FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
721 19th ST. SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

January 26, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0216 A.C. No. 41-03401-578784
v.	
BILLY COOPER STONE CO., INC., Respondent.	Mine: Cooper Stone

DECISION AND ORDER

Appearances: Maria C. Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100 Commerce Street, Room 462, Dallas, TX 75242

Micah Flippen, Billy Cooper Stone Co., Inc., P.O. Box 678, Jarrell, TX 76537

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Billy Cooper Stone Co., Inc., ("Cooper Stone" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] This case involves two Section 104(a) citations with a total proposed penalty of $1,757.00.

The parties presented testimony and documentary evidence regarding the citation at issue at a virtual hearing held on November 15, 2023. MSHA Inspector Jason Hoermann testified for the Secretary. Billy Cooper Stone Co., Inc., owner Micah Flippen and employee Dan Wilson testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9741862 and 9741863, as modified herein.

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Billy Cooper Stone Co., Inc., at all times relevant to these proceedings, engaged in mining activities and operations at the Cooper Stone Mine (Mine I.D. 41-03401) ("Cooper Stone") in Williamston County, Texas.

2. Billy Cooper Stone Co., Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

3. Billy Cooper Stone Co., Inc.'s mining operations affect interstate commerce within the meaning and scope of § 4 of the Mine Act, 30 U.S.C. § 803.

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.

6. The individual whose signature appears in Block 22 of the contested citations at issue in this proceeding is an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.

7. The citations at issue in this proceeding were properly served upon Billy Cooper Stone Co., Inc., as required by the Mine Act.

8. The penalties associated with the violations in this docket if imposed, will not affect the Mine's ability to remain in business.

9. The Respondent agrees to withdraw contest of Citation No. 9741859 and agrees to pay the assessed penalty of $905.00.

10. The Respondent agrees to withdraw contest of Citation No. 9741860 and agrees to pay the assessed penalty of $905.00.

11. The Respondent agrees to withdraw contest of Citation No. 9741861 and agrees to pay the assessed penalty of $905.00.

12. The Parties agree that Citation No. 9741864 be modified from "Fatal" injury to "Permanently Disabling", and the penalty be modified from $905.00 to $407.00. For support of this modification, the Respondent asserts that the expected injury would not be as serious as alleged; the welder does not produce a high voltage. The Secretary under these specific circumstances agrees that the expected injury is more appropriately described as "Permanently Disabling."

13. The moving machine parts described in Citation No. 9741862 are required to be guarded to protect persons from contact per 30 C.F.R. § 56.14107(a).

14. The area described in Citation No. 9741863 is a roadway, over which vehicular traffic may travel.

15. The area described in Citation No. 9741863 is within the property boundaries of Cooper Stone, LLC, 3786 FM 487, Jarrell, Texas 76537.

16. Cooper Stone abated Citation No. 9741863 by placing berms along the roadway.

Tr. 6.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Billy Cooper Stone Co., Inc., operates the Cooper Stone Mine, a dimensional stone mine located in Williamston County, Texas. Tr. 13, 18-19; Jt. Stip. 1. On April 19, 2023, MSHA Inspector Jason Hoermann arrived at the mine to conduct a regular EO-1 inspection. Tr. 21. While inspecting the site, he was accompanied by two members of mine management, Dan Trejo and Dan Wilson. Tr. 23.

While inspecting the rock chopper area, Hoermann issued a citation for a splitter that did not have the proper guards. Tr. 34; Ex. S-1-1. Hoermann testified at hearing that the lack of guards on the machine presented an entanglement hazard. Tr. 36. While he could not recall at hearing whether he determined if the splitter was locked out or not, he stated that he would generally make a note during his inspection process if a piece of machinery was locked out. Tr. 40-41. His notes from this inspection did not state that the machine was locked out at the time he issued the citation. Tr. 41; Ex. S-3-2. Concerning the splitter's condition, rock was lying on the belt, dirt debris was located on top of a catch table, and a hammer and gloves that are typically used to clean off the machine were nearby. Tr. 41-42; Ex. S-1-4, S-1-5, S-1-6. No guards were lying in the area or installed on the machine and there were no signs of repair. Tr. 42-43. Hoermann testified that he would have issued the citation regardless of whether the splitter was locked out or not because this evidence indicated that it had been used in a condition without guards, exposing miners to a hazard. Tr. 41-43, 80.

