

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 24, 2020

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

v.

BOART LONGYEAR COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2019-0297-M
A.C. No. 26-02512-485389 Y12

Leeville Mine

DECISION

Appearances: Luis Garcia, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California for Petitioner;
Dana M. Svendsen, Esq., Sherman & Howard L.L.C., Denver, Colorado for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Boart Longyear Company (“Boart”) 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 Elko, Nevada, and filed post-hearing briefs. Two section 104(a) citations and one section 104(g)(1) order, with a total proposed penalty of \$82,886.00, were adjudicated at the hearing.¹ Boart was a contractor working at the Leeville Mine, an underground gold mine in Eureka County, Nevada. For reasons set forth below, I vacate Citation No. 9379548 and Order No. 9379555 and modify Citation No. 9379549. Although I have not included a detailed summary of all evidence or each argument

¹ The three enforcement actions in this proceeding were issued along with imminent danger Order No. 9379547, which Boart neglected to contest. The imminent danger order is not before me. *See Sims Crane Inc.*, 39 FMSHRC 1367 (July 2017); *see also ACI Tygart Valley*, 38 FMSHRC 939 (May 2016). During a conference call with the parties prior to hearing I made clear that I would not allow the Secretary to rely upon the language in the Condition or Practice section of the 107(a) order to establish the underlying facts in this case. *See Knife River Const.*, 38 FMSHRC 1289, 1294 (June 2016) (Contrasting 107(a) imminent danger orders, which are reviewed from the perspective of an objectively reasonable inspector, with violations of mandatory safety standards, which the Secretary must prove by a preponderance of the evidence). During this call, I advised counsel for the Secretary that he would be required to establish the alleged violations by a preponderance of the evidence presented at the hearing.

raised, I have fully considered all of the evidence and arguments. Further, my findings and conclusions are restricted to the particular facts of this case.

The Secretary bears the burden of proving a violation by a “preponderance of the evidence.” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). In order to satisfy his burden the Secretary must convince the court that the existence of a fact is more probable than not. *Id.* “If the Secretary fails to meet this burden then there is no violation, irrespective of any counterarguments.” *Sims Crane*, 41 FMSHRC 393, 396 (July 2019).

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 14, 2019, Juan Sarabia,² a floor mechanic for Boart, was tasked with traveling from Boart’s Salt Lake City shop to the Leeville Mine, an underground gold mine operated by Newmont Gold, to replace a transfer case in a pump rig. Tr. 311, 318. Sarabia loaded the oil-filled replacement transfer case³ into his vehicle and traveled to the mine. Tr. 179, 319, 381.

Upon arrival at the mine around noon, Sarabia, along with other Boart crew members, gathered in the “doghouse”⁴ to prepare the Job Hazard Analysis whiteboard (“JHA board” or “the board”) for the task of changing out the transfer case. Sec’y Ex. 18; Tr. 132, 178, 315, 318-319, 410. Preparing the JHA board involved the entire crew discussing and documenting on the board the hazards and risks associated with the task of replacing the transfer case and how they planned to mitigate against such. Tr. 162, 163, 165, 315, 317, 370-371, 408-409, 429. The group covered suspended loads and the use of taglines, as indicated by the text on the board.⁵

² Sarabia has worked for Boart for approximately eight years, including a period where he worked in oilfields and routinely dealt with suspended loads and taglines. Tr. 311, 368-370. Prior to becoming a mechanic he worked as a floor helper, mast and derrick hand, and safety man. Tr. 364, 369. As a safety man he was responsible for providing hazard training to others. Tr. 369. While he normally worked at Boart’s Salt Lake City shop, he routinely traveled to mine sites to work on equipment. Tr. 366. He has taken apart and assembled many pieces and parts of equipment, including transfer cases on pump rigs. Tr. 365. He operated a forklift daily when working on drilling and pump rigs. Tr. 365-367.

³ Oil was used to lubricate the interior of the case and prevent moisture from causing rust. Tr. 179, 381.

⁴ The “doghouse” was a walk-in trailer located next to the subject pump rig. Tr. 161-163.

⁵ Sarabia and Edwin Spear, an Environment Health and Safety (“EHS”) advisor with Boart, both testified that they would expect to see a JHA board at every Boart worksite. Tr. 216, 295, 375. Jory Shumway, the field supervisor in charge of this particular job, testified that, although he did not have a specific recollection of the board on January 14, he would expect that taglines and suspended loads were covered and documented since they are usually on the board every day. Tr. 113-114, 131-132, 313. Abe Hess, a Boart rig operator, testified that he filled out parts of the board. Tr. 424. During Hess’s testimony he initially appeared to be under the impression that

Sec'y Ex. 18; Tr. 164, 371, 372, 408, 424. Boart has a JHA board for every mine site job and the crew always completes the board before beginning a job and revisits the board each morning during a job. Tr. 165, 372, 408-409, 447-448. After completing the board that morning, the crew moved the replacement transfer case from Sarabia's truck to an area behind the pump rig and then removed the old transfer case from the rig before retiring for the evening.⁶ Tr. 178, 316, 322, 361.

Sarabia arrived at the mine the following morning, January 15, around 7:00 AM. Tr. 323. Like the day before, he and the other Boart crew members gathered in the doghouse to review the board and discuss hazards involved with installing the replacement transfer case. Tr. 179, 323, 380, 381, 429. After reviewing the board, the crew threw salt around the worksite because snow had fallen overnight and accumulated on the ground and equipment. Tr. 324, 360, 401. Sarabia testified that there was snow on the forks of the forklift that morning. Tr. 360. The crew then went about their various tasks for the day.

Sarabia's task included removing multiple fittings from the replacement transfer case in order to fit the case into the pump rig. Tr. 382, 391. Given the weight of the case, approximately 500 pounds, Sarabia was concerned that moving the case while it was on the ground would expose persons to pinch point hazards. Tr. 383. As a result, he planned to use a forklift to suspend the case above the ground so he could position the case to remove the fittings before draining the oil. Tr. 382, 391, 392.

Sarabia, along with other crew members, rigged nylon straps to the replacement transfer case. Tr. 361, 366. After rigging the case and moving the forklift into position, the crew attached the other end of the rigging straps to the left fork of the lift.⁷ Tr. 326, 345, 361, 362, 404. According to Sarabia, he chose to suspend the case from the left fork because it allowed him to be in the best position to have face to face communication with the fork lift operator and also be able to see whether the lift operator's hands were off the lift controls.⁸ Boart Ex. B p. 3, 4; Tr. 392, 404. At that point, only Sarabia and Juan Ortega, the lift operator, were working on the task. Tr. 116, 313. Sarabia discussed with Ortega the hand signals he planned to use while

Boart began site setup on January 13. Tr. 423-425. However, his later testimony made clear that his references to January 13 were in error and he should have been referencing January 14 instead. Tr. 426.

