FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. TEICHERT AGGREGATES, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-0028 A.C. No. 04-02792-419417 Mine: Vernalis Plant

DECISION AND ORDER

Appearances: Randy L. Cardwell, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for Petitioner;

Luis A. Garcia, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;

Alberto Ramirez, *pro se*, Sacramento, California, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves one citation issued pursuant to Section 104(a) of the Act with an originally proposed penalty of $114.00. The parties presented testimony and evidence regarding the citation at a hearing held in Sacramento, California, on April 12, 2017. The Secretary provided a memorandum of law regarding this single guarding violation prior to the hearing.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Vernalis Plant is a surface sand and gravel mine located in San Joaquin County, California. The parties have stipulated that Teichert Aggregates is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and that the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. Jt. Stips. ¶¶ 2-6.

Citation No. 8873581 was issued for violation of 30 C.F.R. § 56.14107(a) for an inadequate guard on a head pulley. The Secretary alleges that the violation was unlikely to cause injury, that if an injury did occur it would be permanently disabling, that the violation was not significant and substantial, and that it was the result of low negligence. The Secretary proposed

a penalty of $114.00 based on his penalty criteria. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I find that the Secretary has proven that a violation occurred as alleged.

A. MSHA's Inspection

Inspector William Edminister has been a mine inspector for nine years, and has a total of 16 years mining experience. He is familiar with the Vernalis sand and gravel operation and familiarized himself with the mine file prior to conducting an inspection there. The mine employs approximately 40 to 50 miners, with production primarily on the day shift. Edminister travelled to the mine on August 1, 2016, to conduct a regular inspection beginning in the late afternoon. During the course of his inspection, he observed the 2 CNV 25 tripper conveyor. The tripper conveyor is an overland conveyor that moves finished product from one location to another, where it is dumped onto a stock pile. The end of the conveyor, where this citation was issued, is on a trolley and can be moved to change the location of dumping. Edminister and the others in the inspection party walked the length of the conveyor on the designated walkway, up the slope to the discharge point at the top. At the end of the conveyor walkway, the inspector climbed a ladder about seven or eight feet up to the work platform. From that platform, Edminister observed a second work platform higher up where the head pulley was located. The platform with the pulley was surrounded by a handrail. The Respondent's Exhibit 3-14 shows an aerial view of the conveyor and work platform with the pulley. Edminister did not enter the work platform, but observed that a miner could enter it by climbing over or through the handrails. Other than the handrails, the head pulley was not guarded on either side. The unguarded area was 26 inches wide and 40 inches above the work platform. The aerial photograph shows a shovel on the work platform that miners use to dislodge material in the discharge chute, bringing them very close to the unguarded portion of the pulley.

The Secretary's Exhibits 3 and 4 are photographs that show the unguarded pulley as observed by the inspector. The inspector explained that there were exposed moving machine parts at the drive shaft area where the head pulley passes over the drum. The primary purpose of the work platform, which was added after the conveyor was purchased, is to service the head pulley. The bearings must be changed periodically, and miners must occasionally access the platform to unclog the discharge point. Some maintenance on the pulley can be completed by visual inspection, and lubrication is done with a remote grease line. However, if the grease line fails or material builds up at the chute, a miner must enter the area and will be exposed to the moving parts.

Edminister testified that the moving parts as he observed them could pull a miner into the area, possibly causing a fatal injury. He was told that the pulley had been unguarded for quite a while, but he was not certain exactly how long. He understood that the mine had a lock-out/tag-out policy for anyone accessing the area and that the area was not accessed often. Due to the limited exposure, he designated the citation as non-S&S and unlikely to cause injury. He chose also to designate the negligence as low because mine management believed that the handrail around the work platform was sufficient to protect miners from the pulley.

The mine operator called three witnesses, all of whom were present for at least part of this inspection. Chris Walters, the assistant hot plant operator, has worked at the plant for 13 years. He has not worked on the cited platform but testified that the miners are trained not to enter the area unless they have de-energized and locked out the belt. He also explained that the miners know not to go past the handrails on the platform, and that the only time a miner would come close to the pulley would be to do work on it. He explained that miners occasionally enter the area to change the direction of the discharge chute, but that they de-energize the equipment first. The moving parts are not accessible, in his view, when miners are following the safety procedure. Mark Muniain, the plant repairmen, agreed that the area is accessed only for maintenance, which is infrequent. He testified that it was possible for a miner to go through or over the rails and access the cited area, but that this would be against the mine's safety procedures.

