FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

March 29, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2017-222-M A.C. No. 47-01724-433690
v.	:	
THE KRAEMER COMPANY LLC, Respondent.	:	Mine: Plant #2

DECISION

Appearances: Dan Venier, Conference and Litigation Representative, and Jason Patterson, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;

Tristan Gardner, The Kraemer Company LLC, Plain, Wisconsin, for Respondent.

Before: Judge Paez

This Simplified Proceedings docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815.[1] In dispute is one section 104(a) citation issued to The Kraemer Company LLC ("Kraemer" or "Respondent").[2] To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

On November 15, 2016, the Secretary issued Citation No. 8944483 alleging Kraemer violated 30 C.F.R. § 56.3200 by failing to take down or support hazardous ground conditions.

---

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

[2] On October 18, 2017, the Secretary filed a motion to approve partial settlement, which I approved in an order issued October 26, 2017. Two of the three violations at issue in this docket were resolved in the partial settlement with only Citation No. 8944483 remaining to be heard.

The Secretary proposed a penalty of $330.00, which Kraemer timely contested. Chief Administrative Law Judge Robert J. Lesnick assigned me this matter on July 12, 2017. Upon proper notice to the parties, I held a hearing on January 30, 2018, in La Crosse, Wisconsin.

At the hearing, the parties stipulated to the following items verbatim in a joint exhibit:

1. The Kraemer Company LLC is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

2. The Kraemer Company LLC is the operator of the mine, MSHA I.D. No. 47-01724.

3. The Kraemer Company LLC is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d).

4. The Kraemer Company LLC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

5. The Administrative Law Judge has jurisdiction in this matter.

6. The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of The Kraemer Company LLC on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

7. The exhibits to be offered by The Kraemer Company LLC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

8. The assessed penalties, if affirmed, will not impair The Kraemer Company LLC's ability to remain in business.

9. Mine Safety and Health Administration (MSHA) Inspector Peter P. Ackley was acting in his official capacity and as authorized representatives [sic] of the Secretary of Labor when aforesaid citations and orders were issued.

10. On November 15, 2016, MSHA Inspector Peter P. Ackley issued Citation Number 8944483 for a violation of 30 C.F.R. § 56.3200, which requires:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

(Joint Ex. 1; Tr. 9:1–4.) The Secretary presented testimony from MSHA Inspector Peter Ackley. Kraemer presented testimony from Safety and Human Resources Manager Tristan Gardner. The parties made closing arguments at the hearing in lieu of submitting post-hearing briefs.

II. ISSUES

For Citation No. 8944483, the Secretary asserts that Kraemer violated 30 C.F.R. § 56.3200[3] by failing to take down or support hazardous ground conditions as required by the standard. (Tr. 10:6–25; Ex. S–1.) The Secretary asserts that the violation should be upheld as significant and substantial ("S&S"),[4] inasmuch as it was reasonably likely to result in a fatality, and resulted from the operator's moderate negligence. (Tr. 11:14–23.) Kraemer contests the fact of the violation and challenges the Secretary's negligence determination on the grounds that there are mitigating factors. (Tr. 12:9–16, 73:6–13.)

Accordingly, the following issues are before me: (1) whether Kraemer violated 30 C.F.R. § 56.3200 as alleged in Citation No. 8944483; (2) if so, whether the violation was S&S and reasonably likely to lead to a fatal injury; (3) whether Kraemer's negligence in committing the violation was "moderate;" and (4) whether the Secretary's proposed penalty against Kraemer is appropriate under section 110(i) of the Mine Act.

For the reasons set forth below, Citation No. 8944483 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Operations at Kraemer's Plant #2

Kraemer has been operating the stone quarry at Plant #2 for over 20 years in Sauk County, Wisconsin. (Tr. 51:9–19.) The quarry is a large open pit, with a main road that enters the mine site near the top of the 40-foot highwall at issue, on a very large bench up to 1,000 feet wide. (Tr. 52:8–23, 53:12–54:15; Ex. S–6.) The quarry access road slopes down towards the opposite side of the pit where the miners work at a mobile plant that began operation around September 2016, near a second highwall not presently at issue. (Tr. 52:8–23, 54:9–12; Ex. S–6.) The mine's operations involve quarrying and crushing limestone to smaller sizes for use in highway construction and other construction work. (Tr. 22:12–18, 51:12–19, 54:21–25.) Although the quarrying and crushing take place on the pit floor, Kraemer occasionally stores finish material on the wide bench at the top of the 40-foot highwall at issue. (*Id.*) Workers at the mine site routinely use heavy machinery, including multiple types of loaders. (Tr. 32:1–4; Ex. S–7.) Although all of the quarrying and crushing operations were occurring elsewhere at the time of the inspection, miners habitually parked their personal vehicles about 20 feet from the highwall at issue. (Tr. 24:12–14, 32:15–25, 56:4–20; Ex. S–6.)