⁶ Sarabia testified that he used a used a tagline during the removal of the old case. Tr. 338.

⁷ For purposes of the decision, references to the right and left fork, or right and left side of the forklift, are made from the perspective of an individual sitting in the forklift operator's cab. The forklift at issue, a JLG Telehandler, was an extended boom forklift. The operator's cab was located on the left, while the boom was to the right of the operator cab. Sec'y Ex. 9; Tr. 183, 184. Given the position of the cab, the operator had a better view of the left fork. Tr. 184-185.

⁸ Sarabia explained that he always suspends machinery from the left fork because using the right fork required the presence of another person to act as a spotter. Tr. 404.

moving the case and how the two of them needed to be able to maintain eye contact.⁹ Tr. 383-384.

Ortega raised the forks, thereby lifting the rigging and transfer case off the ground. Tr. 327, 399. After picking up the case, which was behind the pump rig, Ortega drove the lift around a series of barricades to the side of the rig.¹⁰ Tr. 361, 409. Sarabia used an attached tagline to prevent the case from rocking back and forth while it was being moved. Tr. 362. After moving the case into position, Ortega showed Sarabia that his hands were no longer on the lift controls, indicating that Sarabia could go to work.¹¹ Tr. 281, 384, 388. The forklift was parked, the tagline was removed, the lift's outriggers were dropped to the ground, and the transfer case was lifted approximately two to three feet off the ground, i.e., roughly knee height according to Sarabia, above a bucket that would catch oil released during the task.¹² Tr. 141-142, 188-189, 327, 328, 333, 338, 353-355, 362, 385, 388, 395, 400, 403. The forklift was powered off. Tr. 384-385, 387-88, 395, 400.

Sarabia, who was standing on the left side of the forks so that he could maintain eye contact with Ortega in the cab, placed his left hand on the transfer case to prevent it from moving and began the process of removing the fittings, which required the use of a pipe wrench in his

⁹ Boart employees use hand signals to communicate with equipment operators. Tr. 181. Employees are instructed on the hand signals "as soon as they come into the field." Tr. 181.

¹⁰ Abe Hess, a Boart pump rig operator, testified that barricades, or barriers, surrounded the whole worksite as depicted by yellow blocks in Boart Ex. A p. 4; Tr. 407, 409-410. Spear testified that the concrete barriers, which were "Jersey" freeway barriers, were approximately three feet high and were positioned all the way around the pump rig and doghouse, with a small opening for the forklift to get in and out. Tr. 231-233. Spear also used a green pen to identify on Sec'y Ex. 3A the approximate location of the barriers but the markings are difficult to see because the Secretary laminated the exhibit. Tr. 232-233, 266. He noted that the barriers on the aerial photos were not in those positions on January 15 but were located as shown in Boart Ex. A p. 4; Tr. 267. He further testified that anyone beyond the barriers looking at the pump rig and forklift may have had their view obstructed. Tr. 233. Shumway testified that the markings on Boart Ex. A p. 4 accurately depicted the location of the pump rig, doghouse, forklift, and barricades on January 15. Tr. 171, 175.

¹¹ Boart's "Show Hands Policy," required equipment operators to show others that their hands were not on the equipment controls, thereby indicating it was safe for those around the equipment. Tr. 182, 384.

¹² Shumway and Sarabia testified that the best location for the transfer case during this task was just above the bucket on the ground. Tr. 188-189, 389. If the transfer case was above a mechanic's head, the mechanic would not be able to reach the fittings or have leverage to manipulate tools needed during the task. Tr. 186, 188. Further, oil would pour onto the ground and the mechanic if the plug was opened while the case was that high. Tr. 186. Sarabia, who is approximately 5 feet, 4 inches tall, testified that if the case had been above his head he would not have been able to use the tools necessary to complete the task. Tr. 388.

right hand. Tr. 282, 327, 329, 332, 344, 345, 355, 386, 390-391, 403. Boart introduced the photographs in Boart Ex. B, which were taken in its Salt Lake City shop, to illustrate the position of Sarabia's body as he was preparing to remove the fittings. Shortly after beginning that task, but before draining any oil, Sarabia heard someone yell "[y]ou stop working, you're dangerous, you can die." Tr. 326, 332, 395, 402. Sarabia immediately stopped what he was doing and walked over to the individual who was yelling at him.¹³ Tr. 329, 348, 403. The individual, MSHA Inspector Amanda Gonzalez,¹⁴ asked Sarabia to get his supervisor. Tr. 329-330.

Gonzalez's recollection is substantially different. She testified that she traveled to the Leeville Mine on January 15 to conduct an EO1 underground inspection. Tr. 20. She initially drove to the mine's safety administration office (the "safety office"), went in, and told a member of Newmont's safety department that she was there to conduct health sampling and finish an underground inspection. Tr. 20. After attaching sampling pumps to some of the miners, Gonzalez exited the safety office and walked 30 feet to her vehicle to put back items that she did not need to take underground. Tr. 20-21, 95.

According to Gonzalez, while walking back toward the safety office from her vehicle she noticed Sarabia standing underneath the right fork of the forklift.¹⁵ Tr. 23-25, 74. Gonzalez testified that, although barriers were in the area, she had a clear line of sight and saw Sarabia using his right hand to guide the transfer case hanging from a tow strap attached to the middle of the right fork above. Tr. 23-27, 74, 84, 462-464. According to Gonzalez, the case was initially at about the middle of Sarabia's body¹⁶ and was being raised into the air by Ortega, who was in the cab operating the forklift. Tr. 24-26, 86. Once stopped, the fork from which the case was suspended was approximately 12 feet off the ground, while the bottom of the transfer case was approximately 6 feet off the ground, i.e., at approximately Sarabia's eye level. Tr. 25, 26, 83-84. Gonzalez stated that Sarabia was facing away from the forklift operator, there was no eye contact between the two, and hand signals were not being given. Tr. 27. She saw no taglines in the area and she did not see a bucket underneath the transfer case. Tr. 27.

Gonzalez testified that only a "split second" elapsed between the time she saw the situation and when she yelled to Sarabia to get his attention and called him over. Tr. 28, 83. When Sarabia was next to Gonzalez she told him that she was issuing an imminent danger order because he was standing underneath the forklift guiding the transfer case while the lift operator was in the cab operating the machine. Tr. 29. According to Gonzalez, Sarabia told her that he

¹³ Sarabia testified that Gonzalez was approximately 15 to 20 feet away from him when he first heard her yell and that he ultimately walked 10 to 15 feet to meet her. Tr. 329, 387.