Dan Wilson, one of the members of mine management who accompanied Inspector Hoermann on April 19, 2023, testified for the Respondent. He testified that the splitter had not been in use on the day of the inspection, nor was he aware of its use in the 70 days prior to that when he started his employment with Cooper Stone. Tr. 128-29. He did not check on the day of the inspection if the splitter was tagged out or not but stated that the splitter had been de-energized. Tr. 132-33. He also testified that it is common practice for employees to lay equipment down wherever there is space when it is not needed, as an explanation for the tools located in the splitter's vicinity. Tr. 131-32. Micah Flippen, owner of Cooper Stone, also testified that it was normal for employees to lay tools and other equipment "anywhere they wish[ed]" and that the company made every effort to ensure the machine was de-energized. Tr. 165-66. To demonstrate that the machine had been locked out at the time of the citation, the Respondent

submitted a photograph that could not be authenticated by Dan Wilson, who was present on the day of the inspection. Tr. 146-47; R-1.

When traveling on roads to inspect another area of the mine, Hoermann issued a citation for a missing berm on a 40-foot section of roadway. Tr. 50. The road appeared to be heavily traveled with equipment tracks and was narrow at only fifteen feet with an eight-foot drop-off leading to a pond. Tr. 51, 55-56. The inspector determined that this combination of conditions created a rollover hazard for vehicles traveling along the road. Tr. 57. Inspector Hoermann did not observe machinery operating on the road or mining equipment in the area but noted that there were signs that the area had been mined for dimensional stone, as evidenced by Vermeer saw cuts. Tr. 94-95, 109. He also testified that the area was moist where the berm had sloughed off. Tr. 95. Cooper Stone promptly terminated the violation by replacing the missing berm with blocks. Tr. 61-62.

Concerning the ownership of the road, Hoermann determined the road belonged to Cooper Stone because the road connected into a network of other roads and there was no signage or other indicators that demonstrated ownership by an entity other than Cooper Stone. Tr. 60-61. He also stated that if a mine's employees are traveling in an area, it is the mine's responsibility to correct any hazard an employee may be exposed to. Tr. 84. The Respondent presented evidence that the road was under the control of Heartland Quarries, a separate entity that leased the road from Cooper Stone, and asserted that Heartland was responsible for its maintenance. Tr. 136-39, 169-70, Ex. R-2, R-5. Mine employee Dan Wilson testified that Heartland Quarries had created new roads and manipulated roads that had been used by Cooper Stone in the past at its own discretion. Tr. 138-39. He admitted that the road where the citation was issued had been used by Cooper Stone in the past, but that it was not a normal travel way for Cooper Stone employees. Tr. 154-56, 161. Micah Flippen testified further that Heartland Quarries was in the process of stripping the area and had been manipulating the road and that Cooper Stone was not managing either the berm or the road at the time of the citation. Tr. 166, 169. Further, he testified that the largest piece of equipment owned by Cooper Stone is a "skid steer that is maybe six feet wide" and that they would not build a road that was so much wider than their equipment. Tr. 167. He also stated that rain had occurred in the area recently, explaining the moist ground that the inspector observed at the location of the citation, and that it was probable that the berm had sloughed off due to this recent rain. Tr. 169.

IV. DISPOSITION

A. Citation No. 9741862

During his inspection on April 19, 2023, Hoermann issued 104(a) Citation No. 9741862, which alleged:

> The head pulley for the discharge belt and the chopper chains were not guarded on the No. 3 Hydrasplit Chopper. The head pulley guards were missing[,] and the chain guard was lying on the ground. This condition exposes miners using the chopper to an entanglement hazard resulting in serious injuries.

Ex. S-1-1; Tr. 35-36.

Hoermann designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.14107(a) that was unlikely to cause an injury that could reasonably be expected to be "permanently disabling," would affect one miner, and was caused by Respondent's moderate negligence. Ex. S-1-1.

