

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 11, 2017

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

v.

FREEMPORT-MCMORAN SIERRITA,  
INC.,  
Respondent

**CIVIL PENALTY PROCEEDINGS**

Docket No. WEST 2015-0873-M  
A.C. No. 02-00144-385291

Docket No. WEST 2016-0414-M  
A.C. No. 02-00144-404052

Docket No. WEST 2016-0691-M  
A.C. No. 02-00144-415949

Docket No. WEST 2017-0002-M  
A.C. No. 02-00144-418450

Sierrita Mine

**DECISION**

Appearances: Timothy Turner, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary;  
Kristin R.B. White, Esq., Jackson Kelly PLLC, Denver, Colorado, for Freeport-McMoRan Sierrita, Inc., for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Freeport-McMoRan Sierrita, Inc., (“Freeport”) 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”). Freeport operates the Sierrita Mine (“Sierrita”), a surface copper mine in Pima County, Arizona.

These dockets involve thirteen section 104(a) citations issued by the Secretary to Freeport. Prior to hearing the parties settled four of the thirteen citations. On April 18, 2017 the Secretary filed a Motion to Approve Partial Settlement and Order Payment. The motion is addressed at the end of this decision. The parties presented testimony and documentary evidence on the nine remaining section 104(a) citations at a hearing held in Tucson, Arizona and filed post-hearing briefs.

**I. DISCUSSION WITH FINDINGS OF FACT  
& CONCLUSIONS OF LAW**

**WEST 2015-0873**

**Citation No. 8929292**

Citation No. 8929292 alleges a violation of section 56.14100(b) of the Secretary's safety standards and asserts that the emergency steering system on a haul truck was not being maintained in a functional condition, which in turn exposed the driver to collision/rollover hazards that could result in a fatal accident. The citation states that the truck travels along elevated, winding roadways where both small and large mobile equipment travel. The citation further alleges that a steering test was conducted three times and the wheels could not be turned. Section 56.14100(b) requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b).

Inspector Enrique Vidal<sup>1</sup> determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. He determined that the condition was significant and substantial ("S&S"), that one person was affected, and that Freeport's negligence was moderate. The Secretary proposed a penalty of \$4,329.00 for this alleged violation.

*Summary of the Evidence*

On April 15, 2015 Inspector Vidal conducted an inspection of a haul truck at the Sierrita Mine. As part of the inspection he asked the driver to test the truck's emergency steering system. Tr. 43.

The emergency steering system is designed to provide the driver with backup steering power in the event the engine goes out and truck loses power. Tr. 43-44. The system is composed of accumulators that hold pressurized nitrogen that can be activated in the event of an engine failure to provide the driver with steering power for a limited period of time during which the driver can steer the truck into a berm or out of the way. Tr. 43-44, 46.

Vidal explained that testing the emergency steering system requires two persons. Tr. 45. Here, Vidal had the driver test the system by pulling the truck onto a flat area, chocking the back wheels, and then having a man on the ground turn off the engine<sup>2</sup> to simulate an engine failure so the driver could test the emergency steering from inside the cab. Tr. 44, 69. Vidal was not aware of how the truck's service manual recommended testing the system. Tr. 69.

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<sup>1</sup> Inspector Vidal has been with MSHA for 18 years and performs approximately 30 inspections a year. Tr. 9. He is a certified accident investigator, trained as a mechanic and, prior to MSHA, worked 29 years in the mining industry, primarily as a heavy equipment mechanic. Tr. 10-11.

<sup>2</sup> The haul trucks are equipped with an engine shut off mechanism at ground level.

Vidal testified that, during the test, when the driver of the truck turned the steering wheel, the truck wheels only turned a few inches. Tr. 45, 67-68. At some point the driver told Vidal that he did not know how to do the test and that the drivers are not allowed to conduct the tests. Tr. 45, 74. As a result, Vidal allowed a mechanic to conduct another test. Tr. 45, 75. The system was ultimately tested three times, and in each case it failed to work properly. Tr. 43, 45.

Vidal understood that the emergency steering systems on the haul trucks were tested by mine personnel every 500 hours as part of preventative maintenance (“PM”). Tr. 47. In his opinion, while there is no requirement to conduct a steering test daily, he believed that the testing method used by Freeport was not enough because the drivers of the truck, who are told not to test the system, would not have knowledge whether the system was operational. Tr. 47-48, 75. Vidal observed no issues with the engine that day and the truck’s monitoring systems were not alerting to any problems. Tr. 69.

Based on his observations, Vidal issued Citation No. 8929292 which alleged that Freeport had failed to correct the unsafe condition presented by the non-functional emergency steering system in a timely manner. Tr. 43. The hazard, according to Vidal, was that a haul truck driver going down a ramp would not have emergency steering if the engine went out. Tr. 44. Vidal testified that the truck travels near edges of benches and around other smaller vehicles, and the lack of emergency steering would create a hazard that could cause a collision or rollover. Tr. 48-51. It was unclear how long the steering had been defective and Vidal observed no problems with the truck’s engine and, although he stated he had seen engines go out, he could not provide specific instances. Tr. 49-50.

Ramon Figueroa<sup>3</sup>, a technical coordinator in the mine’s maintenance department, testified that he was present when the inspector conducted the tests on the haul truck’s emergency steering system. Tr. 88-89, 130, 143, 152.

Figueroa explained the procedure for checking the emergency steering system in much the same way that the inspector did, but stated that the wheels do not need to be turned all the way each direction but only need to be turned until movement is observed, and then turned back the other direction. Tr. 131-132, 158. In support of this statement, he pointed to the truck’s maintenance manual, which states that testing involves visually confirming that the “front wheels turn left as the steering wheel is turned left[,]” and vice versa. Tr. 136-136, 159; RX-4 No. 7. According to Figueroa, the inspector’s method of having the wheels turned all the way to the right and then all the way back to the left is not the correct method to test the emergency steering. Tr. 134. The mine checks the system during the PM conducted on the truck every 500 hours of operation, which usually works out to every three to four weeks. Tr. 132. The manual for the truck recommends testing every 500 hours. Tr. 133.

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<sup>3</sup> Figueroa has worked at this mine since 1974, with short stints elsewhere during layoffs. Tr. 87-88. He has worked as a helper, mechanic, and lead supervisor. Tr. 88. As a member of the mine maintenance department he is responsible for care of multiple pieces of equipment, including haul trucks. Tr. 89.

Figuroa explained that, given the procedure required to test the emergency steering system, the system check should not be done by the drivers and should, instead, be completed by the maintenance department. Tr. 130-131. The only way a driver can do the test is to park at the ready line in the pit where there is not much room and a person on the ground could get hit and crushed by a wheel when it turns. Tr. 132-133, 163.

Figuroa testified that, at the time of the inspection, the truck's monitoring system detected no issues and no alarms were sounding. Tr. 130, 139. According to Figuroa, during the first test the wheels turned all the way to the right, but did not come back. Tr. 138-139, 156. On the second test the wheels moved a little bit, but not as much as during the first test. Tr. 156.

Figuroa opined that the condition was created because, when the wheels were turned all the way to the right, one of the system's three accumulators was drained. Tr. 152-153, 158. The low accumulator would have been discovered when the truck was brought in for PM. Tr. 139-167. He stated that the emergency steering system was functioning and the condition was not a hazard or safety defect because there was still plenty of pressure in the two other accumulators and the tires moved as required by the truck's manual. Tr. 139-140, 158, 166-167. On cross-examination Figuroa conceded that when the other trucks at the mine were tested that day the wheels turned all the way to the left and right. Tr. 160. He further agreed that if a truck in this condition had just received PM the defect could be there for a few weeks without being corrected. Tr. 162.

Figuroa explained that, in order for the secondary steering system to be needed, an engine or steering pump would have to fail. Tr. 141. This happens on average maybe one to two times a year and the truck's message center will notify the driver to pull over and shut down immediately. Tr. 141, 155, 162.

### *Fact of Violation*

I find that the Secretary failed to meet his burden of proof and that the citation should be vacated. The cited standard requires that defects on equipment that affect safety shall be corrected in a timely manner. In order to satisfy the standard the Secretary must show that there was a defect that affected safety, and that the defect was not corrected in a timely manner. Here, while the cited condition was a defect that affected safety, the Secretary failed to establish that the defect was not corrected in a timely manner.