¹⁴ Gonzalez has been an inspector with MSHA for four years. Tr. 14. Prior to working for MSHA she spent 10 years as a heavy equipment operator at an open pit mine. Tr. 73.

¹⁵ Gonzalez estimated that when she first saw Sarabia under the fork she was approximately 10 feet from her vehicle on her way back toward the safety office and Sarabia was approximately 10 feet to her right. Sec'y Ex. 3A; Tr. 30.

¹⁶ Gonzalez testified that she is five feet, six inches tall and that Sarabia is approximately six feet tall. Tr. 84. Sarabia testified that he is approximately five feet, three to four inches. Tr. 388.

had been in the process of taking off fittings and draining water from the case when she yelled. Tr. 75-76, 88.

Abe Hess, the Boart pump rig operator, testified that he walked up to Gonzalez at the same time Sarabia did and Gonzalez told him to go get their supervisor, Jory Shumway, who was in his truck. Tr. 120, 139, 140, 191, 281, 329-331, 333, 395, 407. According to Sarabia, it was somewhat noisy due to all of the traffic in the area, but neither the pump rig nor the forklift were running. Tr. 333. Boart's witnesses testified that Shumway and Hess joined Gonzalez and Sarabia as the group moved toward the safety office.¹⁷ Tr. 121-124, 154, 191-192, 331, 334, 411-412.

Gonzalez again offered a substantially different, and somewhat confusing, account of these events. She first testified that she walked alone with Sarabia to the safety office. Tr. 29. She then agreed that she met Shumway and Sarabia in the middle of the office parking lot, but then stated that once inside the safety office she told Jason Haynes, a Newmont safety officer, that he needed to go get Shumway. Tr. 30. She testified that she did not speak with Abe Hess that day. Tr. 463.

According to Gonzalez, between the time when Haynes left the office to get Shumway and when Shumway arrived, she had a five minute conversation with Sarabia during which she discussed the need to use a tagline and avoid standing under the forks of a forklift, especially while the lift operator is in the cab. Tr. 30-31. Gonzalez testified that when Shumway arrived at the office she told him that she was issuing a 107(a) imminent danger order and discussed the citations she was going to issue in conjunction with the order. Tr. 31. Gonzalez claims that both Sarabia and Shumway stated that they were not aware of the requirement to stay clear of suspended loads or the need to use a tagline. Tr. 32. She estimated that her conversations with Shumway and Sarabia lasted approximately 10 minutes. Tr. 91.

Gonzalez testified that, after she spoke with Shumway, she took a photograph of the area around the forklift from approximately the same vantage point where she first observed the Sarabia. Sec'y Ex. 5 p. SOL 00022; Tr. 94. She took no measurements as part of her inspection. Tr. 94. After taking the picture, Gonzalez then traveled underground. Gonzalez stated that she was "not [at the mine] for Boart Longyear, I was there for Leeville[,]" and testified that she needed to get underground that day to perform health sampling and continue the EO1 inspection. Tr. 33, 91-92.

According to Gonzalez, at no point during her time on the surface the morning of January 15 did anyone from Boart attempt to show her training documents or the JHA board, and she only became aware of the JHA board in the weeks prior to hearing. Tr. 33, 68-71. On cross-examination Gonzalez agreed that an appropriately completed job hazard analysis could be used

¹⁷ Hess testified that he heard Gonzalez yell at Sarabia and, when he approached Gonzalez she asked for his name and if he was a supervisor before telling him to go get his supervisor. Tr. 415, 418. According to Hess it took him about 15 seconds to get Shumway and for the two of them to return to Gonzalez and Sarabia, at which point the group then headed toward the safety office. Tr. 419.

as a training guide for task training and that once a miner has performed a task it is no longer a new task. Tr. 77-78.

Sarabia disputed that he had any conversation with Gonzalez when they were in the office and both he and Shumway testified that Sarabia was never alone with Gonzalez in the office. Tr. 192-193, 396. Shumway, Sarabia and Hess all testified that Sarabia and Hess had very little, if any, conversation with Gonzalez that morning. Tr. 124-125, 334-336, 414-415, 419. Rather, Shumway was the only individual who spoke at any length with Gonzalez. Tr. 334-336, 419. According to Shumway, he did not protest when Gonzalez said she was issuing the imminent danger order because he did not know the facts and he had been told by his bosses that it was not his job to fight with inspectors to prove a case. Tr. 115, 123, 126, 134, 136, 140-141, 157 192, 196. Further, Shumway stated that once inside the safety office the only thing Gonzalez said to him was that she needed to get with the other MSHA inspectors underground. Tr. 123. Shumway testified that at no time did Gonzalez say anything about Sarabia not using a tagline, his training, or ask that Boart demonstrate safe procedures. Tr. 134-135, 192.

Sarabia estimated Gonzalez spent maybe two to three minutes talking to Shumway. Tr. 336. Shumway testified that the entire conversation lasted less than 30 seconds. Tr. 193. Hess testified that he and Sarabia stood inside an office while Gonzalez and Shumway had only a short discussion before she left. Tr. 419-420.

Following Gonzalez's departure from the safety office, Shumway, Hess, Sarabia and others, at the request of Newmont safety personnel, filled out a Newmont Job Hazard Analysis form (the "Newmont JHA") for the task of installing the transfer case. Sec'y Ex. 8; Tr. 56-57, 112, 113, 125-127, 145, 193, 340-341, 421. Although Boart's employees informed Newmont that there was already a JHA board in the doghouse, Newmont nevertheless asked for Boart to complete Newmont's JHA form. Tr. 112, 422. According to Shumway, Boart prepared the Newmont JHA form in response to the imminent danger order and because Newmont wanted it filled out. Tr. 114, 125-126. Shumway testified that Sarabia was "upset, physically, visibly shaken" when the group departed the office. Tr. 149.

Later the same day, Edwin Spear, an EHS advisor for Boart, traveled to the mine to talk to the crew. Tr. 279, 145-146. At the time he arrived no paperwork had been issued by MSHA to Boart. Tr. 279. Sarabia, Ortega and Shumway provided written statements regarding the events of that morning.¹⁸ Tr. 137-139, 147, 221-222, 234; Sec'y Exs. 15, 16, 17. At some point Spear entered the doghouse, reviewed the JHA board, and discussed it with Shumway. Tr. 236. Shumway told Spear that the entire crew had discussed the JHA board that morning. Tr. 237.