---

[3] Section 56.3200 provides: "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." 30 C.F.R. § 56.3200.

[4] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

B. Inspection on November 15, 2016

On November 15, 2016, MSHA Inspector Peter Ackley began a routine inspection of Plant #2, accompanied by a Kraemer foreman, Dan Mick.[5] (Tr. 15:4–15; Ex. S–1.) Ackley noticed and photographed conditions on the 40-foot highwall that he believed to be hazardous. (Tr. 23:19–32; Exs. S–2, S–3, S–4, S–5, S–6.) Ackley photographed a pile of material, approximately three feet by five feet, and a boulder, approximately one foot in diameter, located at the base of the highwall. (Tr. 20:2–8, Exs. S–2, S–4.) Ackley believed the material had fallen from the highwall. (Tr. 18:22–24, 21:19–25, 23:24–24:1, 35:6–12.) Ackley also observed tire tracks indicating vehicles had traveled within two feet of the highwall's base. (Tr. 32:15–25.) Consequently, Ackley issued Citation No. 8944483, which alleged:

> Hazardous ground conditions were not taken down or supported before travel was permitted by the base of the north highwall located by the boulder pile. There was approximately 100 foot of highwall with no barrier to impede access to the base of the highwall. The highwall was about 40 feet high and composed of loose unconsolidated material. There were sections of rock cracked and gaped, both horizontally and vertically at the section of the highwall above where the loader has been traveling. This condition exposed the miners to fatal impact or crushing injuries from falling rock. Loader had traveled the [sic] next to the base under the loose material. Front end loader tracks were observed running parallel to the high wall for about 60 feet and as close as 1.5 feet to the toe.[6]

(Ex. S–1 at 1; Ex. R–2 at 2.)

Ackley designated the citation as S&S and reasonably likely to lead to a fatal injury, and he characterized the violation as the result of moderate negligence. (Tr. 64:4–15; Ex. S–1.) Ackley based his gravity determination partially on the fact that the cited standard was one of MSHA's "rules to live by" due to the number of fatal incidents MSHA had reviewed in the past five years at different mines. (Tr. 33:2–10; Exs. S–10, S–11, S–12, S–13, S–14, S–15.) To abate the citation, Ackley had Kraemer install a berm 20 feet away from the base of the highwall to act as a barrier while Ackley completed his inspection of the mine. (Ex. S–1.) Kraemer had no history of documented falls or failures from the cited highwall, and prior to the citation, in September 2016, Kraemer conducted scaling to remove loose material from the highwall. (Tr. 58:21–60:5.)

---

[5] Mick did not testify at the hearing. However, Kraemer's Safety and Human Resources Manager, Tristan Gardner, testified to his general knowledge of Respondent's inspection practices and records of the highwall's condition. (Tr. 48:7–65:12.) Gardner was not present during the inspection. (Tr. 49:13–15.)

[6] At the hearing, Ackley explained that the tracks depicted in Exhibit S–7 match a Caterpillar loader and the tracks in Exhibit S–8 match a Komatsu loader, both of which were on-site at the time of his inspection. (Tr. 31:25–32:10; *see also* Ex. S–4.) Kraemer did not dispute Ackley's explanation.

IV. PRINCIPLES OF LAW

A. Elements for S&S Violation

A violation is S&S "if, based on 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element has been realized and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence

The Commission evaluates the degree of negligence using "a traditional negligence analysis." *The American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations addressing the proposal of civil penalties set forth in 30 C.F.R. part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator 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. *Id.* at 1702 (citation omitted). In making a negligence determination, a Commission Judge is not limited to an evaluation of allegedly "mitigating" circumstances, but may consider the totality of the circumstances holistically. *Id.*

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8944483: Hazardous Ground Conditions

Kraemer denies that it violated section 56.3200 and challenges the Secretary's gravity and negligence determinations. (Tr. 12:9–16, 73:6–13.) Kraemer contends that the level of negligence was mitigated through their past proactive maintenance, repeated examinations of the highwall's condition, and commitment to maintaining a good safety record. (Tr. 58:14–60:13.)