The emergency steering system's inability to provide power sufficient to turn the wheel more than, at most, a few inches is a defect that affects safety. The purpose of the system is to provide steering power for the haul truck in the event the engine goes out and the primary steering system loses power. Without this system, the driver of the haul truck would not have full steering control of the truck in the event the engine went out. Drivers are aware of the system and undoubtedly would rely on it if the engine went. Notably, while losing an engine is not a frequent occurrence at this mine, it does happen on average one to two times a year. Had this truck's engine gone out, the driver would have had limited control over the direction of travel. While this limited control may be sufficient in many instances, the limitation nevertheless affects safety given that the driver would not have the same level of control that a fully

functional system would provide. I credit Vidal's testimony that the truck travels on hills and benches, and operates in the area of other smaller equipment. Given the limited control, and the areas in which this truck operated, both the driver's safety and the safety of others in the area were impacted. According, I find that this defect affected safety.

Freeport argues that there was no defect affecting safety because the truck passed the emergency steering test as described in the truck's service manual. Freeport Br. 3. This argument lacks merit. While the service manual may have outlined a method for testing the emergency steering system, the manual is silent as to how far the wheels must turn during the test. Although the parties dispute how much the wheels turned during the three tests, there is no dispute that, when tested, the wheels on this truck did not turn all the way in each direction like the other trucks tested that day did.

The Secretary failed to establish that the defect was not corrected in a timely manner. In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001), the Commission stated that "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." Here, the Secretary did not introduce credible evidence establishing when the defective condition developed.<sup>4</sup> Nevertheless, the Secretary argues that the court should find that the condition was not corrected in a timely manner because the mine did not require its drivers to conduct a pre-shift check of the system and Freeport only checks the system every 500 hours of operation as part of its PM program. Sec'y Br. 8. Consequently, the Secretary argues, "it was possible the defect could sit dormant for up to four weeks before the operator found out [the defective condition] existed." *Id.* I find this argument unavailing.

The Secretary argues that the mine *should* check the system during every pre-shift examination and *should* have known of the condition's existence. I disagree. There is no requirement that the emergency braking system be checked as part of a pre-shift examination. The truck's service manual recommends testing only every 500 hours, which is exactly what Freeport did. Further, I credit Figueroa's testimony that having mechanics in the maintenance department test the system, as opposed drivers on the ready line where there is not much room, is the safer method.

I find that Freeport's reliance on the manual in determining when and where to test the system was reasonable. The Secretary has failed to meet his burden of proof. Citation No. 8929292 is **VACATED**.

**Citation Nos. 8929293, 8929294 and 8929295**

Three of the citations in this docket allege essentially identical violations of section 56.14101(a)(3) of the Secretary's safety standards, which requires that "[a]ll braking systems installed on the equipment shall be maintained in functional condition." 30 C.F.R. §

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<sup>4</sup> Commission Judges have vacated citations under similar circumstances. *Northern Aggregate, Inc.*, 37 FMSHRC 562, 594 (Mar. 2015) (ALJ); *Nelson Quarries, Inc.*, 36 FMSHRC 3143 (Feb. 2014) (ALJ)

56.14101(a)(3). MSHA inspector Enrique Vidal issued each of the citations. I address the citations together.

Citation No. 8929293 alleges that the left front brake assembly of a haul truck was leaking brake oil, which affected the truck's braking effectiveness in the event of an emergency and exposed the driver to collision and rollover hazards which could result in a fatal accident. The citation further alleges that the truck travels elevated, winding roadways where all types of mobile equipment travel.

Citation Nos. 8929294 and 8929295 allege essentially the same thing, with the only difference being that those citations involve a right front brake assembly and left rear brake assembly respectively.

In each of the three citations Inspector Vidal determined that an injury was unlikely to be sustained, but that if an injury occurred, it could reasonably be expected to be fatal. He determined that the conditions were not S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$585.00 for each of these alleged violations.

#### *Summary of the Evidence*

On April 21, 2015 Inspector Vidal was at the mine to conduct a mandatory inspection. Tr. 13. While inspecting the equipment in the pit he observed what he believed were violative conditions on three different haul trucks.

Vidal testified that the brake assemblies on the three subject haul trucks have two types of oil, one of which is gear oil and is used on the spindle and large bearings, and another of which is brake oil and used for the brake assembly. Tr. 22. The two types of oil are easy to differentiate by their "thickness, tackiness." Tr. 22. While gear oil is roughly 50 to 60 weight and very thick, brake oil is approximately 30 weight and much thinner and clearer. Tr. 22-23. Vidal testified that the purpose of brake oil in the brake system is to make the brake function by compressing the springs. Tr. 20-21. The brake oil is added to the brake assembly via an oil tank on the exterior of the truck. Tr. 21. The wheel bearings with gear oil are next to the brake assemblies. Tr. 23. According to Vidal, mine personnel check all fluids every shift, including the brake oil, and top off the oil tanks if there is any leakage. Tr. 24, 73.

Vidal testified that section 56.14101(a)(3) requires the service brakes to work and that a brake test is not required in the field when a leak is observed since he already knows that something is wrong with the system. Tr. 72-74. The only time testing is required is when there is a question whether the brakes are operational. Tr. 74. However, on cross-examination he agreed that a leak may not necessarily affect functionality. Tr. 61-62. Moreover, he acknowledged that the technology for brakes had changed quite a bit since he was a mechanic. Tr. 61.

Vidal observed and photographed brake oil leaking from one of the brake assemblies on each of the three trucks. Tr. 19, 32-33, 37; GX-9 p. 1, GX-3 P-1, GX-6 p.1. He was adamant

that the leaks were brake oil, as opposed to gear oil. Tr. 23-24. Based on his observations, Vidal issued Citation Nos. 8329293, 8929294, and 8929295 to Freeport for alleged violations of section 56.14101(a)(3) because the break assemblies were leaking and, therefore, were not being maintained. Tr. 18-19, 32, 38-39. In each instance Vidal believed that an injury was unlikely to be sustained, but that if an injury occurred it would be fatal given that the trucks operate all day, in all types of weather, on elevated haul roads and a collision or rollover could occur. Tr. 27-29, 35-36, 39.

On cross-examination Vidal agreed that he did not test the functionality of the brakes on the three cited trucks, was not aware of any issues with the functionality of the brakes, and no tests were done to determine where the leaking oil was coming from. Tr. 63-667. In writing the citations he relied only on his visual observation of the leaking assemblies. Tr. 63-66. Further, he agreed that the trucks' monitoring systems did not indicate any problems with the brakes and he was not sure if the overstroke pins had been engaged. Tr. 63-67. Moreover, he conceded that it was unlikely overstrokes would ever be triggered since the oil tanks were topped off every shift. Tr. 73.

Ramon Figueroa was present during the inspection of each of the three trucks and testified that the three citations involved the same issue, i.e., leaking brake assemblies. Tr. 91-92, 106. While he agreed that there was an oil leak, he disagreed that the leak was at the service brake on each of the three trucks. Tr. 92. He explained that, while the model numbers of the three trucks were not identical, the brake assemblies were designed the same. Tr. 93-94. Each brake assembly consisted of three different systems: the service brake component which includes a brake piston that applies the service brake, a cooling package that runs through the brake itself, and a parking brake release piston. Tr. 94. Each of these systems runs on its own independent circuit of brake oil. Tr. 103, 119, 163. The cooling system runs on brake oil at low pressure and high volume and provides a heat exchange to the assembly, but is not part of the actual service braking system. Tr. 94, 145-146.

