FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

May 3, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2015-315 A.C. No. 08-01336-381845 (B1758)
v.	
SIMS CRANE, Respondent	Mine: S.D.I. Quarry

DECISION AND ORDER

Appearances: Daniel R. McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

W. Ben Hart, CMSP, W. Ben Hart & Associates, Tallahassee, Florida, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("the Secretary") against Sims Crane ("Sims" or "Respondent"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(a). This docket was designated for Simplified Proceedings and contains one section 104(a) citation alleging a violation of a mandatory health and safety standard.

A hearing was held in Miami, Florida on March 31, 2016. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered. Thereafter, the parties presented closing arguments in lieu of submitting post-hearing briefs, pursuant to Commission Procedural Rule 108(e), 30 C.F.R. § 2700.108(e).

[1] In this decision, "Tr." refers to the hearing transcript; "Ex. ALJ-#" refers to the ALJ's exhibits; "Ex. S-#" refers to the Secretary's exhibits; and "Ex. R-#" refers to the Respondent's exhibits. Exs. ALJ-1, ALJ-2, S-1, S-2, S-3, S-4, R-1, R-3, R-7, R-8, R-9, R-10, and R-11 were received into evidence at the hearing. Tr. 9-11, 60, 75, 104-108, 122-123. Exs. R-2, R-4, and R-5 were marked for identification at hearing, but were not offered into evidence. Tr. 63, 75-76. Finally, I found Ex. R-6 irrelevant and excluded it from record evidence. Tr. 78-79, 101.

For the reasons set forth below, I affirm Citation No. 8819088, but increase the level of negligence from "moderate" to "high." I assess a civil penalty of $300.

Based on the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the parties' closing statements, I make the following findings:

II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND

A. Stipulations of Fact and Law

At hearing, the parties agreed to the following stipulations:

1. Jurisdiction exists because Respondent was an operator of a mine as defined in section 3(b) of the Mine Act, 30 C.F.R. § 803(b), and the products of the subject mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Act, 30 U.S.C. § 803.

2. Sims is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

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

4. The MSHA citation at issue in this proceeding was properly served upon Sims as required by the Mine Act.

5. The citation at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.

6. The penalties proposed by the Secretary in this case will not affect the ability of Sims to continue in business.

7. Sims was at all times relevant to these proceedings engaged in mining activities at the S.D.I. Quarry located in or near Florida City, Florida.

8. Sims' mining operations affect interstate commerce.

9. Sims in an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the S.D.I. Quarry (Mine ID No. 08-01336) where the contested citation in this proceeding was issued.

10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector was acting as a duly authorized representative of the Secretary,

[2] In resolving conflicts in the testimony, I have taken into consideration the demeanor of the witnesses, their interest in this matter, their experience and credentials, the inherent probability of their testimony in light of other events, the corroboration or lack of corroboration for the testimony given, and the consistency, or lack thereof, within and between the testimony of witnesses.

assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the MSHA citation.

11. Sims demonstrated good faith in abating the alleged violation.

Exs. ALJ-1, ALJ-2; Tr. 9-11.

B. General Factual Background

MSHA Inspector Robert Peters[3] issued the disputed citation at S.D.I. Quarry in Florida City, FL on April 7, 2015. Exs. S-2; ALJ-1; Tr. 36-37. During the inspection, the mine had contractors on-site to complete modifications to its plant. Tr. 24. As part of these modifications, the mine employed Sims to perform crane operations that day. Tr. 24, 101-104. Contractors performing services at mines must comply with MSHA health and safety standards. Tr. 38. The citation at issue alleges that Sims' crane operator and helper did not stay clear of a suspended load, violating MSHA standard 30 C.F.R. § 56.16009. Ex. S-2. The independent facts and circumstances surrounding the citation are discussed in greater detail below.

III. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). An operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681

[3] Peters is a mine safety and health inspector at MSHA's Bartow, Florida field office. Tr. 21. Peters has been working at MSHA for the past 19 years, and prior to working at MSHA, he spent 26 years working in underground coal mining. *Id.* To be an MSHA inspector, Peters completed a 26-week long training course. He also attends refresher training every two to three years. Tr. 22- 23. His formal education includes three years in college studying electrical engineering. Tr. 21.

(Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that an assessment of the likelihood of injury is to be made assuming continued normal mining operations, without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

C. Negligence

Negligence is not defined in the Mine Act. The Commission has found "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). *See also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975, 1976-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated).

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), MSHA defines negligence by regulation in the civil penalty context as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to 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. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices . . . .

30 C.F.R. § 100.3(d).

MSHA regulations further provide that mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. 30 C.F.R. § 100.3(d). According to MSHA, the level of negligence is properly designated as high when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3, Table X. The level of negligence is properly designated as moderate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* The level of negligence is properly designated as low when there are considerable mitigating circumstances surrounding the violation. *Id.*

Recently, the Commission held that Commission judges are not required to apply the level-of-negligence definitions in Part 100 and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Moreover, because Commission judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential mitigating circumstances, and may find "high negligence," in spite of mitigating circumstances, or moderate negligence, without identifying mitigating circumstances. *Brody*, 37 FMSHRC at 1701; *Mach Mining*, 809 F.3d at 1263-64. In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody*, 37 FMSHRC at 1701, (citing *Topper Coal Co.*, 20 FMSHRC 344, 350) (Apr. 1998). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances and may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Id.*

D. Penalty Assessment

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, *supra*, at 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a

violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to the citation at issue in this case.

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8819088: Failure to Stay Clear of Suspended Load

1. Further Findings of Fact

Inspector Peters began his inspection of S.D.I. Quarry at about 7:00 a.m. on April 7, 2015. Tr. 24. During the inspection, a mine supervisor informed Peters that the mine had contractors on-site to perform modifications to the mine's plant. *Id.* While inspecting the plant, Peters saw a crane operating approximately 50 feet away. Tr. 24-25. The crane had a spreader bar attached to its hoist hook. Tr. 24, 29-30.

A spreader bar is a rigging device used to aid crane operators in picking up heavier loads by distributing the load of the lift across multiple connection points. Tr. 29. The spreader bar that was attached to the crane that Peters observed consisted of a steel cylinder measuring approximately 14 feet long and 8 inches in diameter.[4] Tr. 118; Exs. S-4, R-10. The spreader bar was hung from the crane's hoist hook by cables, which looped through to U-shaped shackles at each end of the spreader bar. Tr. 30, 93; Ex. S-4. Steel pins inserted through the shackles secured the shackles and cables to the spreader bar. Tr. 30-31, 94; Ex. S-4. The steel pins could be removed to detach the spreader bar from the cables and crane. Tr. 31. The spreader bar weighed approximately 625 pounds.[5] Tr. 118; Ex. R-10. When rigged up, the spreader bar is typically suspended at around chest to head height. Tr. 125.

The spreader bar was rigged to the crane and suspended approximately 25- to 35-feet in the air when Peters observed it. Tr. 25, 29, 111; Ex. S-3. At that point in time, the spreader bar had been lifted in order for crane operator Milton Minchener[6] ("Minchener") to scope out the

[4] Inspector Peters initially estimated that the spreader bar measured 10 feet long and 6 inches in diameter. Ex. S-2. However, crane helper, William Assad, subsequently testified that the spreader bar measured 14 feet long and 8 inches in diameter. Tr. 119-11. Assad is a certified rigger and oiler at Sims and has been working there for two years. Tr. 116; Ex. R-11. He has nine years of experience working in the crane industry. Tr. 117. His training includes both on-the-job training and an apprenticeship program provided by a local union. *Id.* Based on Assad's first-hand experience with the assigned task, I credit Assad's testimony and find that the spreader bar measured 14 feet by 8 inches.