1. Violation of Section 56.3200

To prove a violation of section 56.3200, the Secretary must demonstrate that Kraemer allowed hazardous ground conditions to exist while miners traveled by its 40-foot highwall, with no barrier or warning against entry to the area. Here, when Ackley issued Citation No. 8944483, he observed a number of potentially hazardous conditions on the highwall—no recent scaling of the highwall; cracked, gapping, and broken material on the highwall; and material on the top ledge of the highwall that could fall. (Tr. 17:1–21:25; Exs. S–2, S–3, S–4, S–5, S–6.) In addition, Ackley took photographs of tire tracks running parallel to the highwall's base for approximately 60 feet and coming as close as 1.5 feet to the highwall. (Tr. 18:4–20:21; Exs. S–1, S–3, S–4, S–5.) Miners' personal vehicles were also parked approximately 20 feet from the highwall. (Tr. 42:23–43:11, 61:18–20; Ex. S–6.) Kraemer does not dispute that there was no barrier or warning against entry to the area cited near the highwall. Based on the facts above, I therefore determine that Kraemer violated section 56.3200 by allowing hazardous ground conditions to exist while miners traveled by the highwall with no barrier or warning signs.

2. S&S and Gravity

To establish the first element of the *Mathies* test for an S&S violation, the Secretary must prove a violation of a mandatory safety standard. My determination that Kraemer violated section 56.3200 establishes the first element of an S&S violation.

Regarding the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.3200 aims to prevent would occur. Section 56.3200 requires that operators take down or support hazardous ground conditions before permitting work or travel in the area. 30 C.F.R. § 56.3200. The purpose of this standard is to prevent the hazard of ground material striking miners or their equipment, in this case from a highwall fall or failure. Here, the highwall had loose and unsecured material present on the highwall which could have fallen from the surface of the wall.[7] (Tr. 17:1–21:25.) Ackley testified he was concerned that during "continued mining operations, [miners] would be continually exposed to that area." (Tr. 34:12–14.) Ackley testified in detail about seven separate hazards that he observed on the highwall. (Tr. 27:1–31:25; Exs. S–5, S–6.) Although Kraemer

[7] This material is distinguished from the conical pile of processed material Ackley observed at the base of the highwall, which Gardner explained was material likely pushed off from the stockpile located at the top of the highwall. (Tr. 54:21–55:4; Exs. S–5, S–6.)

had conducted scaling on the highwall in September 2016, no maintenance had been conducted since to remove loose material during the seasonal rains or changes in temperature between September and November 15. (Tr. 67:6–9.) I note that Kraemer presented no witnesses with direct knowledge of the conditions in the pit or highwall on the date of the inspection. I therefore credit Ackley's testimony based on his years of experience[8] and his direct observations of the highwall at the time of the inspection. Based on the facts above, I determine that the hazard of falling material was reasonably likely to occur, thus satisfying the second element of *Mathies*.

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood the hazard will result in an injury. In analyzing the third element, I must assume the hazard identified in the second *Mathies* element has been realized. *Newtown Energy, Inc.*, 58 FMSHRC at 2045. With regard to this element, Kraemer argues there was a lower likelihood of injury due to the fact that miners did not park their personal vehicles within 20 feet of the highwall, and all work was being done some distance away from the wall itself. (Tr. 42:12–20.) However, the Secretary presented photographs demonstrating that two loaders passed within 1.5 feet of the wall at some point shortly before the inspection. (Tr. 18:4–20:21, 32:15–19; Exs. S–1, S–3, S–4, S–5.) Moreover, although Kraemer parked vehicles 20 feet away from the highwall, there was no barrier to prevent miners getting out of their vehicles after they parked from walking close to the highwall. (Tr. 42:23–43:11, 61:18–20; Ex. S–6.) If loose material fell from the highwall, a miner in the area might be struck by rock. Ackley photographed material at the highwall's base that he suggested had fallen from the highwall, including an approximately one foot in diameter boulder. (Tr. 18:22–24, 20:2–8, 21:19–25, 23:24–24:1, 35:6–12, Exs. S–2, S–4.) Given the highwall's condition and the size of material that could have fallen, I conclude that the hazard of falling material from the highwall could reasonably likely result in an injury, thus satisfying the third *Mathies* element.