Figueroa described the brake assembly in detail through the use of schematic drawings. Tr. 96-99, 122-; RX-3. Relying on those drawings, as well as the work orders that were submitted on the trucks, he explained that the leaks were not from the service brake lines, but rather from the Duo-Cone seals that separate the brake assemblies from the wheel groups.<sup>5</sup> Tr. 95, 99-100, 102-103, 145. The Duo-Cone seals are what hold in the cooling system brake oil. Tr. 124,144, 146. Had the leaks been from the service brake circuits, the overstroke switches would have been thrown and an alarm would have been triggered.<sup>6</sup> Tr. 106. Here, there were no

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<sup>5</sup> Figueroa explained that the brake system uses hydraulic oil as brake oil. Tr. 97. While the terms used by the parties differ from witness to witness, it is clear they were talking about the same thing. For clarification's sake I refer to the fluid as brake oil throughout this decision. The brake oil, which is used by the brake assemblies, is a lighter, 10 weight brake oil, while the gear oil used by the wheel groups is a thick and sticky 60 weight oil. Tr. 95, 99-100, 145.

overstrokes and the trucks' monitoring systems had not triggered an alarm or warning from an overstroke, or indicated any other problems with the brakes. Tr. 89-90, 106-107. The service brakes were in perfect condition. Tr. 164. Figueroa knew the leaks were not from the parking brake circuits because hydraulic pressure is what enables the parking brakes to release and, had there been a drop in pressure, the brakes would have dragged. In addition, there were no temperature issues with the parking brakes. Tr. 107.

Figueroa explained that these types of leaks are caused when dirt gets behind the O-rings, or in the face of the Duo-Cone seals, and those parts start to wear out. Tr. 102. While the Duo-Cone seals were not in perfect condition, they were functional. Tr. 164. Because these leaks involved brake oil from the cooling circuits and not from the service brake circuits they did not affect the functionality of the service brakes and there were no safety hazards. Tr. 103-104. These trucks have 300 gallon brake oil tanks that service each of the three circuits and are checked by the driver each day. Tr. 104, 148. The driver will report these types of leaks and the trucks will be serviced during the next opening in the department's PM schedule. Tr. 104-105. In the event a problem is detected with the braking systems, miners are trained to pull over, set the parking brake and call maintenance. Tr. 120.

Figueroa testified that the inspector did not test the brakes that day and none of the drivers reported weak brakes, brake noise or brake chatter. Tr. 108-109. When the brakes were taken apart in order to fix them, the mechanics found everything was functional and the only issue was the leaking Duo-Cone seals. Tr. 109.

### *Fact of Violation*

I find that the Secretary failed to meet his burden and that each of the three citations should be vacated. The cited standard requires that braking systems on equipment be maintained in functional condition. Consequently, in order for the Secretary to establish a violation he must show that the braking systems were not maintained in a functional condition.

The Secretary argues, and I agree, that the cited standard's use of the term "braking systems" encompasses the entire brake assembly. Sec'y Br. 4. Here, the brake assemblies included three different components which utilized brake oil: the service brake, the parking brake, and the brake cooling components. Each of these components had its own independent brake oil circuit which was served by the same brake oil reservoir.

I credit Figueroa's testimony that, in each case, the source of the leaking brake oil was the Duo-Cone seals where oil was leaking from the cooling circuits. Figueroa credibly testified as to why a leak at the Duo-Cone seal could only be from the cooling circuit and not from either the

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<sup>6</sup> Figueroa explained that the service brake includes a large air chamber that actuates a piston which converts air pressure to hydraulic pressure to operate the service brake. Tr. 108, 126. The hydraulic pressure is between 675 and 750 psi and, if there is a leak, the pressure is going to go all the way down and push the oil out and cause the overstroke switch to be thrown, and in turn cause an alarm to sound in the cab, after which the truck would be taken out of service. Tr. 108, 124, 127. The overstroke switch is bolted to the air system and is triggered when there is a leak in the hydraulic circuit of the service brake that allows the air piston to go too far. Tr. 127.



parking brake or service brake components. Specifically, he explained that, had the leaks been from the parking brake circuits a drop in pressure would have caused the parking brakes to drag since pressure is what enables the parking brakes to disengage. No signs of dragging, such as temperature issues, were present. Further, he explained that, had a leak been present in the service brake circuits the brake overstroke switches would have been triggered and an alarm would have sounded, yet there were no overstrokes and the trucks' monitoring systems reflected such. Notably, the inspector did not conduct any testing to determine the sources of the leaks. Given that the sources of the leaking oil were the cooling circuits, the next question that must be asked is whether those leaks affected the functionality of the braking systems.

I find that the Secretary failed to meet his burden of proof to establish that the braking systems were not being maintained in a functional condition. At no point during his testimony did Vidal address the brake assemblies' cooling components and the Secretary presented no evidence on the impact a leak in the cooling system would have on the functionality of the brake systems. In fact, when asked on direct examination what was the purpose of the oil in the brake systems, Vidal responded that it was "used to compress the springs[.]" Tr. 20-21. No testimony, from either party, indicates that springs were involved in either the cooling or service brake systems. Moreover, although there is no dispute that leaks did exist on each of the cited brake assemblies, the presence of a leak, by itself, does not establish that a brake system is not being maintained in a functional condition. Vidal confirmed as much on cross-examination when he agreed that a leak on a part may not necessarily affect functionality. Tr. 61-62. Moreover, as conceded by Vidal, the braking systems of haul trucks are significantly more sophisticated and complex than they were when he was a mechanic.

While the Secretary takes issue with the Freeport's practice of filling the brake oil reservoir each shift, and argues that doing so only amounts to a "Band-Aid masking the defect[.]" the issue here is not whether the Duo-Cones had a "defect," but rather whether the braking systems were maintained in a "functional" condition. Sec'y Br. 5. Here, I find no credible evidence that these leaks affected the functionality of the braking systems. Freeport's practice of refilling the reservoirs each shift, while not optimal in the Secretary's opinion, enabled the braking systems to function as designed. The leak would have been repaired during the next PM. Under different circumstances a leak may in fact evidence an operator's failure to maintain a brake system in a functional condition but, under the facts of this case, the Secretary has failed to meet his burden of establishing that any of the three components utilizing the brake oil was not functioning as intended. Accordingly, Citation Nos. 8929293, 8929294 and 8929295 are **VACATED**.

#### **WEST 2016-0414**

#### **Citation No. 8934664**

Citation No. 8934664 alleges a violation of section 56.20003(a) of the Secretary's safety standards and asserts that, due to a holding tank overflowing, the base of the stairway in the sump floor area was obstructed by an accumulation of material made up of slurry and water that created a slip, trip and fall hazard that could result in a lost time injury. Section 56.20003(a)

requires that “[a]t all mining operations . . . [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly[.]” 30 C.F.R. § 56.20003(a).

Inspector Enrique Vidal determined that an injury was unlikely to be sustained, but that if an injury occurred, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the condition was not S&S, that one person was affected, and that Freeport’s negligence was moderate. The Secretary has proposed a penalty of \$243.00 for this alleged violation.

### *Summary of the Evidence*

On January 7, 2016 Inspector Vidal was traveling in the area of the mine’s molybdenum plant when he observed an accumulation of material on a stairway and on the floor at the bottom of the stairway. Tr. 55, 78; GX-16 p. 1. Vidal testified that the stairway was the dedicated access point to an area where miners worked “24/7.” Tr. 55-56, 58. After having his memory refreshed he acknowledged that the area was the secondary containment area. Tr. 71-72. Vidal learned that the accumulation of material, which consisted of a “slurry of concentrated water mixture[.]” some of which was dry, had come from a tank that had overflowed due to a “burp” in the system. Tr. 55-56. A burp occurs when material does not flow through the system as designed, which in turn plugs up the system and causes a spill. Tr. 55. Vidal was not sure how long the material had been present, or how often the tank overflowed. Tr. 56. There was a sump in the area that could be used to clear the spillage, but it was not working. Tr. 56-57. While Vidal initially testified that workers were in the area, on cross-examination he acknowledged that the workers were actually 50 feet away from the area and he did not see any persons in the sump/secondary containment area. Tr. 58, 72.

Based on his observations, Vidal issued Citation No. 8934664 to Freeport for failing to keep the cited work area clean. Tr. 54. He determined that Freeport exhibited moderate negligence because any miner could have identified this problem and documented it, reported it, and barricaded it. Tr. 59. Vidal acknowledged that the area was barricaded. Tr. 59. While no mitigating circumstances were presented by the mine at the time, Vidal noted that a supervisor was not in the area and, as a result, he did not believe there was high negligence. Tr. 59.