1. Fact of Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in civil law and the standard applicable here, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

30 C.F.R. § 56.14107(a) states that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

The Secretary asserts that it is undisputed by both parties that the machine did not have proper guards at the time of the citation and that there was no indication of ongoing repair. Sec'y Br. at 10-11. Further, the inspector testified that there was substantial evidence that the machine had been used without guards and that he would have issued the citation anyway regardless of whether the splitter was properly locked out. Tr. 41-43. Cooper Stone contends that the machine was in fact locked out and tagged out at the time the citation was issued but failed to present any testimonial evidence to that effect. Resp Br. at 1-2. While the Respondent submitted a photograph that appeared to show that the machine was locked and tagged out, this photograph could not be authenticated at hearing. Especially critical is the failure to establish when the splitter was locked and tagged out. Therefore, I cannot place much evidentiary weight on the photograph. Tr. 146-47; Ex. R-1. I do place weight on and credit the inspector's testimony that, even had the splitter been locked and tagged out, he would have issued the citation given the evidence it had been used without the presence of the required guards. Accordingly, I find that the Secretary has presented sufficient evidence to show that Cooper Stone violated 30 C.F.R. § 56.14107(a).

2. Gravity

Hoermann designated the citation as unlikely to cause an injury that could be reasonably expected to result in a permanently disabling injury. Ex. S-1-1. He testified at hearing that he selected "unlikely" because the machine was not in use at the time of his inspection and the machine was a spare. Tr. 43. He selected permanently disabling because the pulley located on the machine could grab loose clothing or a hand, leading to crushing injuries and possible amputation. Tr. 43-44. Because the splitter was not in immediate use, it was unlikely to cause

injury, so Hoermann marked the gravity as not significant and substantial. Tr. 44. Hoermann also testified that one person would be affected since one person would be injured by the head pulley at a time. Tr. 44. Respondent did not contest the gravity designations for this violation, and I find the designations made by the inspector to be appropriate.

3. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Hoermann marked the violation as moderate negligence because the violation was visible and it was obvious that the machine was unguarded, and because the operator had been cited in the past "for another guarding violation." Tr. 44-45. At the time of this citation, management stated that they did not know that the cited machine was unguarded, and never mentioned that the machine was locked out or was down for repairs during the inspection. Tr. 45-46. Hoermann testified that the operator should have been aware that machine parts should be guarded, but the Assessed Violation History Report does not indicate any such prior machine related guarding violations. Tr. 45. Ex. S-4-1. Because there is no evidence of the operator's previous history regarding such guarding violations, I lower the negligence from moderate to low.

B. Citation No. 9741863

During his inspection on April 19, 2023, Hoermann issued 104(a) Citation No. 9741863, which alleged:

> The roadway going to the upper bench at the main pit was missing a 40 ft section of berm. The roadway had an 8 ft drop off on the North side and tire tracks were observed within 2 ft from the edge. The roadway is used by mobile equipment to move blocks from the pit to the saw area. This condition exposes equipment operators to a [roll-over] hazard resulting in serious injuries.

Ex. S-2-1; Tr. 55-56.

Hoermann designated the citation as a significant and substantial violation of 30 C.F.R. § 56.9300(a) that was reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," would affect one miner, and was caused by Respondent's moderate negligence. Ex. S-2-1.

1. Fact of Violation

30 C.F.R. § 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

The Secretary argues that Cooper Stone violated this standard by failing to have a berm on a narrow road with an eight-foot drop-off. Owner operator Flippen testified that the road was not under Respondent's control, and that the area was not actively being mined by Cooper Stone. Instead, the road was being controlled and manipulated by Cooper Stone's, lessee, Heartland Quarries. I find that the ownership of the road in this matter is irrelevant to the issuance of a citation, because if a mine's employees are traveling on a road, per inspector Hoermann's credited testimony it is that mine's duty to ensure that the road is in compliance with all safety regulations. Tr. 84. I also note the parties stipulated to the fact that the road in question is within the property boundaries of Cooper Stone. Jt. Stip. 15. It is also undisputed that the road in question was missing a berm at the time of the citation. I affirm the finding that there was a violation of 30 C.F.R. § 56.9300(a).

