FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th St., Suite 443
Denver, CO 80202-2500
Office: (303) 844-5266/Fax: (303) 844-5262

December 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2015-385 A.C. No. 23-00027-379789
v.	:	
BUSSEN QUARRIES, INC., Respondent.	:	Mine: Jefferson Barracks

DECISION AND ORDER

Appearances: Dan Brechbuhl, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Ryan Seelke, Steelman, Gaunt & Horsefield, Rolla, Missouri, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act"). This docket involves one citation issued pursuant to section 104(a) of the Mine Act on December 2, 2014, with a proposed penalty of $6,300.00. The parties presented testimony and evidence regarding the citation at a hearing held in St. Louis, Missouri, on November 4, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Jefferson Barracks mine is a limestone mine owned and operated by Bussen Quarries, Inc., in St. Louis County, Missouri. The parties have stipulated that Bussen was at all relevant times engaged in mining at Jefferson Barracks and is therefore an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stips. ¶¶ 1, 3. The parties have also stipulated to the jurisdiction of the Mine Safety and Health Administration (MSHA) and the Commission. Jt. Stips. ¶¶ 2-5.

Citation No. 8860004 was issued by Inspector Gary Swan on December 2, 2014, pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 56.15005. The citation alleges that there was a portable pump on a wheeled cart being used on the highwall between the edge of the highwall and the last row of drill holes, and that a miner using the pump would have been exposed to a fall hazard. The inspector determined that the condition was reasonably likely

to result in a fatal injury, was significant and substantial, affected one person, and was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $6,300.00 for this alleged violation. For the reasons discussed below, I find that the Secretary has proven the violation as cited.

MSHA's Inspection

Gary Swan is a mine inspector who has been with MSHA since 2008. Prior to becoming an inspector, he worked for 30 years in the mining industry, primarily in surface coal mines, holding a number of positions, including supervisory positions. As part of his duties as an inspector, he has conducted several inspections of the Jefferson Barracks mine. Jefferson Barracks is a large limestone mine that uses explosives to blast through the limestone and rock. Miners drill bore holes into the rock along a highwall, pump water out of the holes as necessary, and then set a charge. The citation at issue involves a portable cart used to pump water out of the drill holes.

When Swan arrived at the highwall, there were four people in the area engaged in a variety of activities. David Becker identified himself as the senior employee present. Becker was standing near a row of drill holes approximately eight feet from the edge of the seventy-foot highwall. Swan observed the pump stationed approximately four and a half feet from the edge of the highwall with its handles pointed towards the edge. No one was using the pump at the time, but it had recently been unloaded from a truck for use throughout the shift. Swan understood that the pump would be used to pump water out of the blasting holes and over the side of the highwall. Swan approached Becker and told him that he wanted to discuss the placement of the pump. Becker then reached for the pump, pulling it closer to the line of drill holes and spinning it so that the handles no longer faced the highwall. Photographs produced by the Secretary show the position of the pump after it was moved and an estimation of its position before it was moved. Ex. 1. Swan noticed that there were older footprints near the edge of the highwall, but they were covered in rock dust and he could not tell how recently they had been made. Rock dust also blurred the edge of the highwall. The weather was overcast and thirty degrees. The conditions at the time including the footprints and the highwall edge are depicted in the photographs introduced by the Secretary. Ex. 1. Swan did not observe any fall protection in the area or any equipment that could be used as an anchor to tie off. Becker informed the inspector that the equipment was in a truck parked nearby, but indicated that it was not needed. Swan observed that there was no line painted on the rock to warn miners when they were approaching the edge, as is a common practice at some mines. There were no signs or other warnings marking the area near the edge. Instead, blasters relied on a measuring pole to place drilling holes eight feet from the edge, then worked near those holes so as not to cross within the six-foot limit.

David Becker has worked for eleven years at Bussen as a drilling and blasting laborer. His current position is as lead blaster. One of his tasks is to remove the water from the drill holes prior to blasting, which is done by attaching a hose to the back of the pump and pumping water out, sometimes over the edge of the highwall. On December 2, 2014, Becker was preparing to load a shot, which required pumping water out of some of the holes. Before he could do so, a powder truck arrived to be unloaded, and Becker had to push the pump out of the

way to clear a path to unload bags of powder. Becker testified that at all times, including when he moved the pump out of the way, his feet remained on the far side of the blast holes, at least eight feet from the highwall edge. The mine has a policy that fall protection is required within seven feet of the edge, and miners had received training on the subject. Becker testified that at no point was he within seven feet of the edge on the morning of the citation. He stated that he was the only one who would have used the pump that day, and that he would not have used it in the position four and a half feet from the edge and would not have crossed the seven-foot line to retrieve it. I do not credit his testimony, however, particularly his statement that no one would have gone within six feet of the highwall to move the pump and that he would have been the only person to use the pump. There were three other workers in the area and any of them could have had a need to use or move the pump throughout the day.