Spear also met with Shumway, Hess and Jason Haynes to discuss the Newmont JHA that had been prepared. Sec'y Ex. 8; Tr. 239. It was Spear's understanding that the Newmont JHA had been prepared in response to the imminent danger order so that work could be resumed. Tr. 240. He did not discuss Boart's JHA board with Haynes at the time. Tr. 240. However, Spear

¹⁸ Ortega did not appear at hearing. His witness statement was offered into evidence. Sec'y Ex. 16. Because Ortega did not appear at hearing and could not be cross-examined regarding the statement, I give it no weight.

testified that he did have a discussion with Shumway that the Newmont JHA was pretty much the same thing as the Boart JHA board, but with a few more elaborate details. Tr. 240-241.

After Gonzalez completed her health sampling underground she returned to the surface around 6:00 PM and met with Spear and Devon Wood, Boart's pump division regional manager, in the safety office. Tr. 33-34, 217, 241-242. The three of them had a short discussion about the imminent danger order and the safety features of the forklift, including the safety check valve which prevented the lift from falling in the event of hydraulic failure. Tr. 218, 242, 243, 267-268, 282-284, 299. Gonzalez testified that during the conversation she requested that Spear provide training records for Sarabia because she had reason to believe he was not task trained for this particular task. Tr. 34, 35. According to Gonzalez, she specifically requested MSHA form 5000-23 showing that Sarabia had been task trained. Tr. 471-472. Spear testified that Gonzalez did not suggest that she was going to issue a 104(g)(1) order for a lack of task training. Tr. 242.

On the morning of January 16 Spear emailed Gonzalez a portion of the forklift manual that discussed a feature of the lift that locked out the system in the event of a hydraulic or other type of system failure. Sec'y Ex. 9; Tr. 58-59, 243-244. The forklift was equipped with this lock-out system because it was designed to also be used as a man-lift. Gonzalez testified that this feature was not relevant because the forklift operator was in the cab and the lift was in motion at the time she observed the cited conditions. Tr. 59.

Spear testified that the morning of the January 16 was the first time he discussed Sarabia's training with Gonzalez. Tr. 285. Specifically, he testified that Gonzalez wanted him to provide information about how Boart trained its miners on suspended loads and taglines. Tr. 285. According to Spear, he used an iPad to show Gonzalez Boart's annual refresher training slides as well as the field guide that was given to every employee and kept in the doghouse.¹⁹ Boart Ex. L; Sec'y Ex. 10; Tr. 286, 288, 300. After showing her the documents on his iPad Spear sent a second email and attached the annual refresher training slides. Sec'y Ex. 10; Tr. 61, 245, 301. Spear testified that he sent the slides to show her that all Boart personnel were trained on suspended loads and the use of taglines. Tr. 245-246. Spear disputed that Gonzalez asked for any 5000-23 training records at this time and instead asserted that she only asked for information about the programs Boart used to train its employees. Tr. 246-247.

Spear testified that the slides covered working around suspended loads and the use of taglines. Tr. 247-248. During annual refresher training, the photograph on the first slide showing a suspended load with miners holding attached taglines would have been accompanied by a discussion of both suspended loads and taglines. Sec'y Ex. 10 p. SOL 000107; Tr. 247-248. Further, a second slide, which addressed the issue of hazard identification and specifically listed "Gravity or Overhead hazards," also included a photograph of a suspended load with attached taglines and would have been accompanied by a discussion about both topics. Sec'y Ex. 10 p. SOL 000119; Tr. 249-250. Finally, a third slide addressing "gravity" related hazards would have involved a discussion of overhead loads and associated hazards. Sec'y Ex. 10 p. SOL 000146;

¹⁹ There is some dispute regarding the timing of certain requests, what was requested, and when those documents were provided. However, given my findings below with regard to Order No. 9379555, I need not resolve those conflicts.

Tr. 250. Shumway also testified that a discussion accompanied each slide and that more than just the text of the slide was covered. Sec'y Ex. 10 p. SOL 000146; Tr. 166-167, 205-207, 215. Spear testified that Sarabia's 5000-23 forms and sign-in sheets for multiple annual refresher trainings prove that Sarabia was given the training represented in the slides. Boart Ex. R; Tr. 247.

After reviewing the slides sent by Spear, Gonzalez determined that they provided no information about the use of taglines and working around suspended loads. Tr. 61. 468. Gonzalez sent an email response to Spear in which she notified him that she would not accept the slides as evidence of training and informed him that she would be issuing a 104(g)(1) order. Sec'y Ex. 11; Tr. 61, 63. Spear was surprised by the email because he thought the training materials would be sufficient. Tr. 272. In the same email Gonzalez stated that she would lift the withdrawal order once Boart provided the names and 5000-23 forms for each miner who was working on the day in question. Sec'y Ex. 11; Tr. 63, 256.

Spear responded to Gonzalez's email the following morning, January 17, with the names of the Boart employees and stated that he would send the 5000-23 forms shortly. Sec'y Ex. 12; Tr. 64, 259. Later that same day Gonzalez emailed Spear four enforcement actions, including Citation No. 9379548, alleging that a miner was not clear of a suspended load, Citation No. 9379549, alleging that a tagline was not attached to a suspended load that was being guided by a miner and Order No. 9379555, alleging that the subject miner had not been task trained. Sec'y Ex. 13; Tr. 65, 259.

On January 21, after a telephone conversation with Gonzalez, Spear emailed Sarabia's 5000-23 form to her. Sec'y Ex. 14; Tr. 64-66, 259-260. According to Spear, Gonzalez only requested Sarabia's 5000-23 form for the training he received to lift the 104(g) order. Tr. 260.

Bruce Grange, Boart's senior environmental health and safety coordinator, met with Gonzalez at the closeout conference on January 22 and again at Boart's Elko office on January 28. Tr. 434, 436. He testified that during both conversations Gonzalez was unwilling to listen to his arguments about mitigating circumstances. Tr. 436-438, 449-454.

Grange testified that Sarabia had received relevant training multiple times and cited new hire training, crane training, task training, and annual refresher training as examples. Tr. 434, 448. Moreover, OSHA's 10 hour training course covered suspended loads and taglines. Tr. 297-298, 449. Everyone at Boart received OSHA 10 hour training. Tr. 449. Sarabia testified that Boart Ex. V was his OSHA training card indicating that he had successfully completed the OSHA 10 hour training. Tr. 297, 377.