2. Gravity and S&S

Hoermann designated the citation as reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty." Ex. S-2-1. He explained at hearing that the road was narrow and very compacted, which indicated heavy use. Tr. 57. He selected "lost workdays and restricted duty because the equipment would likely roll over on its side, leading to broken bones, sprains, contusions, and cuts. Tr. 57-58. The Respondent did not contest the gravity of the expected injury. I affirm the finding that the injury would likely result in lost workdays or restricted duty to one miner.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

The Secretary has established a violation and therefore satisfies step 1. But the Secretary has failed to satisfy step 2 because she has not shown that the occurrence of a roll-over hazard is reasonably likely to occur to one of Respondent's employees. There are too many intervening factors to establish that the rollover hazard was reasonably likely, particularly concerning the lack of evidence demonstrating Respondent's use of the road. At the hearing, the inspector testified that he did not see equipment working in the area and that mine management were unaware of the berm's condition. Tr. 59, 109. Further, Respondent presented testimony at trial

that indicates that the road was not in use at the time of the inspection. Tr. 166-69. Additionally, Cooper Stone contends that their equipment is significantly narrower than the road itself. Tr. 167. The danger to Respondent's employees presented by the missing berm remained relatively remote given these facts. Accordingly, the berm violation was not S&S and I lower the likelihood of injury to unlikely.

3. Negligence

Hoermann determined that the violation was a result of Cooper Stone's moderate negligence. It was visible and obvious that the 40-foot section of berm was missing, but the mitigating circumstances of nobody using the road at the time of inspection and the lack of reporting about the situation decreased the negligence to moderate. Tr. 59. Further, the inspector determined that the road belonged to Cooper Stone because the road tied into the network of roads leading to the pit and there was no signage or barriers to indicate the road belonged to another entity. Tr. 60.

As stated above, it is the mine's duty to ensure compliance with safety regulations if their employees are traveling on a road, regardless of the actual ownership of the road. However, given the considerable mitigating circumstances and the low frequency that Cooper Stone was using the road at the time of the citation, I reduce Cooper Stone's negligence from moderate to low for this citation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9741862, the Secretary proposed a regularly assessed penalty of $407.00. As discussed above, there is no evidence aside from the inspector's unsupported testimony regarding the operator's prior machine guarding violation history. It is undisputed that Cooper Stone is a small operator with approximately 30 employees. Tr. 21. The parties also stipulated that the penalty will not affect Cooper Stone's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this non-S&S violation was unlikely to result in an injury causing permanently disabling injuries and was the result of Cooper Stone's low negligence. Finally, Cooper Stone demonstrated good faith by quickly terminating the citation. In light of these considerations, I find that a penalty of $350.00 is appropriate.

For Citation No. 9741863, the Secretary has proposed a regularly assessed penalty of $1,350.00. The mine operator has had berm violations in the past. Ex. S-4-1. The parties stipulated that the penalty will not affect Cooper Stone's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this is a non-S&S violation that was unlikely to result in an injury causing lost workdays or restricted duty and was the result of Cooper Stone's low negligence. Finally, Cooper Stone Co., Inc., demonstrated good faith by quickly remedying the citation, even under the belief that they were not responsible for the missing berm. I have considered the representations and documentation submitted and conclude that a penalty of $600.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

IV.ORDER

It is hereby **ORDERED** that Citation No. 9741862 is **AFFIRMED** as modified to reduce the negligence to low and that Citation No. 9741863 is **AFFIRMED**, as modified to reduce the likelihood of injury or illness to "Unlikely", reduce the negligence to low, and to remove the S&S designation. Billy Cooper Stone Co., Inc, is **ORDERED** to pay the Secretary the total sum of **$950.00** within 40 days of this order.[2]

David P. Simonton
Administrative Law Judge

[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

Distribution: (Electronic and Certified mail)

Maria Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100 Commerce Street, Room 462, Dallas, TX 75242, dobyns.maria@dol.gov

Micah H. Flippen, Owner, Cooper Stone LLC, P.O. Box 678, Jarrell, TX 76537, micah.flippen@cooperstone.com