A. The Violation

Section 56.15005 requires that "Safety belts and lines shall be worn when persons work where there is a danger of falling . . . ." 30 C.F.R. § 56.15005. The Commission has specifically determined that in deciding whether the Secretary has proven a violation of this standard, the relevant question is whether "an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Section 56.15005 is one of thirteen priority standards listed by MSHA in its "Rules to Live By" initiative implemented to improve the prevention of fatalities in mining. Ex. 3. Violations of the standard contributed to thirty-seven fatalities between 1990 and 1998, more than any other standard. Ex. 5 at 2. MSHA has created a PowerPoint presentation addressing the prevention of falls from highwalls, in which it indicates that miners should use fall protection when working within six feet of a stable crest or within six feet of unstable ground. Ex. 5 at 7. MSHA advises mine operators to install visual warnings such as signs, tape, cones, boulders, paint, or chalk to warn miners when they are approaching an edge. Ex. 5 at 8. MSHA also suggests using berms, barriers, or handrails to prevent miners working on the highwall from working too close to the edge. *Id.*

In this case, the issue is whether there was a "danger of falling" that triggered the fall protection requirements of § 56.15005. Inspector Swan observed the pump cart approximately four and a half feet from the edge of the highwall with its handles pointed towards the edge. I agree with the Secretary that the position of the pump together with the absence of any warnings near the edge created a danger of falling. The photographs produced by the mine show drill dust in the area which blurs the edge of the highwall. The bore holes had been drilled between eight and nine feet from the highwall edge, which itself would make it easy for a miner to come within six feet of the edge, given there was no demarcation line for reference. The addition of the pump only four and a half feet from the edge made the fall hazard even greater.

Additionally, Swan observed that there were a number of people working in the area. Becker testified that he was the only one who worked with the pump, and that while he had not yet decided where to use the pump that day, he would not have used it in its current position. He testified that he could have reached the pump to move it back to a safe working position without

going into the hazard zone. However, there were three others in the area who had every opportunity to use or move the pump. The testimony of the miner witnesses indicated that the water pump was put in its position so that it would be out of the way while they unloaded the powder truck. It is difficult to know whether the pump would have been used in the position observed by the inspector. But even if it were not, it would nonetheless have to be moved to a location where it would be used. In either scenario, a miner would enter the fall hazard zone. I agree with the inspector's reasonable inferences that these other miners could have used or moved the pump from its location near the edge. If the pump were used in the location where Swan observed it, a miner would be using both hands to attach a hose, and the water would be discharged from the other side, down the side of the highwall. To move the pump, a miner would likely have used the handles as they were intended, thereby placing himself within a few feet of the edge of the highwall. Clearly, a reasonably prudent person would recognize the fall hazard that was created by placing the pump with the handles facing the edge of the high wall.

Finally, while Becker denies ever entering the fall hazard zone, it is difficult to imagine that he did not go within six feet of the highwall when he placed the pump in the position initially observed by the inspector. While his account is to the contrary, it seems most likely that Becker pushed the pump by its handles rather than carrying it or pushing or pulling it from the side opposite the handles. Bussen argues that, given Becker's assertions, there is no evidence that a miner entered the fall hazard zone. Resp. Br. at 2-6. However, there is no requirement that an inspector witness a violation at the moment it is being committed: the Commission has held that a violation may be proven through "reasonable inferences drawn from indirect evidence." *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (1984). Here, the inspector indicated that someone must have placed the pump in the position he observed. There were no lines or demarcations on the ground to identify the fall hazard area and warn miners when they were too close to the edge. Considering the mining practices as observed by the inspector, it was highly likely that a miner had entered the fall hazard zone without being tied off to place the pump near the edge and out of the way while unloading the truck. It is also reasonable to believe that a miner would have re-entered the fall hazard zone without protection to either move or use the pump.