David Scott Robinson<sup>7</sup>, who is currently a health and safety specialist for Freeport, was escorting the inspector when the cited condition was discovered. Tr. 81-82. Robinson explained that, prior to the citation being written, the mine had experienced issues with the leach process and the plant had been stopped. Tr. 78. When the process was stopped all of the harder and heavier material that had been flowing through the plant settled in the pipes and vessels. Tr. 78. That morning the plant was restarted and a backflow occurred, which in turn caused material to overflow. Tr. 78. This occurs roughly six times a year. Tr. 82, 85.

Robinson explained that the overflow material fell into the secondary containment area, which is below the leach process and designed specifically for the purpose of holding material in the event of an overflow. Tr. 78-80; GX-16 p. 1. The area has a three foot tall wall surrounding

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<sup>7</sup> Robinson has been a health and safety specialist at the mine for four years, and prior to that worked in the security department. Tr. 76-77.

it in order to hold material and is equipped with a sump that is only run when there is spill and material needs to be sucked up and put back into the system. Tr. 79-80, 83. Robinson explained that the dry material on the stairs would be removed with squeegees and hoses and eventually sucked back up through the sump and put into the system. Tr. 83, 85. On the day in question miners were cleaning the area and pushing material toward the sumps. Tr. 80. Employees would only be in the area in order to turn on the sumps and use the squeegees and hoses to push material to the sump. Tr. 79-81, 86.

### *Fact of Violation*

I find that the citation should be vacated. The cited standard, as relevant to this case, requires that workplaces and passageways shall be kept clean and orderly. The secondary containment area and staircase were clearly a workplace and passageway. I credit Robinson's testimony that those areas are only entered in the event of a spill for the sole purpose of cleaning the area, which ultimately is what the standard is intended to encourage. In *Nelson Quarries*, I vacated a citation where the Secretary issued a housekeeping citation for material covering a walkway to a screen. *Nelson Quarries, Inc.*, 30 FMSHRC 254 (Apr. 2008) (ALJ). There, in vacating the citation I stated that there was no evidence that miners walked or worked in the area without first cleaning it. Here, cleaning is the *only* work conducted in the cited area.

The purpose of section 56.20003(a) is to encourage mine operators to keep workplaces clean and orderly. When the specific purposes of an area is to contain material which, by its very nature, is not clean and orderly, a mine operator should not be held liable under this standard for allowing that area to become dirty and unorderly. Holding otherwise would be illogical and such an interpretation would lead to the absurd result that mine operators would be in violation of the standard while in the process of cleaning or preparing to clean, which is the activity the standard seeks to encourage. See *Consolidation Coal Co.*, 15 FMSHRC 1555 (Aug. 1993) (Rejecting interpretation of a standard which would defeat the intention of the standard). I credit Robinson's testimony that on the day in question the mine was actively engaged in addressing issues related to the spill, which had just developed that morning. Accordingly, Citation No. 8934664 is **VACATED**.<sup>8</sup>

### **WEST 2016-0691**

This docket includes two citations that involve many of the same facts and circumstances. Accordingly, I address the citations together where appropriate.

Citation No. 9302025 alleges a violation of section 56.16009 of the Secretary's safety standards and asserts that two persons were not clear of a load, i.e., a 700 pound steel pipe spacer, while it was suspended at roughly head height. The persons were steadying the load with

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<sup>8</sup> The transcript of the hearing includes testimony from the inspector indicating that the cited area was barricaded. Tr. 59. The Secretary, in his brief, disputes this testimony and states that the area was not barricaded. Sec'y Br. 10. The Secretary offers no cite in support of the statement. In reaching my decision to vacate this citation I have not relied upon the testimony offered by the inspector on this issue.

their hands while standing on top of a roughly two foot wide cement divider with a drop-off of approximately four feet on each side. This exposed them to being struck should the load fall while persons were next to it. Section 56.16009 requires that “[p]ersons shall stay clear of suspended loads.” 30 C.F.R. § 56.16009.

Inspector Robert Jacobs<sup>9</sup> determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the condition was S&S, that one person was affected, and that Freeport’s negligence was moderate. The Secretary has proposed a penalty of \$783.00 for this alleged violation.

Citation No. 9302026 alleges a violation of section 56.11001 of the Secretary’s safety standards and asserts that a person was not clear of a load, i.e., a 700 pound steel pipe spacer, while it was suspended approximately 15 feet above the individual. The individual had a fall harness on which was attached to a retractable lanyard that crossed under the load to its anchor point approximately eight feet away. If the load had fallen it would have struck the lanyard and pulled the person into contact with the load. Section 56.11001 requires that “[s]afe means of access shall be provided and maintained to all working places.” 30 C.F.R. § 56.11001.

Inspector Robert Jacobs determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be fatal. He determined that the condition was S&S, that one person was affected, and that Freeport’s negligence was moderate. The Secretary has proposed a penalty of \$2,598.00 for this alleged violation.

#### *Summary of the Evidence*

On May 12, 2016 Jacobs observed a 700 pound, three foot diameter pipe spacer being lowered by a boom truck into a steel structure where miners were waiting. Tr. 178-179, 203. The boom operator was approximately 30 to 40 feet away from where the miners were and could not see the load in the structure. Tr. 180-181. The opening of the structure through which the spacer was being lowered was approximately ten feet by ten feet. Tr. 180. Miners inside the structure were standing on top of cement walls, approximately four to five foot tall, that ran parallel to each other and created a trough. Tr. 180, 250. One of the miners standing on the wall inside the structure was observed guiding the spacer into place with his hands while it was being lowered. Tr. 180-181. As Jacobs approached the scene, the miner pulled his hands back from the load, which was at approximately shoulder height at the time. Tr. 181. Jacobs observed no taglines on the load, nor were mine personnel using any other tools to maneuver the spacer while it was suspended. Tr. 181.

Jacobs, when questioned about photos of the miners lowering the spacer into place, agreed that the photos depicted the area in question, but stated that he did not take the photos and

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<sup>9</sup> Jacobs has been with MSHA for over eight years and has been trained on crane safety. Tr. 177-176. Prior to working for MSHA, Jacobs worked nine years at a remote mine where he was in charge of compliance. Tr. 176-177. The remoteness of that mine required that deliveries be made by helicopter via suspended loads. Tr. 176. As a result, Jacobs is familiar with the regulations for suspended loads. Tr. 194

the photos did not reflect the conditions as he observed them that day. Tr. 181-182; GX-20. He explained that, while the photos show a tagline connected to the load and miners using the tagline as well as push-pull sticks, taglines were not connected, nor were miners using push-pull sticks when he observed the scene. Tr. 182-183, 201-202.

Jacobs was concerned that the miner touching the spacer was at risk if the load were to shift or drop, as the load could contact the miner or cause him to fall from the narrow cement wall he was standing on. Tr. 182, 211. A miner who lost his balance, given the narrow wall, would not be able to readjust his center of balance and, in turn, would fall. Tr. 211. Further, if the load were to fall while the miner was guiding it with his hands, Jacobs stated the miner's natural reaction would be to grab the load, which would cause the miner to fall with the load. Tr. 204. A miner not touching the load is at less of a risk of falling with the load. Tr. 204. Jacobs opined that the miners should have put taglines on the load prior to suspending it and used those taglines to maneuver the load. Tr. 183.

Based on his observations, Jacobs issued Citation No. 9302025 because the miner with his hands on the spacer was not clear of the load, as is required by the cited standard. Tr. 178-179. He explained that, in addition to staying out from underneath the load, the standard requires people to stay out of areas where the load could swing or shift if the rigging failed so that if the load were to drop they would not be struck. Tr. 179, 197, 202. While Jacobs had never seen a boom shift with a suspended load, he believed it could occur if the operator misread a signal from one of the miners relaying information to the operator. Tr. 184, 205. On cross-examination Jacobs acknowledged that he did not observe any problems with the rigging or boom, or the training of the boom operator, and explained that, in order for changes to be made to the rigging, a load must be put down. Tr. 196, 205-206. Counsel for Freeport questioned Inspector Jacobs regarding the applicability of an MSHA Program Policy Letter ("PPL"), RX-7. Jacobs testified that the PPL was not clear and disagreed with Freeport's counsel that the PPL allowed miners to approach and touch a suspended load to attach and detach equipment to/from the load. Tr. 197-199.

