power switch was not opened because of concerns that important data in the elevator's CPU would be lost if the entire system was de-energized. When Trammell tripped the run/stop switch before leaving for the day, he removed all power from the controls to the elevator and activated the high tension jaws of the rope gripper, which physically clamped the rope and prevented the car from moving. I find that these high tension jaws of the rope gripper blocked the elevator car and all other equipment against motion. In addition, Trammell tripped additional switches that made movement of the elevator even more unlikely. These switches were on the CPU's circuit board inside an electrical box in the padlocked mechanical room. (Ex. R-6). I note that, while the standard does not require that the power be locked out and tagged out, it effectively was. All

the switches that Trammell tripped were in the mechanical room which he padlocked, and he pocketed the only key.

Although the inspector expressed concern over the potential for a switch to fail, she acknowledged that she had never researched the topic. (Tr. 65). I must note that the evidence makes clear that Inspector Gearity had little knowledge of the rather sophisticated workings of elevators or the maintenance and repair of elevators. The record established that all of the water-damaged parts had been replaced before her inspection. The only work that remained for the following day was to repair the interlock for the door and make critical adjustments so that the elevator functioned properly.

It is undisputed that a light in the elevator car was on when the inspector examined the elevator, but the inspector acknowledged that it ran on a separate circuit that was unrelated to the functioning or movement of the elevator. (Tr. 72). Trammell also admitted that energized wires were exposed in the control box located inside the elevator car. (Tr. 112). It is important to understand that the cited standard is not an electrical standard; it is intended to prevent a miner from being struck by machinery or equipment that is not de-energized or properly blocked against hazardous motion. Moreover, Inspector Gearity was not concerned that someone would be exposed to an electric shock hazard as a result of the conditions she observed. (Tr. 69). She was concerned that by not tripping the power at the main switch there was a possibility that the car could move and someone would be injured as a result. For the reasons set forth above, I find that the switches thrown by Trammell prevented all movement notwithstanding that the main power switch was not opened.

While TKE makes much of the fact that it was not engaged in repairs or maintenance at the actual time the citation was issued, it is clear that Trammell and Miller were working to repair the elevator on September 9. Trammell testified that TKE had been working on the elevators for about two weeks. It is not clear what work they performed on September 9. Trammell stated that they “finish[ed] the wiring [and] button[ed] up all the electrical boxes, closing them up.” (Tr. 83). They also installed the toe guard and started the adjustment procedure. The parties presented little evidence concerning the conditions that existed when Trammell and Miller were working on the elevator earlier that day. The record does not reveal whether TKE was complying with the safety standard when Trammell and Miller were actively working to repair the elevator. It is not clear whether the power was off when the elevator motor was replaced, for example, or what precautions were taken when the toe guard was installed.

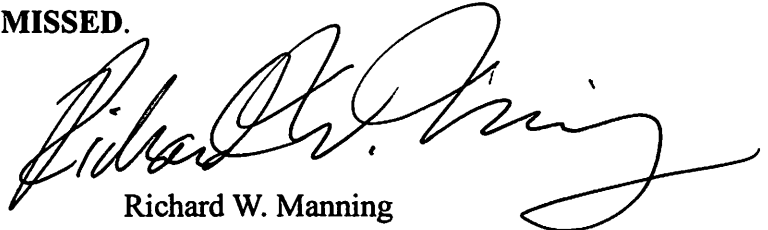
In addition, when Trammell was “adjusting” the elevator, the adjustment and testing exception would have applied. Equipment activation and motion is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided persons are effectively protected from hazardous motion. 30 C.F.R. § 56.14105. TKE was in the final stages of the repair and had begun the “adjustment” phase of their work. Trammell explained that the “adjustment” phase involves making sure that the elevator car “hits the floors right,” making sure all the interlocks and limit switches work, and getting the elevator ready for the inspection required by the State of Colorado. (Tr. 83). Naturally, making sure the elevator car lines up correctly with the floors requires the activation of the elevator machinery and the movement of the elevator car. I credit the testimony of Trammell that, during the adjustment phase, there was

the risk that shutting off the power at the main disconnect would cause the loss of volatile data stored on the CPU. In the event the data was lost, TKE would need to start over the adjustment phase. No evidence was presented by the Secretary to contradict TKE's evidence on these issues and I find that when TKE was making these adjustments, the exception applied.

I find that the Secretary did not meet his burden of proof with respect to Citation No. 8830997. The evidence establishes that TKE was in compliance with the safety standard at the time Inspector Gearity examined the elevator. The Secretary presented insufficient evidence to establish whether TKE was in violation of the safety standard earlier in the day or on previous days when Trammell and Miller were actively working on the elevator. As a consequence, Citation No. 8830997 is vacated.

II. ORDER

For the reasons set for above, Citation Nos. 8830994 and 8830997 are **VACATED**, the Notices of Contest brought by TKE in WEST 2015-33-RM and WEST 2015-34-RM are **GRANTED**, and all three dockets are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

Michelle A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518

Paul J. Waters, Esq., Waters Law Group, 1465 S Fort Harrison Ave., Suite 205, Clearwater, FL 33756-2504