Bussen also argues that even if a miner did enter the fall hazard zone, there is no evidence that he was not wearing fall protection. Resp. Br. at 5. The mine witnesses explained that there was fall protection located in the highwall area, stored in the truck. The witnesses also indicated that the company had a policy requiring miners to use fall protection when working within seven feet of the highwall. However, the miners also suggested that there was no need for protection at the time of the inspection. Perhaps if the miners were to actually use the pump for some period of time, they would use fall protection. However, it is easy to see why the inspector, who saw no fall protection in the area and no tie-off location, concluded that fall protection would not have been used for a simple task like moving the pump. Although fall protection was available in the truck, there is nothing that leads me to believe that a miner would have travelled to the truck, donned the fall protection, and secured an area to tie off in order to perform the simple task of moving the pump. Finally, I find that in moving the pump to the location the inspector identified, Becker was near the edge and did not use fall protection. Accordingly, I find that the Secretary has established a violation.

B. Gravity and S&S

The Secretary asserts that Bussen's violation created the reasonably likely risk of fatal injury and that it was significant and substantial ("S&S"). A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury," but rather that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

Applying the *Mathies* test to the case at hand, I find that the Secretary has established the first element by demonstrating the violation of a mandatory safety standard. The violation also contributed to a hazard in that it presented the danger of a miner tripping and falling from the seventy-foot highwall while either using the pump or moving it to or from another location, without the benefit of fall protection.

As for the third element, the Commission has clarified that "The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining

operations had continued." *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005) (quoting *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989)). Here, the miners believed that their activities did not require fall protection. Thus, it is likely that they would have continued to work without it for the remainder of the shift. There were no markings on the ground or other warnings present, so the miners were likely to approach the edge throughout the shift. Given the position of the pump, they were likely to come within three or four feet of the edge when operating the pump or attempting to move it. The presence of rock dust, the freezing temperature, and the number of people working in the area all exacerbated the tripping hazard. Additionally, the position of the pump with its handles facing towards the highwall created the possibility that it would fall over in that direction, which would require that a miner retrieve it, bringing him even closer to the highwall. Based on these factors, I find that there was a discrete hazard created by the violation and that the hazard was reasonably likely to result in an injury. The injury would almost certainly be fatal due to the seventy-foot drop off the highwall. The third and fourth elements of the *Mathies* test are therefore also established. Accordingly, I conclude that the violation was S&S.

C. Negligence

Inspector Swan indicated that the negligence in this instance was high. Bussen argues that its negligence was less than high because all of the employees on the highwall were hourly employees and all had been trained in the use of fall protection.

Negligence is "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.*

The fall protection standard is one of MSHA's "Rules to Live By." Ex. 3. MSHA's Rules to Live By initiative identifies twenty-four standards that are frequently cited in fatal accident investigations. MSHA provides reference materials for operators to learn about these standards and how to stop common yet preventable fatalities. Since operators have been put on notice and given resources about ways to prevent these specific types of accidents, violating one of these standards is indicative of a significant lack of care.

Here, Becker was an hourly employee, but he indicated that he was in charge of the blasting operation and described himself as the lead blaster. It seems clear that Becker was aware that the pump was too close to the edge. When Inspector Swan was asked at hearing whether he had required Becker to use fall protection when he moved the pump in Swan's presence, Swan said, "It was just too fast. I mean, yeah, I didn't ask him and he didn't say anything. He just turned around and grabbed it . . . ." Tr. at 42. Becker was aware that the pump was too close to the edge and quickly moved it before the inspector could do anything further.

Bussen has a policy requiring miners to stay an extra foot back from the highwall, seven feet instead of the six feet required by MSHA. It also has a policy of disciplining miners who do not follow the safety policies when working in the highwall area. The mine had held a safety meeting in March, a few months prior to the citation, regarding its policies for the use of fall protection. However, these policies and training did not keep Becker from placing the pump in such a location that it created a hazard to the other miners. The placement of the pump close to the edge was obvious. Becker identified himself as the person in charge, yet he is the one who placed the pump in the location that was cited. Further, the mine failed to provide warning devices to indicate the edge of the wall such as a painted line or warning sign. The miners testified that they stayed seven feet back from the edge, but I am skeptical given the location of the holes, the location of the pump, and the fact that there were no warnings to remind workers to stay back. Hence, I find the negligence to be high.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows that the mine had not been cited for a fall protection violation in the fifteen months preceding this violation. Ex. 8. Bussen is a large operator. The penalty as proposed will not affect its ability to continue in business, and the operator demonstrated good faith in abating the citation. The gravity and negligence are discussed above. I find that a penalty of $6,300.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess a penalty of $6,300.00 for Citation No. 8860004. Bussen Quarries is **ORDERED** to pay the Secretary of Labor the sum of $6,300.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Daniel T. Brechbuhl, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Ryan D. Seelke, Steelman, Gaunt & Horsefield, 901 Pine Street, Suite 110, Rolla, MO 65401