Shortly after Jacobs observed the miner with his hands on the load he went to look for a supervisor. Tr. 207. During that time, and while the load was being lifted back out of the structure and still above the opening, one of the miners in the structure moved such that his retractable lanyard, which was providing fall protection, crossed the open area below the suspended load. Tr. 187. Jacobs explained that, had the load fallen, it would have most likely come in contact with the lanyard and pulled the person into the load. Tr. 187-188. The men inside the structure were working in an area approximately 12 to 14 feet wide and were standing on top of a concrete wall approximately 10 to 12 inches wide, roughly 4 to 5 feet above the bottom of the trough. Tr. 187-188. The miner at issue had clamped his lanyard onto a beam and crossed over to another side of the opening, roughly 6 to 8 feet from his anchor. Tr. 188-189.

Jacobs explained that this fall protection system, as used here, would not prevent a fall because lanyards, which function like a seatbelt, have to be at near vertical from the anchor point in order to work, and will not catch until a certain degree from vertical, e.g., 30 degrees, is reached during a fall. Tr. 188-190. Here, while the lanyard would likely catch if the miner fell backwards, if a miner fell forwards, being 8 feet away from the anchor point would result in a

miner falling while the lanyard retracted and until that degree from vertical was made, and then swinging the miner into the opposing cement wall once the lanyard did catch. Tr. 188-189. Jacobs noted that the lanyard was beneath the load for only approximately five seconds. Tr. 189.

Based on his observations, Jacobs issued Citation No. 9302026 because the working area in the structure was not safe, as evidenced by the walls the miners were standing on, their lanyard clamping locations, and because a miner's retractable lanyard was exposed under the suspended load. Tr. 186-187, 206. In order to satisfy the standard the operator could have provided beam clamps for the lanyards closer to their working positions. Tr. 190. Jacobs designated the citation as S&S and determined that a fatal injury was reasonably likely to occur because, if the load fell, nothing would have prevented serious injury since the load would have contacted the lanyard and, because the miner's harness attachment point was between his shoulder blades, pulled the miner into the load headfirst. Tr. 191. Jacobs attributed the violation to moderate negligence because there was no supervisor present, which he found to be a mitigating circumstance. Tr. 192.

Mario Rivera<sup>10</sup>, a diagnostic mechanic at the time the subject citations were issued, testified that on the day in question the mine was using a boom truck to lower a sweep and spacer into the structure.<sup>11 12</sup> Tr. 215. Given the dimensions of the opening in the structure the spacer had to be lowered in a vertical position. Tr. 222.

After lowering the sweep into the trough at the bottom of the structure the miners began to lower the spacer into the structure. Tr. 218-219, 221. Rivera testified that a 10 foot tagline was attached to the spacer when it was being lowered and stated that the mine never suspends a load without a tagline. Tr. 226, 236-237, 246. Rivera, who was inside the structure and standing on one of the walls of the trough, reached out when the load was at about chest/belly height and touched the load with his hands to turn the load to connect a "come-along" to an eye-bolt on the

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<sup>10</sup> Rivera is currently the mill supervisor and has worked at the mine since 2014. Tr. 214. He has received training on suspended loads, operating cranes, and rigging through the National Crane Operators, as well as on-site training at the mine. Tr. 216.

<sup>11</sup> Rivera referred to the spacer as a "spool." For clarification's sake, I refer to the object as a spacer throughout this decision. The sweep and spacer are essentially pipe conduits for slurry. Tr. 218-219.

<sup>12</sup> Rivera's testimony relied heavily on describing what was occurring in the photos, GX-20, which were not taken at the time the citations were issued. Tr. 247. At points during Rivera's testimony on direct examination, counsel for Freeport would ask what was occurring in the photos and would then ask about what occurred the first time the spacer was lowered. This resulted in confusing testimony as to what time period Rivera was discussing.

spacer, which would then be used to pull the spacer into place on top of the sweep.<sup>13</sup> Tr. 221, 223-225, 227-228, 238, 246. He did not use the tagline to turn the load because it was on the opposite side of the spacer when the load was lowered to him. Tr. 237. Rivera opined that, had the spacer come loose it would have fallen straight down and he was not worried about it falling. Tr. 240. At that point the inspector arrived and had the miners lift the spacer out of structure. Tr. 227, 229. Rivera was not sure if the inspector saw the tagline. Tr. 246. Mine personnel then conducted a safety meeting where they checked the rigging and found a way to re-rig the load and lower it into place.<sup>14</sup> Tr. 226, 229.

Rivera testified that at no point did his retractable lanyard go under the suspended load, and he never saw the retractable lanyard worn by the other miner in the area go under the load. Tr. 231, 242. Had he seen that occur he would have immediately stopped the job. Tr. 242. Rivera explained that the retractable lanyard systems he and the other miner in the area were wearing would have engaged immediately if one of them fell since the shock absorbers had been removed. Tr. 241-242. On cross-examination Rivera stated that while the lanyard would have prevented him from falling to the ground, it would not have prevented him from swinging. Tr. 252.

#### **Citation No. 9302025**

##### *Fact of Violation*

I find that the citation should vacated. The cited standard requires that miners “stay clear” of suspended loads. There is no dispute that the spacer was a suspended load. For reasons set forth below, I find that the Secretary has failed to meet his burden to establish that Freeport failed to comply with the Secretary’s interpretation of the cited standard.

The Secretary’s regulations do not define what “stay clear of” means in the context of section 56.16009. In *Dawes Rigging & Crane Rental*, 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)).

While the standard requires miners to stay clear of suspended loads, the Secretary, in Program Policy Letter No. P17-IV-01, has crafted an exception which allows miners, under

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<sup>13</sup> A “come-along” is “a small portable winch usually consisting of a cable attached to a hand-operated ratchet.” Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/come-along> (last visited April 24, 2017). Rivera noted that the mine had initially tried to use push-pull sticks as part of the job but, given the small area the miners were working in and the length of the sticks, stopped using them. Tr. 234-235, 247.

<sup>14</sup> Rivera explained that the miners were ultimately able to get the spacer into place by attaching a chain fall to lower the spacer into a horizontal position after it was on the ground and then attaching a “come-along” to an eyebolt on the spacer which was then used to move the spacer horizontally into place. Tr. 227, 234, 236, 249.

certain circumstances, to attach and detach equipment to suspended loads. RX-7. The PPL, the subject of which is “Suspended Loads (30 C.F.R. §§ 56/57.16009),” states that “[i]f the only activity at issue involves miners (including riggers) working near load-attaching equipment in order to attach and detach this equipment from the object or materials being hoisted, and if MSHA determines that miners are not exposed to a foreseeable risk of being struck by load attaching equipment, MSHA does not intend to cite under §§ 56/57.16009.”<sup>15</sup> RX-7 p. 2.

The Secretary, in his brief, concedes that the standard “does not unequivocally . . . forbid the use of hands to position a load[.]” Sec’y Br. 14. However, he argues that “a reasonably prudent person familiar with the mining industry and the protective purposes of the standard’ would certainly not expect to be in compliance with the standard when miners are present within the arc of the load, directly under the load, or in the area that would be affected should the load fall.” Sec’y Br. 14 (citing *CCC Group, Inc.*, 34 FMSHRC 1192, 1198 (May. 2012) (ALJ)). I disagree when considering the facts presented here.

At hearing the inspector testified that the PPL was not clear on whether the exception for allowing attaching or detaching of equipment applied to “suspended loads.” Tr. 198-199. While the PPL could have been better crafted, I find that it clearly applies to the attaching or detaching of equipment to suspended loads. Otherwise, the PPL would serve no purpose, since there is no need to stay clear of unsuspended loads that would require an exception under this standard.

I credit Rivera’s testimony that he approached and touched the load for the sole purpose of attaching the “come-along” to an eye-bolt on the spacer, which would then be used to pull the spacer into place on top of the sweep. The PPL defines “load attaching equipment” as being equipment “such as, the load blocks, ropes, slings, shackles, and any other ancillary attachment.” While a “come-along” is not explicitly listed, I find that it fits within the category of “other ancillary equipment.”