[5] Sims Safety Director, Robert Berry, testified that a 10-foot by 6-inch spreader bar weighed 163 pounds. Tr. 88. However, the spreader bar actually measured 14 feet by 8 inches. According to Assad, a 14-foot by 8-inch spreader bar would weigh about 625 pounds. Tr. 118; Ex. R-10. Again, I credit Assad's testimony based on his experience with the assignment and find that the spreader bar weighed about 625 pounds.

[6] Minchener is a certified crane operator at Sims Crane. Tr. 101; Ex. R-7. He has been employed at Sims Crane for five years and has worked in the crane industry for nine years. *Id.* His training in crane rigging

crane. Tr. 111-12, 127. Minchener testified that he had finished scoping and began swinging and cabling the spreader bar down into the area where he and Assad would finish attaching the load they were assigned to move. Tr. 111-12. Meanwhile, Peters saw crane helper William Assad standing directly underneath the suspended spreader bar. Tr. 24; Ex. S-2. Peters immediately went over toward the crane to tell Assad to move out from underneath the spreader bar. Tr. 25.

Peters informed Assad that he was issuing a verbal imminent danger order for standing underneath a suspended load in violation of MSHA standards.[7] Tr. 25-26. During this conversation, Minchener got out of the crane cab and walked over to Peters and Assad, passing underneath the spreader bar to get to their location. Tr. 34-35. When Minchener arrived, Inspector Peters informed him that he could not walk underneath a suspended load. *Id.* Minchener disagreed with the inspector and walked back toward the crane cab, passing underneath the spreader bar once more. Tr. 36.

Upon examining the situation further, Peters issued Citation No. 8819088, alleging a violation of 30 C.F.R. § 56.16009. Ex. S-2. Inspector Peters determined that this alleged failure to stay clear of a suspended load was unlikely to cause injury or illness to any workers, but that any injury could reasonably be expected to be fatal if the spreader bar fell and struck a miner. Tr. 37; Ex. S-2. Peters designated the operator's negligence as moderate. Ex. S-2. Sims abated the violation by removing miners from the area underneath the spreader bar and lowering the spreader bar onto a truck. Tr. 38; Ex. S-2.

At the hearing, Sims called safety director Berry to discuss crane operation and industry standards.[8] Tr. 55. Berry was not involved in the incident that led to the disputed citation, but offered testimony based on his knowledge and professional experience training crane operators and riggers. Tr. 55-58. According to Berry, the spreader bar did not constitute a load under OSHA standards. Tr. 60-65; Exs. R-2, R-3. OSHA defines "load" as the objects or weight of objects being hoisted, referring to both the objects and any load-attaching equipment. *Id.* Berry opined that a spreader bar does not constitute a load under OSHA's definition until it is attached to the object being lifted. Tr. 76. Berry also explained that OSHA standards allow workers to stand within the "fall zone" of suspended loads in certain situations, which include rigging up a load. Tr. 65-69; Ex. R-3. OSHA defines "fall zone" as the area in which it is reasonably foreseeable that suspended materials could fall in the event of an accident. Ex. R-3. Berry additionally testified that if the spreader bar were to fall, it would have not caused any major injuries. Tr. 91-92.

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procedures includes on-the-job training and a four-year apprenticeship program, which covered OSHA and industry standards. Tr. 102.

[7] Peters later determined that the violation did not meet the criteria for an imminent danger order and instead issued the instant citation. Tr. 26; Ex. S-2.

[8] Berry is the corporate safety director at Sims Crane. Tr. 55; Ex. R-1. He has been employed at Sims Crane for the past seven years and has over 40 years of experience in the crane industry, 26 of which dealt with crane safety. Tr. 55. He is a certified crane operator and practical examiner. *Id.*; Ex. R-1. He has also taught crane operating and rigging for the past 20 years. Tr. 56; Ex. R-1.