At hearing, Spear and Sarabia offered testimony regarding photographs of the subject area that show the snow on the left fork had been disturbed and/or removed, while snow on the right fork had remained undisturbed.²⁰ Sec'y Ex. 3 p. 4; Boart Ex. C. p. BOART 000406-

²⁰ According to Grange, the pictures contained in Boart Ex. C were sent to him shortly before hearing by a Newmont safety employee who had found them in a folder Newmont kept regarding the inspection. Tr. 441. The Newmont employee told Grange that the pictures were taken the day Boart was ordered to shut down. Tr. 441. According to Grange, Newmont takes

000407; Tr. 265, 292-293, 360. Both Spear and Sarabia testified that the disturbed snow on the left fork indicates that the crew had rigged the nylon straps to that fork and not the right fork as Gonzalez had alleged. Tr. 265-266, 360.

A. Credibility Determination and Resolution of Critical Disputes of Fact

Sarabia and Gonzalez, the only two witnesses present at the time Gonzalez observed the allegedly violative conduct, offered substantially different accounts. In reaching my decision in these matters I find it necessary to resolve three critical disputes of fact: (1) whether the forklift was powered on and the transfer case was being lifted at the time in question, (2) the position of the transfer case, and (3) the position of Sarabia relative to the case and forklift.

Based on my observation of the witnesses and my careful evaluation of their respective accounts, I credit Sarabia's testimony on each of these issues. Specifically, I find that the forklift was not powered on and the transfer case was not moving. I further find that the transfer case was suspended from the left fork at roughly the height of Sarabia's knee. Finally, I find that Sarabia was not underneath the forks but, rather, was in a position to the left of the case from the perspective of the lift operator, which afforded him the ability to maintain eye contact with the operator.

In reaching these conclusions I rely primarily on Sarabia's clear and convincing testimony regarding his firsthand knowledge of the situation. Although Sarabia testified that he was a little bit nervous at the hearing, he nevertheless provided testimony that was both internally consistent and consistent with the testimonies of other witnesses regarding the events that occurred after Gonzalez ordered Sarabia away from the forklift. Tr. 364. His detailed recollection of events and calm demeanor helped convince me that his testimony should be credited.

It is important to note that I am not finding that Inspector Gonzalez testified untruthfully. Rather, based upon my observations, I am finding that Sarabia was in the best position to observe what happened and that his recollection was more consistent with other evidence offered. Because the inspector did not walk over to the work area to more closely examine the conditions, she may have misinterpreted what she observed.

Gonzalez's recollection also appears to be inconsistent with photographic evidence of the scene. At least three separate photos, including the single photo taken by the inspector, show that snow had been removed or disturbed on the left fork, while snow on the right fork appeared undisturbed. Sec'y Ex. 5 p. SOL 00022; Boart Ex. C. p. BOART-000406-000407. Boart argues that the "snow removed from the left forklift tine . . . supports Mr. Sarabia's testimony that the transfer case was hanging from the left forklift tine" because the rigging straps would have disturbed the snow. Boart Br. 10. The Secretary argues that "[t]here should be no relevancy afforded to" the close-up photograph of the forks offered as Boart Ex. C. p. BOART-000406 and that the photo could have been manipulated after the imminent danger order was issued. Sec'y Br. 17 n. 12. However, the court finds that the photograph taken by the inspector, Sec'y Ex. 5 p.

pictures of every condition cited at the mine even when the citation is issued to a contractor. Tr. 444.

SOL 00022, as well as other photographs taken by Boart and/or Newmont, all show the same condition, i.e., an area on the left fork where the snow had been removed or disturbed with undisturbed snow on the right fork. As a result, I agree with Boart that the photos support Sarabia's recollection of events.

Although I do not know precisely why Gonzalez's recollection of events is so different from Sarabia's, I take note that she wanted to get underground quickly to conduct health sampling. Gonzalez was clearly in a rush. She was responsible for conducting underground health sampling on January 15, but instead found herself dealing with what she determined to be an imminent danger on the surface. I am troubled by the truncated nature of the inspector's investigation of the physical evidence. Gonzalez conceded that she never spoke to the forklift operator, never went inside the barriers to closely observe the conditions, never took any measurements, never asked Sarabia to demonstrate or discuss safe procedures for completing the task, and only took a single photograph.²¹ Tr. 90, 92, 93, 94. Notably, Inspector Gonzalez did not take a photo after she first met with Sarabia to document the position of the forks and the transfer case but waited until later after the forks were lowered to the ground and the transfer case removed. Moreover, the only photo she did take was shot from roughly the same location where she met Sarabia. She only observed the scene from that vantage point. Tr. 94-95. It appears Gonzalez's need to get underground may have caused her to conduct a rather cursory investigation of the conditions.

I am required to resolve genuine disputes of fact that are relevant in determining whether there was a violation and, if so, the gravity of the violation and the negligence of the operator. The burden of establishing credible facts to support a violation rests with the Secretary. I have concluded that the Secretary has not met this burden with respect to many issues, as discussed in more detail below.

B. Citation No. 9379548

Citation No. 9379548, issued under section 104(a) of the Mine Act on January 15, 2019, alleges a violation of Section 57.16009 of the Secretary's safety standards. The Condition or Practice section of the citation states, in pertinent part, as follows:

A mechanic was found standing underneath a suspended load while the forklift operator was located inside the cab raising the transfer case at Pump Rig LX40 in front of the operations dry. The forks were raised approximately 12 feet off the ground and the transfer case was approximately 6 feet off the ground while the mechanic was guiding the load with his hand. In the event the suspended load were to fall to the ground while the mechanic was standing underneath fatal injuries would occur.

²¹ All of the photographs of the scene introduced into evidence were taken after the forks had been lowered and transfer case removed from the forklift.

Section 57.16009 requires that “[p]ersons shall stay clear of suspended loads.” 30 C.F.R. § 57.16009.

Inspector Gonzalez determined that an injury was highly likely to be sustained and that any injury could reasonably be expected to be fatal. She further determined that the condition was S&S, affected one person, and was the result of Respondent’s high negligence. The Secretary proposed a penalty of \$33,840.00 for this alleged violation.

Fact of Violation

Neither the body of the citation nor the inspector’s handwritten “Citation/Order Documentation” notes clearly identify what exactly the Secretary considered to be the suspended load at issue in this citation. Sec’y Ex. 5. Although the language of these documents is vague, the Secretary, in his brief, identifies the forks on the forklift as the suspended load.²² The Secretary argues that Boart violated Section 57.16009 because Sarabia was “not clear of the Forklift’s tynes, or outside the limit of its point of suspension[.]”²³ Sec’y Br. 11-12. I find the Secretary did not meet his burden of establishing this alleged violation.²⁴

Section 57.16009 requires that “[p]ersons shall stay clear of suspended loads.” 30 C.F.R. § 57.16009. The Secretary’s regulations do not define “stay clear of” or “suspended load” in the context of section 57.16009. I first address what constitutes a “suspended load.” Although the Commission has not defined the term, it has twice addressed the identically worded standard applicable to surface metal and nonmetal mines, i.e., 30 C.F.R. § 56.16009.