Michael Goss has been a superintendent for Teichert for 14 years and has worked at the Vernalis location slightly more than a year. He was called at home when Edminister arrived to conduct an inspection, and he returned to the mine to accompany the inspector. He was present for the inspection of the conveyor area and the work platform. He explained that the unguarded pulley had been unguarded during the year he was at the plant, and he believed that the work platform had been added eight or ten years earlier when the bearings on the pulley had to be changed. He believes additional guarding was not necessary because the area with moving machine parts was completely enclosed by a handrail with a mid-rail. In his view, if someone were to trip and fall as they entered the work platform, the handrail would prevent contact with the unguarded area.

B. The Violation

Based on his observations, Edminister issued Citation No. 8873581 for an unguarded head pulley. The Secretary alleges a violation of 30 C.F.R. § 56.14107, which provides that

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The parties agree that a work platform on the 2 CNV 25 tripper conveyor provided access to the head pulley, and that there were moving machine parts inside the pulley which had the potential to cause injury. The parts were exposed to someone standing on the work platform. The issue is whether the machine parts were "guarded" under the meaning of the standard. The Secretary argues that the exposed parts of the head pulley violated § 56.14107. However, Teichert argues that the handrails surrounding the pulley were sufficient guarding to satisfy the standard. In the Secretary's view, the handrails did not constitute a guard because they were too easily defeated.

A plurality of the Commission has found that § 56.14107 is ambiguous because "its language is broad and does not specify the extent of guarding required or explain how moving

parts should be guarded." *Alan Lee Good*, 23 FMSHRC 995, 1004 (Sept. 2001) (Jordan and Beatty, Comm'rs). In cases involving an ambiguous regulatory provision, Commission judges must defer to the Secretary's interpretation of his own regulation "as long as it is reasonable." *Small Mine Dev.*, 37 FMSHRC 1892, 1894 (Sept. 2015) (quoting *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001)); *see also Auer v. Robins*, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation").

The purpose of MSHA's guarding standards is to "prevent, to the greatest extent possible, accidents in the use of [mechanical] equipment." *See Arch of Ky., Inc.*, 13 FMSHRC 753, 756 (May 1991) (quoting 38 Fed. Reg. 4976, 4977 (Feb. 1973)) (interpreting a different guarding standard). Here, several witnesses testified that it was possible for a miner to climb over or through the handrail to reach the work platform near the pulley. If he did so, he would be exposed to the moving machine parts. The additional guard required by the inspector would prevent such a person from coming into contact with the moving parts. The additional guard did not impede the functioning of the pulley and would be crucial in the event of someone entering the work platform without de-energizing the pulley. Thus, I find that the handrail alone would not prevent an accident involving the pulley "to the greatest extent possible." Therefore, the Secretary's interpretation requiring a guard on the specific moving parts is a reasonable interpretation of the regulation.

Teichert also argues that additional guarding was not necessary because the mine has a lock-out/tag-out policy which would require that the pulley be de-energized before anyone performed maintenance on it. However, the Commission has found that guarding standards should be interpreted to account for "all relevant exposure and injury variables" including "the vagaries of human contact." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consistent with this, Commission judges have interpreted guarding standards to require that guarding be adequate to prevent injury in the event that an employee carelessly disregards a lock-out/tag-out policy. *See, e.g., Climax Molybdenum Co.*, 38 FMSHRC 2453, 2460 (Sept. 2016) (ALJ); *Dix River Stone Inc.*, 29 FMSHRC 186, 203 (Mar. 2007) (ALJ); *Calco Inc.*, 15 FMSHRC 480, 484 (Mar. 1993) (ALJ). Here, I credit the miners' testimony that Teichert had a lock-out/tag-out policy that was consistently followed. Nevertheless, the pulley guarding needed to account for the unlikely event of a miner entering the area without following the policy. The guarding observed by the inspector would not have been adequate to prevent injury in that occasion. Accordingly, I find that the Secretary has proven a violation of the standard.