Neither the Secretary nor the Commission is bound by the policy statements included in PPLs. However, this PPL provides a reasonable interpretation of the cited standard. That interpretation allows for miners to contact suspended loads for the purpose of attaching and detaching equipment. As relevant to this matter, it allowed for the miner to contact the load for the purpose of attaching the come-along. Mine operators should not be held liable for violations of mandatory standards where their actions fit squarely within interpretations published by the Secretary. I find that the Secretary has failed to meet his burden and that the citation should be **VACATED**.<sup>16</sup>

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<sup>15</sup> While the PPL became effective on February 6, 2017, I find it can be used to interpret the safety standard. This PPM was issued to clarify the standard rather than to change its meaning.

<sup>16</sup> While not critical to my decision, I agree with Rivera that the load was suspended above an opening and, had the load fallen, it would have fallen straight down into that opening and not struck miners standing on the walls around the opening, which is ultimately the concern of the cited standard. *See CCC Group, Inc.*, 34 FMSHRC 1192, 1198 (May 2012) (ALJ) (stating that the “cited standard is aimed at preventing a miner from being struck by a suspended load.”).



## Citation No. 9302026

### *Fact of Violation*

I find that the Secretary has established a violation of the cited standard. The cited standard requires that safe means of access be provided and maintained to all working places. There is no dispute that miners were in the area to install the sweep and spacer. As a result, the area was a working place. I find that safe access was not provided in the area because of the passage of the lanyard under the suspended load and the position of the miner's lanyard anchor.

I credit Jacob's testimony that a miner was positioned such that his lanyard extended under the suspended load. I further credit his testimony that if the lanyard were struck by the suspended load the miner would have been pulled into the opening and potentially into the load. Allowing a miner's lanyard to pass under a suspended load does not constitute safe access.

Freeport argues that the inspector did not observe the actual condition and, instead, only speculated that the lanyard passed under the suspended load. Freeport Br. 15. I do not believe that accurately reflects the testimony. I find that, while Jacob's testimony appears to indicate he did not see the miner move from one position to the other, he did see the lanyard positioned under the suspended load. Rivera testified that his lanyard did not move under the suspended load and he did not observe the lanyard of the other miner in the area pass beneath the load. However, Jacobs testified that the condition existed for only "[f]ive seconds or so. Not very long." Tr. 189-190. Given the short duration that the lanyard was under the suspended load, I find it likely Rivera simply did not see the condition.

I also find that safe access was not provided because of the position of the anchor points for the retractable lanyard worn by at least one miner. Freeport disputes that miners who fell from their locations on the wall would have struck the bottom of the trough. Freeport Br. 16. However, Rivera did not dispute that the lanyard would not prevent a miner from swinging if he fell. I credit Jacobs' testimony that, given the location of the miner's anchor point approximately eight feet away, a miner who fell into the opening would have swung and struck a concrete wall, which is unsafe. See *Rock N Road Quarry*, 36 FMSHRC 1278 (May 2014) (ALJ). The Secretary has proven that safe access was not provided.

### *Gravity & 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). An experienced MSHA inspector's opinion that a

violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

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.

The “reasonably likely” provision does not require the Secretary to prove that an injury was “more probable than not.” *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)(emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

I find that the Secretary established that the violation was S&S and that the gravity was serious. I have already found that Freeport violated the standard. Here, the hazard to which the violation allegedly contributes is two-fold. First, the location of one miner’s lanyard under the suspended load exposed the miner to having his lanyard hit by a falling suspended load, which in turn would cause the miner to be pulled into the opening and potentially striking the load. The Secretary presented no evidence that this was anything but an isolated occurrence. I credit Rivera’s testimony that, had he seen a lanyard positioned under the suspended load, he would have stopped the job. Moreover, Jacobs testified that he saw no problems with the rigging, boom, or the training of the boom operator. Accordingly, I find that this particular hazard was unlikely to occur. However, that is not the end of the analysis.

Second, the location of the miner’s lanyard anchor as relative to the miner’s position exposed the miner to falling and swinging into a concrete wall. I credit Jacob’s testimony that miners who lost their balance would not be able to regain it while standing on the narrow walls and, in turn, would fall. The only protection from falling was the retractable lanyard system. Here, while the lanyard may have prevented a miner from striking the ground, it would not have prevented a miner from swinging into the concrete wall. A miner falling from an elevated surface and swinging into a concrete wall is likely to sustain an injury of a reasonably serious nature.

### *Negligence*

The Commission has determined 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 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). The Commission analyzes negligence by considering 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 safety standard. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

I find that Freeport was moderately negligent. Inspector Jacobs determined Freeport was moderately negligent and that the lack of a supervisor in the area at the time was a mitigating circumstance. I agree. Freeport had conducted a job hazard analysis and was using pre-established anchor points for the lanyards. While the location of those anchor points may not have been appropriate, Freeport had taken steps in an effort to provide a safe working place. I find that moderate negligence is appropriate. I assess a penalty of \$2,600.00 for this violation.

### **WEST 2017-0002**

This docket includes two citations that involve many of the same facts and circumstances. Accordingly, I address the citations together where appropriate.

Citation No. 8833133 alleges a violation of section 56.16007(a) of the Secretary's safety standards and asserts, in pertinent part, that a miner did not use a tagline while steadying a suspended load by hand as it was placed in the bed of a truck, thereby exposing persons to the hazard of a fall or shifting of the load, which would have caused blunt force permanently disabling injuries. The citation further alleges that, while a tagline was present at some point, it fell off the load. Section 56.16007(a) requires that "[t]aglines shall be attached to loads that may require steadying or guidance while suspended." 30 C.F.R. § 56.16007(a).

Inspector Sidney Garay<sup>17</sup> determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be permanently disabling. He determined that the violation was S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$918.00 for this alleged violation.

Citation No. 8833134 alleges a violation of section 56.16009 of the Secretary's safety standards and asserts, in pertinent part, that a miner did not use a tagline while steadying a suspended load by hand as it was placed in the bed of a truck. As a result, the miner was not clear of the load, which exposed him and other persons working nearby to the hazard of a fall or shifting of the suspended load. Section 56.16009 requires that "[p]ersons shall stay clear of suspended loads." 30 C.F.R. § 56.16009.

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<sup>17</sup> Inspector Garay has been with MSHA for 15 years and currently supervises the Mesa Arizona South field office. Tr. 255. In addition to performing approximately 24 mine inspections a year he is responsible for reviewing the performance of his inspectors, interacting with the mining community, making field visits to operators, and providing information to industry groups. Tr. 256. He has worked as an accident investigator and received training, both while with MSHA and prior to his employment with MSHA, regarding safe crane operation and suspended loads. Tr. 256-257, 281. He currently holds no certifications with respect to cranes. Tr. 258, 282.

Inspector Garay determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be permanently disabling. He determined that the violation was S&S, that one person was affected, and that Freeport's negligence was moderate. The Secretary has proposed a penalty of \$918.00 for this alleged violation.

### *Summary of the Evidence*

On July 5, 2016 Freeport personnel were using a boom truck to lift materials up to and down from an elevated surface on a large shovel.<sup>18</sup> The materials<sup>19</sup> were being loaded onto a pallet which was rigged with a nylon sling that could be lifted by the boom. Tr. 324.

Inspector Garay was at the mine to conduct a spot inspection for an issue unrelated to this matter. Tr. 260, 282-283. While traveling in a vehicle with one of the mine's representatives from the health and safety department, Garay observed a miner in the bed of the boom truck. Tr. 261-262, 282. The miner was approximately four feet off the ground and not using fall protection. Tr. 263. According to Garay, the miner was under a load suspended from the boom, had his arms extended with hands elevated above his head and was touching the suspended load. Tr. 261-262, 268, 285-286. Garay initially observed the miner's hands holding both the side and bottom of the load. Tr. 285. As the load was lowered the miner's hands moved from holding the bottom and side of the load, to palming the load. Tr. 303. Garay recalled that the suspended load did not have a tagline on it and the miner's palms were out as he touched the load and guided it into place on the bed of the boom truck. Tr. 270, 285, 298. Garay was approximately 100 to 200 feet away from the miner when he first observed the condition. Tr. 267, 287. By the time Garay and the mine representative arrived at the boom truck, the load was already in the bed of the truck. Tr. 261, 287.

According to Garay, the miner in the back of the boom truck said that a tagline had fallen off of the load at some point and the miner did not think it was needed. Tr. 262, 297. Garay found a tagline laying on the ground next to the boom truck. Tr. 262.