2. Analysis and Conclusions of Law

i. Violation of 30 C.F.R. § 56.16009

30 C.F.R. § 56.16009 provides that "[p]ersons shall stay clear of suspended loads." The standard aims to prevent individuals from being hit and injured by such loads should they fall or swing. The Secretary contends that Respondent's crane operator and helper violated the standard by walking directly underneath the suspended spreader bar. Tr. 131-133. Respondent, on the other hand, relies on OSHA standards to assert that the spreader bar did not constitute a "load" and that its workers were allowed to be within the spreader bar's fall zone. Tr. 18, 145-146.

It is undisputed that both Assad and Minchener walked directly beneath the suspended spreader bar. The issue here is whether the spreader bar constituted a "load." MSHA regulations do not define the term "load," nor has the Commission provided a clear definition of the term. In the absence of a statutory or regulatory definition, the Commission applies the ordinary meaning of a term. *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). Commission judges have relied on the dictionary definition of the term "load" in their interpretations of 30 C.F.R. § 56.16009.[9] *See e.g., CCC Group, Inc.*, 34 FMSHRC 1192, 1196 (May 2012) (ALJ); *Haines & Kibblehouse, Inc.*, 30 FMSHRC 504, 516 (Jun. 2008) (ALJ).

The dictionary defines a "load" as a "weight or mass that is supported." *The American Heritage Dictionary of the English Language* 1025 (4th ed. 2009). In this case, the spreader bar weighed approximately 625 pounds. Tr. 118; Ex. R-10. It was supported by cables, which hung from the crane's hoist hook and attached to the spreader bar by removable pins and shackles. Tr. 30, 93; Ex. S-4. Although the spreader bar was secured by cables and pins, those equipment pieces could fail and cause the spreader bar to fall. Tr. 92-95. Under the ordinary meaning of the term, therefore, I conclude that the spreader bar constituted a "load" for purposes of 30 C.F.R. § 56.16009.

Furthermore, OSHA standards are not legally binding on MSHA. Respondent has stipulated that it is subject to the jurisdiction of the Mine Act, was engaged in mining activities at the times relevant to this proceeding, and is an operator as defined by the Mine Act. Ex. ALJ-1. Therefore, I find that the OSHA regulations and definitions that Respondent's relies upon are not dispositive for purposes of determining whether Respondent violated the MSHA standard.[10]

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[9] Although my colleagues decisions are not binding on me, they provide guidance to the extent their reasoning is persuasive.

[10] I note, however, that the cited OSHA regulations are not inconsistent with my finding that the spreader bar constituted a "load" under 30 C.F.R. § 56.16009. First, 29 C.F.R. § 1926.1417(e) provides conditions that must be met in order for an operator to leave crane controls unattended. Although the standard provides an exception for working gear, such as a spreader bar, it does not explicitly permit standing beneath working gear. Second, 29 C.F.R. § 1926.1425(b) allows employees to be directly beneath a load in certain limited situations, including hooking or attaching loads. However, the spreader bar in this case was already attached to the crane. Tr. 24, 29-30. Minchener testified that he was in the process of moving the spreader bar to an area for additional rigging. Tr. 111-112. Assad testified that rigging

Accordingly, I find that Respondent violated 30 C.F.R. § 56.16009.

ii. Gravity

Inspector Peters designated the violation's gravity as unlikely to result in injury or illness. Ex. S-2. He also found that if any injury or illness did occur, it would be fatal and affect one person. *Id.* The Secretary requests that I uphold the inspector's gravity findings. Tr. 143-144. Respondent agrees with the inspector's "unlikely" designation and does not make any arguments as to the number of persons affected. Tr. 145. However, Respondent disagrees that any injury resulting from the violation would be fatal. Tr. 47-48, 92.