Finally, for the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury will be of a reasonably serious nature. In this regard, Respondent argues that there was no immediate risk of a catastrophic highwall failure based on MSHA's guidance on ground condition and Respondent's examination. (Tr. 58:1–59:25; Exs. R–1, R–3 at 44.) Nevertheless, Ackley observed multiple concerning indicators, such as broken and loose material, an unsecured boulder one foot in diameter, and the presence of multiple cracks in the wall running vertically and horizontally. (Tr. 17:1–18:25; Exs. S–1, S–3.) Should larger pieces of rock or other material come loose from the 40-foot highwall, a severe or fatal injury could result from the impact. Given these facts, I determine that the injuries resulting from material falling from the highwall would be reasonably serious, satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I therefore conclude that Citation No. 8944483 was appropriately designated as S&S. For the same reasons,

---

[8] Ackley has been employed by MSHA for over eight years, received formal training at the mine academy in Beckley, West Virginia, and inspects between thirty and forty mines yearly, including limestone, sand and gravel, and silica plants. (Tr. 13:20–14:14.) Prior to working with MSHA, he worked at a cement plant under MSHA's jurisdiction for fifteen years after serving for fifteen years as a heavy equipment operator in the United States Navy. (Tr. 14:24–15:3.)

I affirm the citation's gravity designation as reasonably likely to result in a fatal injury to one miner.

3. Negligence

The Secretary argues that Kraemer's actions constitute moderate negligence. (Tr. 33:14–21.) In support, the Secretary asserts that Kraemer was aware of the conditions on the highwall and that the violative condition was easily visible and had existed for weeks or months. (Tr. 41:10–18.) In contrast, Kraemer argues that it diligently examined the highwall for signs of hazards and did not believe the conditions to be dangerous. (Tr. 58:1–59:25; Ex. R–1.) Further, Kraemer contends that their scaling of the highwall in September 2016, before beginning operations nearby, should be considered as proof of their commitment to ensuring safe conditions while miners worked and traveled in the area. (Tr. 60:1–5.)

In evaluating the operator's level of negligence, I must consider the actions that a reasonably prudent operator would have taken under the circumstances presented that are relevant to the operator's obligation to comply with a standard. *See Brody Mining, LLC*, 37 FMSHRC at 1703. Respondent had no history of highwall falls or failures within the quarry. (Tr. 39:2, 59:10–12; Ex. S–9.) Kraemer asserts that it examined the highwall and that its examination on the day of the inspection did not indicate that a hazard existed on the highwall. (Tr. 58:1–59:25; Ex. R–1.) However, photographs of the wall demonstrate that there was unsupported material and the presence of both horizontal and vertical cracks. (Exs. S–5, S–6.) The conditions were obvious, as Ackley immediately noticed loose material and gapping on the highwall. (Tr. 16:5–8, 17:8–15.) Further, the photographs demonstrate that the condition was extensive. (Exs. S–5, S–6.) Respondent also admitted that it had not removed loose material from the highwall for approximately two months before the inspection, and it did not have equipment on site to test the stability of the wall. (Tr. 31:23–24, 60:8–13.) Moreover, Kraemer failed to call any witnesses, including its foreman Dan Mick, who could testify to the conditions observed on the date of Ackley's inspection. Thus, I am left with the credible testimony of Inspector Ackley, his notes, and his photographs. Lastly, the violation posed a high degree of danger because it was reasonably likely to cause a serious or potentially fatal injury as discussed above. *See* discussion, *supra* Part V.A.2.

After considering all of the factors, including obviousness and extent of the violation, I conclude that the violation was the result of the operator's moderate negligence.

B. Penalty

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed that Kraemer pay a penalty of $330.00 for Citation No. 8944483. Kraemer has stipulated that the proposed penalty will not affect its ability to remain in business. (Joint Ex. 1.) I note that the operator did proactively remove loose material from the highwall before moving its portable unit near the highwall. Additionally, Kraemer had no history of violations that became final orders during the 15 months prior to the inspection. Kraemer made a good faith effort in attempting to achieve rapid compliance after the citation was issued and installed a berm to prevent access to the base of the highwall before the inspector left the mine site. The size of the Respondent's business is relatively small, with the quarry producing less than 10,000 hours in 2016. Nevertheless, I have upheld the Secretary's S&S, gravity, and negligence designations based on consideration of all the evidence submitted at hearing.

Taking into account all of the facts and circumstances set forth above, I hereby determine that the Secretary's proposed civil penalty of $330.00 is appropriate.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8944483 is **AFFIRMED**. Kraemer Company LLC is **ORDERED** to **PAY** a civil penalty of $330.00 within 40 days of the date of this decision.

Alan G. Paez
Administrative Law Judge

Distribution:

Dan L. Venier, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Federal Building, 515 West 1st Street, Room 333, Duluth, MN 55802-1302

Jason Patterson, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

Tristan K. Gardner, Safety & Human Resources Manager, The Kraemer Company LLC, P.O. Box 235, Plain, WI 53577-0235

/kp