In *Sims Crane*, 40 FMSHRC 301 (Apr. 2018), the Commission affirmed a judge’s decision finding a violation of section 56.16009 where a miner traveled within the fall zone of a “spreader bar” suspended from, and attached to, the hoist hook of a crane via two cables. Similarly, in *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075 (Dec. 2014) the Commission affirmed a judge’s decision upholding a violation where a miner traveled under a piece of a crane that was being lifted into place by a smaller crane. Notably, in both of these cases the “suspended loads” were *hanging* from a point of suspension above.

While the Commission has not explicitly stated that suspended loads are only those loads hanging from a point of suspension above, it has described section 56.16009 as “the general rule guiding miners’ interactions with objects suspended from cranes[.]” *Sims Crane* at 304. Moreover, judges applying the cited standard have done so in situations involving objects hanging from a point of suspension above.

²² The Secretary states that “the primary issue in this case is whether Mr. Sarabia was ‘clear’ of the suspended load – Forklift’s tynes.” Sec’y Br. 11. He further states that the inspector observed Sarabia “underneath a suspended load, the Forklift’s right tyne[.]” *Id.* at 11-12.

²³ The terms “tyne,” “tine” and “fork” were used interchangeably throughout the hearing and in the parties’ briefs.

²⁴ Boart, in its brief, disputed Gonzalez’s description of the events and argued that Sarabia’s testimony should be credited. I have already addressed the critical disputes of fact above.

In *Haines & Kibblehouse, Inc.*, 30 FMSHRC 504, 516 (June 2008) (ALJ), Judge Barbour affirmed a violation of 56.16009 where a “pitman assembly” suspended from a crane swung and struck another individual. Judge Barbour, relying upon the dictionary definition of “suspended” explained as follows:

Section 56.16009 is straightforward. . . . The noun “load” is modified by the adjective “suspended,” and when used as an adjective “suspended” is defined as being “held in suspension.” *Id.* at 2303. Thus, a “suspended load” is a mass or weight supported by something that is being held in suspension. To be held in suspension is to be in the “state of being hung.” *Id.* “Hung” is the past tense of “hang,” which is defined as “to fasten so as to allow free motion within given limits on a point of suspension.” *Id.* at 1029. Thus, I conclude a “suspended load” is a mass or weight fastened to allow free motion within the given limits of its point of suspension or support, and this is the same meaning I would reach if I interpreted the standard by applying “suspend” as a verb instead of “suspended” as an adjective.

In finding that the “pitman assembly” was a suspended load the judge outlined the purpose of the standard as follows:

Hanging loads having free motion can swing within a specific arc or radius. The standard's goal is to prevent persons from being hit by such loads through barring persons from locating within a hanging load's possible arc or radius. The logic is simple and irrefutable. When persons are outside the limits of a load's point of suspension, they will not be struck and injured or struck and killed when the load moves freely.

Id. at 517. Judge Miller utilized the same analysis in *CCC Group, Inc.*, 34 FMSHRC 1192, 1196-1198 (May 2012) (ALJ), where she found that beams hung from a crane constituted a suspended load.

Although I am not bound by the decisions of other administrative law judges, I find that the reasoning in *Haines* and *CCC* is sound. In both cases, the judges found that the standard was designed to prevent persons from being struck by loads that were *hung* from a point of suspension above, but were otherwise free to move or swing within a specific arc or radius. Accordingly, I find that to establish that an object is a “suspended load,” the object must be hung from above.

The Secretary's regulations also do not define what “stay clear of” means in the context of the cited standard. In *Dawes Rigging* the Commission explained that “stay[ing] clear . . . requires more than simply staying out from directly underneath a suspended load[.] . . . and [w]hether a person is clear of a suspended load must be determined by considering the particular

facts surrounding the violation.” 36 FMSHRC 3075, 3078 (Dec. 2014) (*citing Anaconda Co.*, 3 FMSHRC 299, 301(Feb.1981)). The Commission noted that miners are not “clear” of a load when they are “located in positions in which they [are] in danger from the movement or falling” of the load. *Id.* at 3078. A “case cannot rest on a vague observation that suspended loads move in unpredictable ways.” *Id.*

I find that the Secretary failed to establish by a preponderance of the evidence that the forks were a “suspended load.” I agree with my colleagues that in order to be a *suspended* load, a load must be hanging from a point of suspension above. There is no dispute that the forks were *elevated*. However, the cited standard is not concerned with elevated loads, but rather loads that are *suspended*, i.e., hanging from a point of suspension above. I find that the forks were not a suspended load.

In addition, I credited Sarabia’s testimony that he was not standing under the forks and that the forklift was shut down. Further, because the forklift was equipped with the safety check valve described by Spear and detailed in Sec’y Ex. 9, and Ortega’s hands were not on the controls, there was no possibility of inadvertent movement of the forks.²⁵

Finally, although not explicitly addressed by the parties, I also find that Sarabia’s presence near the transfer case did not amount to a violation of the cited standard. There can be no dispute that the transfer case was a suspended load. It was hanging from the left fork by the rigging. I find that Sarabia was “clear” of the transfer case. Gonzalez conceded that she never observed Sarabia under the transfer case. Tr. 75. Moreover, given the narrow profile of the transfer case, little to no “arc or radius” existed in which a miner could be struck if the case were to rotate. Similarly, because the lift was powered off and the load was not moving, there was no risk of the load swinging and striking a miner. Although there is no dispute that Sarabia had a hand on the case, his hand was located at the top of the case and would not have been endangered if the case rotated.²⁶ Boart Ex. B illustrates Sarabia’s approximate position relative

²⁵ In *Sims Crane*, 40 FMSHRC 301 (Apr. 2018), the Commission addressed the relationship between section 56.16009 and 56.14211. The Commission stated that “the general mandate” of section 56.16009 and the “more precise language of section 56.14211” must be “read harmoniously to arrive at a reasonable result[.]” 40 FMSHC at 304. Section 56.14211, in general, prohibits miners from working under raised portions of mobile equipment, or components of the equipment, until the equipment has been blocked or mechanically secured. 30 C.F.R. § 56.14211. MSHA’s Program Policy Manual (“PPM”) states that the standard is designed “to prevent a ‘free and uncontrolled descent’ in the event of a sudden failure of the system holding up the raised component.” IV MSHA, U.S. Dep’t of Labor, Program Policy Manual, Parts 56/57, at 55 (2015). The PPM expressly states that “[h]ydraulic telescoping boom cranes with flow restrictions or check valves in the hydraulic system will prevent a free and uncontrolled descent of the boom and attached work platform.” While the parties did not present this argument, it appears that the Secretary’s own interpretive guidance acknowledges that safety check valves may satisfy blocking requirements.