I affirm the inspector's gravity designations. Inspector Peters determined that the spreader bar was securely attached to the crane. Tr. 45-46. For this reason, the inspector appropriately designated the probability of injury as unlikely. Also, I discount Berry's testimony that the spreader bar would cause only a minor injury if it fell on a worker, particularly since he was mistaken when he testified that the spreader bar was only 163 pounds. Tr. 92. Subsequent credited testimony from Respondent's witness Assad revealed that the spreader bar actually weighed over 3.5 times more. Tr. 118; Ex. R-10. In the event of an accident, a 625-pound steel spreader bar could potentially crush and fatally injure any worker caught beneath it. Accordingly, I find that this violation created an unlikely, but fatal risk of injury to one worker.

iii. Negligence

Inspector Peters charged Respondent with moderate negligence in connection with this violation. Ex. S-2. The Secretary requests that the undersigned at least uphold the inspector's negligence designation, but notes that the record could support a finding of high negligence. Tr. 137. Respondent made no specific arguments with respect to negligence in its closing statement, but requested that I vacate the citation as a whole. Tr. 147.

I find that this violation resulted from Respondent's high negligence. Inspector Peters testified that he designated the violation's negligence as moderate because Assad and Minchener were unfamiliar with MSHA regulations and had not performed work at a mine before. Tr. 38. However, Inspector Peters explicitly informed Minchener that walking underneath the suspended spreader bar violated an MSHA standard. Tr. 36. At that point, I find that the operator should have known of the violative practice. Yet, Minchener blatantly dismissed the inspector's instruction and violated the standard by walking underneath the spreader bar a second time. *Id.* Respondent offers no other mitigating circumstances for its crane operator's brazen behavior in disregarding the inspector's instruction concerning the MSHA standard. Based on a totality of the circumstances, therefore, a finding of high negligence is appropriate.

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generally occurred when the spreader bar was suspended at chest to head height. Tr. 125. This testimony and the fact the spreader bar was suspended over 25 feet establishes that neither employee was attaching any objects to the crane at the time relevant to the citation's issuance. Tr. 25, 29, 111. Lastly, 29 C.F.R. § 1926.1401 provides a definition for the term "load," which explicitly includes the weight of any load-attaching equipment, such as a spreader bar, as part of a load.

iv. Penalty Assessment

As previously discussed, the Mine Act requires the Commission to consider the six criteria set forth in section 110(i), 30 U.S.C. § 820(i), when assessing a civil penalty. I look to the Secretary's penalty regulations and proposed assessment as a helpful starting point when independently assessing the statutory penalty criteria to avoid the appearance of arbitrariness.

The Secretary proposed that Sims pay a penalty of $100, the minimum penalty amount under the Secretary's criteria set forth in 30 C.F.R. Part 100. Sec'y Pet. The parties have stipulated that Sims abated this violation in good faith and that the proposed penalty will not affect Sims' ability to remain in business. Ex. ALJ-1. The Secretary's penalty petition demonstrates that he adequately accounted for Sims' size, violation history, and good-faith abatement efforts in reaching his proposed penalty. *See* Ex. S-1; Sec'y Pet. I affirmed the Secretary's gravity findings, but have increased the negligence from moderate to high. Because I find that the violation resulted from Respondent's high negligence, I determine that a penalty higher than the Secretary's proposed assessment is warranted.

Based on the legal principles outlined above and my consideration of the six statutory penalty factors, I find that an assessment of $300 is appropriate. Accordingly, I assess a civil penalty of $300 against Respondent for the instant violation.

V. ORDER

For the reasons discussed above, Citation 8819088 is hereby **AFFIRMED**, but **MODIFIED** to increase the level of negligence to from "moderate" to "high." In addition, Sims Crane is **ORDERED** to pay the penalty amount of $300.00 for this violation within thirty (30) days of the date of this Decision and Order.[11]

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Daniel R. McIntyre, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

W. Ben Hart, CMSP, W. Ben Hart & Associates, 2916 East Park Avenue, Tallahassee, FL 32301

[11] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.