C. Fair Notice

While I find that the Secretary's interpretation of the standard is reasonable, Teichert is entitled to due process protections prior to enforcement of that interpretation. *Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016). Due process requires that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). In the context of regulatory interpretation, a court must not allow deference to an agency's interpretation to "validat[e] the application of a regulation that fails to give fair warning of the

conduct it prohibits or requires." *Id.* (quoting *Suburban Air Freight, Inc. v. Trans. Sec. Admin.*, 716 F.3d 679, 683-84 (D.C. Cir. 2013)). This is known as the "fair notice doctrine." *Id.*

The Commission evaluates fair notice using the reasonably prudent person standard. *Hecla*, 38 FMSHRC at 2125. Under that test, application of a standard to a set of facts is consistent with fair notice if "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In applying the reasonably prudent person standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, explicit definitions in the regulations or the Act, the regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community of its interpretation. *See Hecla,* 38 FMSHRC at 2125-26; *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416. Also relevant is the testimony of the inspector and the operator's employees as to whether they believed the cited condition to be a violation. *Island Creek,* 20 FMSHRC at 24-25. Finally, the Commission has looked to evidence of accepted safety practices in the industry. *See BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996); *Ideal Cement*, 12 FMSHRC at 2416.

In this case, the mine operator has not provided sufficient facts to establish a fair notice defense. There was some testimony that the work platform without a guard had been in place for eight to ten years, but another witness said the platform had only been in place for a year or two. Further, there was no indication that the practice of leaving that pulley unguarded was an accepted safety practice in the industry or that it had been viewed by a previous inspector. Instead, the Secretary has shown that MSHA has published many notices regarding this type of guard, and provided power point presentations and training materials. The Secretary introduced a portion of MSHA's Program Policy Manual, which is sent to mine operators. Sec'y Ex. 7. The manual states that "the use of chains to rail off walkways and travelways near moving machine parts ... is not in compliance with" § 57.14107. *Id.* The Secretary also introduced a PowerPoint presentation that is available to mine operators on the MSHA website. Sec'y Ex. 9. The PowerPoint presentation includes a photograph of a pulley on a work platform with a handrail and indicates that the guarding is insufficient. *Id.* at 24. At the Vernalis plant, miners could easily crawl over or through the handrails to the work platform to dislodge rock or to work on the conveyor. In fact, Respondent's Exhibit 3-14, an aerial photograph of the conveyor and the pulley cited, shows a shovel laying on the work platform, presumably to dislodge rock that may be caught in or around the pulley area. A reasonable miner would have been aware that a guard was needed in this situation, particularly in view of the information in the PowerPoint and Program Policy Manual from MSHA. When the mine added the work platform, it should have been aware that the moving pulley needed a guard.

The MSHA inspector designated the citation as low negligence and non S&S. He indicated that he designated the violation as low negligence for several reasons. First some of the mine personnel believed that the handrail was sufficient to protect against inadvertent contact with the moving pulley. Next the work platform had probably been in place during past inspections without the guard. Likewise, the inspector believed the gravity was not serious,

given the limited use of the work platform and the mine's training and lock-out/tag-out policies. Therefore, in addition to the low negligence, Edminister designated the violation as not significant and substantial. I agree that the mine operator's arguments do not negate the violation, but instead indicate that the violation was properly designated as low negligence and was non-S&S.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The Secretary has proposed a penalty of $114.00 for this violation. The history of violations introduced by the Secretary shows that the mine regularly complies with the standards and abated this violation in good faith. The mine operator is a large one, and has not raised the issue of the ability to pay. The negligence is low and the violation is not significant and substantial. Based upon my review of the six penalty criteria, I assess the penalty of $114.00 as proposed by the Secretary.

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $114.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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Randy Cardwell, CLR, U.S. Department of Labor, MSHA, 991 Nut Tree Road, 2nd Floor, Vacaville, CA 95687

Luis Garcia, Senior Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 350 S. Figueroa Street, Suite 370, Los Angeles, CA 90071

Alberto Ramirez, Project Manager, Teichert Aggregates, 3500 American River Drive, P.O. Box 15002, Sacramento, CA 95864