²⁶ In *Freeport-McMoRan Sierrita*, 39 FMSHRC 1105, 1128 (May 2017) (ALJ), I found that a miner guiding a moving suspended load with his hands was not “clear” of the load. In that case the miner was operating in a small, confined area on the bed of a flat-bed truck, which was

to the forks and the transfer case at the time the inspector observed him. Consequently, I find that Sarabia was “clear” of the transfer case because he was not in danger from the movement or falling of the load. I have reached this conclusion taking into consideration the work that he needed to perform.

I find that the Secretary failed to meet his burden of proof with respect to this citation. Inspector Gonzalez spent the vast majority of her time talking with officials of Boart outside and then inside the Newmont safety office. She did not walk around the barricades to enter the area where the forklift was parked to get a better perspective of the conditions and she did not take a photo of the conditions when the transfer case was still rigged to the forklift while in a raised position.

Citation No. 9379548 is **VACATED**.

C. Citation No. 9379549

Citation No. 9379549, issued under section 104(a) of the Mine Act on January 15, 2019, alleges a violation of Section 57.16007(a) of the Secretary’s safety standards and asserts that a mechanic was observed guiding a suspended load with his hand and that no tagline was in place on the load. Specifically, the citation alleges that the mechanic was guiding a transfer case, which was suspended approximately six feet above the ground. Section 57.16007(a) requires that “[t]aglines shall be attached to loads that may require steadying or guidance while suspended.” 30 C.F.R. § 57.16007(a).

Inspector Gonzalez determined that an injury was highly likely to be sustained and that any injury would reasonably be expected to be permanently disabling. She further determined that the condition was S&S, affected one person, and was the result of Respondent’s high negligence. The Secretary proposed a penalty of \$15,206.00 for this alleged violation.

Fact of Violation

I find that the Secretary has established a violation of the cited standard because a tagline was not attached to the transfer case while Sarabia was observed steadying it with his hand. The Secretary’s regulations do not define “steadying” and the Commission has not addressed the subject standard. In the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines “steady,” the present participle form of the verb “steady,” as “to make or keep steady.” *Webster’s New Collegiate Dictionary* 1129 (1979). The adjective form of “steady” is defined, as relevant to this analysis, as “firm in position: fixed.”

the miner was operating in a small, confined area on the bed of a flat-bed truck, which was approximately four feet off the ground. Given the small area in which the miner was working and the fact that he would have to jump off the bed of the truck in order to “exit” the area, I found that it was critical he remain away from the load. Unlike the miner in *Freeport*, Sarabia was standing on the ground with no apparent obstacles nearby and the load he was touching was not moving.

Consequently, the cited standard requires that a tagline shall be attached to a suspended load when the load may need to be brought to a fixed position or kept in a fixed position.

I find that the transfer case required steadying and therefore a tagline should have been attached. There is no dispute that Sarabia was observed with his hand on the transfer case. Sarabia himself testified that his hand was on the case for the purpose of preventing it from moving while he worked with his other hand to remove the fittings. By placing his hand on the suspended load for the purpose of preventing motion, Sarabia was “steadying” the load, i.e., keeping it in fixed position. Sarabia testified that, although a tagline was attached during the transportation of the case from behind the pump rig to the side of the rig, the tagline was detached before he began the task of removing the fittings. Because a tagline was not attached to the case at the time Sarabia was steadying the load, as is required by the clear language of the standard, the Secretary established a violation.²⁷

Gravity and S&S

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[.]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-2476. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476.

I find that the Secretary failed to establish that the violation was S&S. I have already found that Boart violated the standard because a tagline was not attached to the transfer case at the time Sarabia was steadying it with his hand. Here, the hazard to which the violation allegedly contributes is a miner being unable to safely steady a load due to the lack of a tagline. A tagline is really designed be used when pulling a load into a desired position and it is not clear from the record whether Sarabia could have used a tagline to steady the transfer case while

²⁷ Boart argues that the citation should be vacated because the evidence does not establish that the transfer case required steadying or guidance. Boart Br. 11. However, Boart’s brief concedes that “Sarabia was standing next to the transfer case steadying it[.]” *Id.* at 12.

removing the fittings and draining the oil. He likely would have needed to hold the tagline immediately adjacent to the transfer case in order to keep it steady.

The Secretary, in his brief, argues that Sarabia could have been struck if the transfer case swayed or became detached.²⁸ Sec'y Br. 17. However, given my finding that the case was not in motion and the lift was powered off, there was very little risk of the case swinging. Moreover, the Secretary did not introduce evidence regarding the likelihood of the rigging straps breaking or slipping off the fork or transfer case. The MSHA inspector did not walk over to the transfer case to see whether it securely attached to the fork. Consequently, the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury.

I also find it unlikely that any injury would be sustained. If the case did swing, it would only be because of some outside force, e.g., wind or Sarabia pushing or pulling the case with his hand, and any swinging motion would be minimal. Again, there was no proof that the transfer case would fall from its rigging or that the forks would fall. I find it highly unlikely that any injury would be sustained. As a result, the violation was not S&S and the gravity was low.

Negligence

The Commission has recognized that “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted).

While the Secretary argues that Boart was highly negligent, I find that Boart’s negligence was only moderate. The inspector relied primarily on two factors in making her negligence determination: (1) her belief that Sarabia and Shumway were unaware of the proper use of taglines, and (2) Boart’s alleged failure to produce training records evidencing that Sarabia had been trained on the use of taglines. Sec’y Br. 18. As explained more thoroughly below in my discussion of the task training order, I find that the Secretary failed to establish that Sarabia was not task trained. Boart was only moderately negligent.²⁹ I assess a penalty of \$275.00.

²⁸ The Secretary made other arguments based on Gonzalez’s testimony that the case was moving at the time she observed the condition. Sec’y Br. 16-18. However, given my credibility determinations above, I need not address those arguments.

²⁹ The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. The operator’s supervision, training, and disciplining are relevant. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995).

D. Order No. 9379555

Order No. 9379555, issued under section 104(g)(1) of the Mine Act on January 15, 2019, alleges a violation of Section 48.27 of the Secretary's safety regulations and asserts that a mechanic was not properly task trained. Specifically, the order alleges that the mechanic failed to demonstrate safe procedures when working with a suspended load. Section 48.7 requires, generally, that miners be properly trained prior to performing new tasks.³⁰ 30 C.F.R. § 48.27.