Garay issued two citations based on his observations. First, he issued Citation No. 8833133 because, although a tagline had initially been attached to the suspended load, it was no longer on the load. Tr. 262. Garay designated the citation as S&S and determined that a permanently disabling injury was reasonably likely to be sustained because the miner was standing underneath the suspended load, with his hands extended above his head steadying the load. Tr. 265. Based on his experience the load could shift or fall, or the boom operator could accidentally hit a button triggering the load to jerk, which could cause the load to strike the miner and/or make the miner fall off of the truck and cause permanently disabling injuries such as a fracture or blunt force injuries. Tr. 265-266. He conceded that it was not windy that day and that

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<sup>18</sup> The boom truck was equipped with a crane attached to the frame of the truck. Tr. 263. The crane, or boom, can be operated by a person standing on either side of the truck. Tr. 263. The truck bed was approximately 8 to 10 feet wide, and 20 to 24 feet long. Tr. 263.

<sup>19</sup> While Garay testified that the pallet was loaded with multiple boxes that were not broken down, Tr. 264, 286, Freeport's witnesses testified that the boxes were broken down and stacked on the pallet. This dispute of fact does not affect my analysis. The boxes were empty.

the miner was only maneuvering the load by hand for a moment, but could have used a tagline to do the job. Tr. 265, 270. Garay attributed the violation to moderate negligence given that there was no supervision of the job by agents of Freeport, which he believed was a mitigating circumstance. Tr. 266.

Garay explained that he issued the second citation, Citation No. 8833134 because the miner was not clear of the suspended load since he was touching it with his hands as the load was above his head. Tr. 267. According to Garay, in order to comply with the standard, a miner should never touch a suspended load. Tr. 268, 291. He explained that there is not enough time to react when a load falls free and he has seen miners who touch loads as they are being brought to the ground have their hands crushed. Tr. 268-269.<sup>20</sup> Garay designated the citation as S&S and determined that a permanently disabling injury was reasonably likely to be sustained for essentially the same reasons set forth in the first citation, i.e., the miner was not clear of the load and could be struck by the load if it shifted or fell. Tr. 270-272. He noted that the mine had failed to use the tools designed to prevent a miner from being next to a suspended load, e.g., taglines and push-pull sticks, despite the fact that a tagline had been present at one point. Tr. 271. Garay attributed the violation to moderate negligence given that there was no supervision of the job by agents of Freeport, which he believed was a mitigating circumstance. Tr. 272.

Luis Bernal<sup>21</sup>, who was a health and safety specialist for Freeport at the time in question, testified that he was the mine representative traveling with the inspector that day. Tr. 305-306. Bernal stated that, while traveling in a truck with the inspector, he could see the suspended load at approximately “mid-cab high, mid-shovel height” from about 300 to 400 yards away. Tr. 309-310. At that point no one was guiding the load and he could not tell if there was a tagline on it. Tr. 310-311. He first saw the miner touching the suspended load when the pallet was about waist high. Tr. 308, 315. He could not tell if the miner’s hands were fully extended or close to his body. Tr. 317. When Bernal and Garay arrived at the miner’s location, Garay asked where the tagline was and the miner said it was on the ground and he had taken it off the load. Tr. 313.

Bernal explained that although miners are taught to never get under a suspended load, miners may touch a suspended load and miners typically do so to position a load when it is at the lowest point. Tr. 311-312. In all his time as a health and safety specialist, he never saw someone stand under a suspended load. Tr. 312. Here it appears that the miner was touching the load to position it on the truck bed. Tr. 308-309. Bernal testified that if he had seen someone under a load with their hands above their head guiding the load down it would have been his responsibility to stop the job and he would have had a conversation with the miner and their supervisor. Tr. 311. While the mine tries to utilize taglines and push-pull sticks when they have the opportunity, there are situations when that is not possible. Tr. 312. On cross-examination,

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<sup>20</sup> Counsel for Freeport questioned Inspector Garay regarding the applicability of the MSHA PPL, RX-7, discussed above in the context of the suspended spool. As mentioned above, the PPL applies to attaching or detaching equipment.

<sup>21</sup> Bernal has been with Freeport for over five years. Tr. 305. He is currently a conveying supervisor, but was a health and safety specialist prior to that. Tr. 305.

Bernal conceded that it would not have been difficult to use push-pull sticks or taglines to maneuver or adjust this particular load. Tr. 315-316

Arthur Laguna<sup>22</sup>, a diagnostic mechanic at the mine, testified that he was the miner in the bed of the boom truck at the time in question. Tr. 322. Laguna stated that he was not standing in the swing radius of the load while it was coming down. Tr. 326-327. While the load had a tagline on the “bottom end of the pallet”<sup>23</sup> as it was being lowered, he removed the tagline because it was in an awkward position for final placement, and threw it on the ground so that the load would not set on top of the tagline when the load was placed. Tr. 327-329. Laguna acknowledged that, in the alternative, the tagline could have been tied to the side of the pallet in a position where it would have been useful to him. Tr. 339. He explained that the pallet holding the material, which was approximately four feet by four feet, was about knee high when it reached him, and he gave directions to the boom operator so that the load was not above him. Tr. 324-325, 329, 334, 337. Laguna stated that he would never position himself under a suspended load since the load could fall. Tr. 329-330.

Laguna explained that, while the bed of the truck was loaded with other materials that had already been lowered down, he had left a clear path to walk and enough room to set the pallet in place. Tr. 325, 327-328. To do so, once the load reached a certain point, he had to touch it to maneuver it into a position for final placement on the truck. Tr. 325, 339. Laguna believes that he used only his palms to place the load and that his feet were clear of the load. Tr. 325-326, 333. He acknowledged it was possible that if the boom operator shifted the boom he would be knocked off the truck. Tr. 337-338. He agreed that he had used the same method for final placement of other materials that had been lowered from the shovel via the boom truck. Tr. 338-339.

Laguna acknowledged that could have done the job safely with a push-pull stick and that the sticks are designed to help with suspended loads. Tr. 329, 336-337. Nevertheless, on redirect he stated that, based on his experience, the sticks create a hazard because if the load shifts the stick could push him. Tr. 340.

Laguna testified that the inspector arrived after he placed the load and disconnected it. Tr. 331. He informed the inspector that the load had a tagline he had taken off and that the mine allows persons to touch suspended loads in order to place them. Tr. 331-332. If he had thought anything about the job was unsafe he could have stopped the process, but he thought he was clear of the load at all times. Tr. 329-330. On cross-examination, when asked if he could have moved the load after it was set down, he responded that he could not have done so because there was not

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<sup>22</sup> Laguna has been at Sierrita for six years and previously worked at other Freeport mines. Tr. 319. As a diagnostic mechanic he is responsible for maintaining equipment. Tr. 320. He has been in the mining industry for 28 years. Tr. 319. He has had training on suspended loads, and handling and working with suspended loads is a regulator part of his job. Tr. 320-321.

<sup>23</sup> Laguna’s testimony that the tagline was at the “bottom end of the pallet” is somewhat ambiguous. On one hand it could mean that the tagline was attached to underside of the pallet, or it could be interpreted to mean the tagline was attached near the bottom of the pallet on the end.

much room for him to work given that there was only about a two feet by six feet area for him to stand. Tr. 335-336. Moreover, he acknowledged that, while he left an exit way in case the load unexpectedly shifted, exiting could mean jumping off of the truck. Tr. 340-341.

### **Citation No. 8833133**

#### *Fact of Violation*

I find that the Secretary has established a violation of the cited standard. The cited standard requires that suspended loads have taglines when the loads may require steadying or guidance. There is no dispute that the Laguna had to guide the suspended load into its final placement. Laguna testified that he removed the tagline before guiding the load into its final placement. Accordingly, a tagline was not attached to the load while it was being guided, as is required under the standard.

#### *Gravity & S&S*

I find that the Secretary has not established that the violation was S&S. I have already found that Freeport violated the standard when a tagline was not attached to the load while it was being guided. Here, the hazard to which the violation allegedly contributes to is a miner being unable to safely steady or guide a load due to the lack of a tagline. A tagline would not have been of much use in this instance because Laguna could not pull the pallet into position with the tagline. A stick or other device would have been more useful.