Inspector Gonzalez determined that an injury was highly likely to be sustained and that any injury could reasonably be expected to be fatal. She further determined that the condition was S&S, affected one person, and was the result of Respondent's high negligence. The Secretary proposed a penalty of \$33,840.00 for this alleged violation.

Fact of Violation

The Secretary argues that Sarabia's conduct and statements made to Gonzalez by Sarabia and Shumway led her to believe that there was a "lack of training about the hazards of working under suspended loads and the proper use of taglines[.]" Sec'y Br. 19-20. Based on that belief and the lack of direct evidence of Sarabia's task training provided to Gonzalez, the Secretary argues that the order was properly issued. Sec'y Br. 20.

I find that the Secretary failed to establish that Sarabia was not task trained on how to work with a suspended load. In reaching this conclusion I rely primarily on two points. First, Gonzalez premised the issuance of the order on factual assertions that I declined to credit. Gonzalez testified that she issued the order, at least in part, because Sarabia was not using a tagline, was guiding the transfer case with his hand while it was in motion, and was standing under the forks that were 12 feet off the ground. Tr. 53. However, I credited Sarabia's testimony that the transfer case was not in motion and he was not under the forks.

Second, Boart put on considerable evidence that Sarabia had received training on suspended loads and the use of taglines.³¹ Sarabia was an experienced mechanic who had

³⁰ The citation, as modified, was issued for an alleged violation section 48.27. The Secretary, in his brief, states that subsection (c) of the standard is applicable in this instance. Sec'y Br. 19. Section 48.27(c) states that "[m]iners assigned a new task . . . shall be instructed in the safety and health aspects and safe work procedures of the task, including information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program, prior to performing such task." 30 C.F.R. § 48.27(c).

³¹ The Secretary, in his brief, states that Boart never provided Gonzalez with direct evidence of Sarabia having been trained. Sec'y Br. 6-8, 19-23. This court must consider all the evidence presented at a hearing and not just the information that was given to the inspector at the time the order was issued. *See Knife River Const.*, 38 FMSHRC 1289, 1294 (June 2016). I have considered all of evidence of training and not just what the inspector was aware of at the time she issued the order.

previously worked with suspended loads and taglines. I credit the testimonies of Sarabia, Shumway and Hess that the crew gathered in the doghouse the mornings of January 14 and 15 to prepare and review the JHA board by discussing and documenting hazards presented and how to protect against those hazards while replacing the transfer case. Boart's witnesses offered corroborating testimony that suspended loads and taglines were covered during those gatherings. Shumway and Hess testified that, given the nature of the work Boart does, suspended loads and taglines are discussed and encountered almost "every day." Tr. 132, 167, 408. Although Gonzalez never saw the JHA board, at hearing she acknowledged that an appropriately completed job hazard analysis could be used as a training guide for task training. MSHA's own PPM recognizes this fact. Boart Ex. W. Notably, the Secretary did not dispute that the JHA board as displayed in Sec'y Ex. 18 was "appropriately completed."

I also find that Sarabia received other prior training on suspended loads and taglines during MSHA mandated annual refresher training courses. Sarabia attended annual refresher training courses in 2016, 2017 and 2018, as evidenced by the sign-in sheets and signed 5000-23 forms. Boart Ex. R. While Gonzalez believed that the annual refresher training slides sent to her by Spear were "insufficient training" for purposes of satisfying the cited standard, she offered little reasoning why. Sec'y Ex. 10, 11. I credit the testimonies of Spear and Shumway that each eight hour annual refresher training course covered suspended loads and taglines during a slide presentation that was accompanied by a discussion of the slide content.

Sarabia also received relevant training during his OSHA 10 hour certification. Sarabia successfully completed the OSHA 10 hour course in 2012, as evidenced by his signed OSHA training card. Boart Ex. V. I credit the testimonies of Spear and Grange that the OSHA 10 hour training, which every Boart employee must take, covered suspended loads and taglines. Tr. 297-298, 449.³²

Given my analysis, I find that the Secretary failed to establish by a preponderance of the evidence that Sarabia had not been task trained regarding suspended loads and the use of taglines. Order No. 9379555 is **VACATED**.

II. APPROPRIATE CIVIL PENALTY

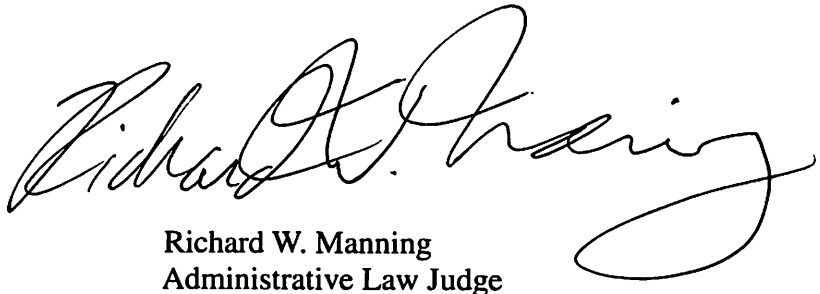
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's Mine Data Retrieval System website, Boart worked over 1,000,000 hours in each of 2017, 2018 and 2019, which correlates with a large contractor. 30 C.F.R. § 100.3 Table V. The parties have stipulated that the penalties, if affirmed, will not affect Boart's ability to remain in business. Boart has a history of 19 paid citations since October 17, 2017 issued at all mines where it was working, only one of which was designated as S&S. Sec'y Ex. 20. It has no history of previous citations at the Leeville Mine. The gravity and negligence of Citation No. 9379549 are discussed above.

³² While not critical to my analysis, I do take note of training Sarabia received from Barrick, another mine operator, in June of 2018 that specifically covered working under suspended loads. Boart Ex. T; Tr. 377-378. Further, I note that Sarabia had access to Boart's "EHS Management System Field Reference" document, which references staying away from suspended loads. Boart Ex. L p. BOART 000196.

Citation No. 9379549 was timely abated. Sec'y Br. p. 3. Based on the penalty criteria I assess a penalty of \$275 for Citation No. 9379549. This penalty is similar to the penalty that would be assessed using the Secretary's penalty point system at 30 C.F.R. § 100.3.

III. ORDER

For reasons set forth above, Citation No. 9379548 and Order No. 9379555 are **VACATED**. Citation No. 9379549 is **MODIFIED** to a non-S&S violation with moderate negligence. Boart Longyear Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$275 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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