The Secretary failed to establish that there existed a reasonable likelihood that, under the facts of this case, a miner would be unable to safely steady or guide this load due to the lack of a tagline. For the same reasons discussed below in the context of the “staying clear” citation, I find that it was unlikely Laguna would be struck by the suspended load. In addition, I credit Laguna’s testimony that the location of the tagline on the load when it was attached was such that it could not be used to place the load into position on the truck. As a result, the lack of tagline did not affect the likelihood of the occurrence of the hazard. Moreover, and consistent with my below findings on the “staying clear” citation, an injury was unlikely to occur as a result of this condition. As a result the violation was not S&S. I find that the gravity was not serious.

#### *Negligence*

I find that Freeport was moderately negligent. Inspector Garay determined Freeport was moderately negligent and that the lack of a supervisor in the area at the time was a mitigating circumstance. While Laguna testified that he knowingly removed the tagline before using his hands to position the load in the bed of the truck, which could potentially weigh in favor of a higher negligence designation, I defer to Inspector Garay’s determination. I assess a penalty of \$300.00 for this violation.

## Citation No. 8833134

### *Fact of Violation*

I find that the Secretary has proven a violation of the cited standard. There is no dispute that the miner was touching the load and guiding it into place.<sup>24</sup> The Secretary, in his brief, concedes that the standard “does not unequivocally . . . forbid the use of hands to position a load[.]” Sec’y Br. 14. In determining whether a person is “clear” of a suspended load the court must consider the “particular facts surrounding the violation.” *Dawes Rigging*, 36 FMSHRC at 3078. Here, the miner was operating in a small area and testified that “exiting” the area if the load shifted would likely require him to jump off the truck. I hold that although the safety standard does not forbid a miner from touching a suspended load or standing close to a suspended load in all circumstances, the particular facts of the situation are critical. In this instance, Laguna was working in a very small area on the back of a truck, with a four foot drop off to the ground, directing a suspended load into place. Given the confined space in which he was working, it was critical that Laguna remain away from the load until it was just above the bed of the truck. I find that he was not “clear” of the load. The Secretary has established a violation.<sup>25</sup>

### *Gravity & S&S*

I find that the Secretary has not established that the violation was S&S. I have already found that Freeport violated the standard when the miner touched the suspended load in order to guide it into place. Here, the hazard to which the violation allegedly contributes to is a miner being struck by a suspended load.

The Secretary failed to establish that there existed a reasonable likelihood that, under the facts of this case, Laguna was likely to be struck by this suspended load. Conflicting testimony was offered by each of the three witnesses who described the events of that day. Inspector Garay testified that he observed the miner with his hands above his head reaching up and touching the load. He made this observation from a moving vehicle approximately 100 to 200 feet away.

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<sup>24</sup> Freeport, in a footnote, cites the decision of a judge with the Occupational Safety and Health Review Commission (“OSHRC”) for the proposition touching a suspended load for final placement may be necessary. Freeport Br. 18. OSHRC ALJ decisions are not binding on this court and that decision was not “examined and adopted by OSHRC or a reviewing court.” *H. Bittle & Son, Inc.*, 38 FMSHRC 2446, 2451 n. 7 (Sept. 2016) (ALJ). Accordingly, I decline to consider that decision in reaching my finding in this matter.

<sup>25</sup> Freeport argues that Citation No. 8833133 and Citation No. 8833134 are duplicative because they do not impose separate and distinct duties on the operator. Freeport Br. 19-20. I disagree. Section 56.16007(a), at issue in Citation No. 8833133, requires that taglines be attached to loads if the loads will require steadying or guidance, while Section 56.16009, at issue in the present citation, requires that miners stay clear of loads. These are clearly different duties, as evidenced by the fact that Freeport could have complied with section 56.16007(a) had the miner not removed tagline, while at the same time being in violation of 56.16009 by touching the suspended load while it was too high above the truck-bed.



Bernal testified that he first saw the suspended load being lowered from 300 to 400 yards away while in the vehicle with the inspector and that the miner in the bed of the boom truck did not touch the load until the pallet was at about waist height. Laguna testified that he would never position himself under a suspended load and that the pallet was at approximately knee height when he first touched it. Moreover, he stated that his feet were clear of the load and that he only touched the load with his palms out.

For purposes of determining whether the violation was S&S, I will assume that Laguna first touched the load with his palms out while it was at about eye level or slightly higher. The hazard that the safety standard is designed to prevent in this instance is the risk that Laguna would be hit by the suspended load and knocked off the truck. Given the particular facts presented, as discussed above, I find that it was not reasonably likely that Laguna would be struck by the load. It was not windy that day, the boom operator was in the final process of lowering the load, and Laguna was steadying the load and helping to move it into place as it was lowered. Although it was possible that the load of empty boxes could shift, it was not reasonably likely. “[A] vague observation that suspended loads move in unpredictable ways” is insufficient to establish an S&S violation. *Dawes Rigging*, 36 FMSHRC at 3078. Of course, if I assume that the load shifted and moved out of position or if I assume that the boom operator accidentally bumped the wrong lever, the load could strike Laguna. However, such events were unlikely. If he were to be struck, he would likely suffer a lost work-days type of injury.

The Secretary failed to establish that an injury was reasonably likely to be sustained. The S&S designation is not appropriate, but the violation was serious.

*Negligence*

I find that Freeport was moderately negligent. Inspector Garay determined Freeport was moderately negligent and that the lack of a supervisor in the area at the time was a mitigating circumstance. I affirm Inspector Garay’s negligence determination. I assess a penalty of \$500.00 for this violation.

**II. SETTLED CITATIONS**

The Secretary filed a Motion to Approve Settlement of the other citations in the above captioned docket. The proposed settlement is set forth in the table below:

<b>Citation/Order</b>	<b>Proposed Penalty</b>	<b>Settlement Amount</b>	<b>Other Modifications to Citation/Order</b>
Docket No. WEST 2016-0414			
8934448	\$138.00	\$138.00	None
8934275	\$108.00	\$108.00	None
8934269	\$138.00	\$138.00	Modify from Moderate Negligence to Low Negligence
<b>Docket Totals:</b>	<b>\$384.00</b>	<b>\$384.00</b>	

Docket No. WEST 2015-0873			
8929291	\$392.00	\$392.00	Modify from Moderate Negligence to Low Negligence
<b>Docket Totals:</b>	<b>\$392.00</b>	<b>\$392.00</b>	
<b>Overall Totals:</b>	<b>\$776.00</b>	<b>\$776.00</b>	

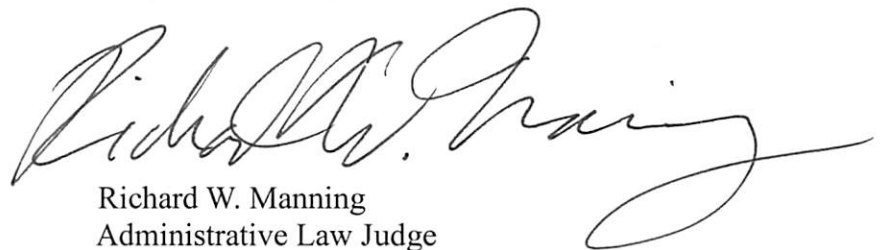
I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The Secretary's Motion for Approval of Settlement is **GRANTED**.

### III. 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). The parties have stipulated that Freeport is a large operator and the penalties will not affect its ability to remain in business. The citations which were not vacated were issued in May and July of 2016. Freeport had approximately 68 violations in the fifteen months preceding the issuance of these citations, roughly 17 of which were S&S. The gravity and negligence are discussed above. The citations were timely abated. Based on the penalty criteria I assess a total penalty of \$3,400.00 for the citations addressed at hearing.

### III. ORDER

For the reasons set forth above, Citation Nos. 8929292, 8929293, 8929294, 8929295, 8934664, and 9302025 are **VACATED**. Citation No. 9302026 is **AFFIRMED** as issued. Citation Nos. 8833133 and 8833134 are **MODIFIED** as set forth above. Freeport-McMoRan Sierrita, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$4,176.00.00 for both the settled citations and those addressed at hearing within 40 days of the date of this decision.

  
 Richard W. Manning  
 Administrative Law Judge

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