THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 12 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2016-463-M A.C. No. 16-01536-414747
v.	Docket No. CENT 2016-519-M A.C. No. 16-01536-417024
SOUTHERN AGGREGATES, LLC, Respondent	Mine: Plant 9

DECISION

Appearances: Jim DoByns, Conference and Litigation Representative, U.S. Dept. of Labor, MSHA, Dallas, Texas; Christopher Lopez-Loftis, Esq., U.S. Dept. of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Justin Winter, Esq. and Bryan Carey, Esq., Conn Maciel Carey PLLC, Washington, D.C., for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Southern Aggregates, LLC, ("Southern Aggregates"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $214.00 for two alleged violations of his mandatory safety standards.

A hearing was held in New Orleans, Louisiana. The following issues are before me: (1) whether Southern Aggregates violated the cited standards; (2) whether the violations were attributable to the level of gravity alleged; (3) whether the violations were attributable to the degree of negligence alleged; and (4) the appropriate penalty. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **VACATE** one citation, **AFFIRM** one citation, as modified, and assess a penalty against Respondent.

I. FACTUAL BACKGROUND

Southern Aggregates operates Plant 9, a surface sand and gravel mine in Amite, Louisiana, which employs 11 miners. Ex. R-1 at 1. Southern Aggregates' mining process involves dredging sand from a pond into two plants consisting of belt lines, screw conveyors, a log washer, and a scale house. Tr. 20. Kevin Black, Plant 9 Vice President and General Manager, and Duane "Bull" Lanier, Plant 9 Manager, were working at the Plant at the time of the inspection. Tr. 79, 81; Ex. R-1 at 2.

On May 26, 2016, MSHA Inspector O'Neal Robertson, accompanied by Bull Lanier, conducted a regular inspection of Plant 9 that resulted in three citations, two of which are at issue in this proceeding: failure to replace a discharged fire extinguisher in the cab of an excavator (Ex. P-1); and failure to maintain a guard on the pea gravel beltline to withstand the effect of normal operation (Ex. P-3). Tr. 19, 21.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8964279

Inspector Robertson issued 104(a) Citation No. 8964279 on May 26, 2016, alleging a violation of section 56.4203 that was "unlikely" to result in an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Southern Aggregates' "moderate" negligence.[1] The "Condition or Practice" is described as follows:

> Fire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge. The five lbs. fire extinguisher in the John Deere excavator showed recharged on the gauge. The excavator is used as needed to do various clean up jobs around the plant. A miner has been using this machine since the start of his shift. A miner could receive smoke or burn type injuries from not being able to extinguish a fire at its early stages.

Ex. P-1. The citation was terminated on May 26, after Southern Aggregates replaced the extinguisher in the excavator.

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[1] 30 C.F.R. § 56.4203 provides that "[f]ire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge." The Secretary's unopposed Motion to Plead in the Alternative a violation of 30 C.F.R. § 4200(b)(2) was granted on October 21, 2016.

30 C.F.R. § 56.4200(b)(2) provides that "onsite firefighting equipment shall be [s]trategically located, readily accessible, plainly marked, and maintained in fire-ready condition."

1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

The Secretary contends that Southern Aggregates failed to replace a fire extinguisher which, according to its pressure gauge, had been discharged. In the alternative, the Secretary argues that the gauge reading demonstrated that the extinguisher was not being maintained in fire-ready condition because a miner would choose not to use it in the event of a fire. Sec'y Br. at 6-7.

Southern Aggregates, relying on the National Fire Protection Association's Standard for Portable Fire Extinguishers, argues that a gauge reading, alone, is insufficient to establish a violation of either standard, and that the fire extinguisher had not been discharged and was fire ready. Resp't Br. at 7-9 (citing 10 NATIONAL FIRE PROTECTION ASSOCIATION, STANDARD FOR PORTABLE FIRE EXTINGUISHERS §§ 7.1.7.1.1, 7.2.2, A.7.7.1.3 (2013 ed.)). It cites several cases in support of its position that the operator can rebut evidence of discharge with other indications of an extinguisher's condition. Resp't Br. at 6-8; *see Warren E. Manter Co., Inc.*, 11 FMSHRC 805 (May 1989) (ALJ) (dismissing a violation of section 56.4203 where the inspector failed to note an extinguisher's pressure gauge reading, and the operator averred that the extinguisher was full); *Paul Hubbs Constr. Co.*, 9 FMSHRC 1368 (Aug. 1987) (ALJ) (upholding a violation of section 56.4200(b)(2) where the inspector observed a "completely discharged" fire extinguisher in a trailer, and the operator failed to prove that it had been discharged by vandalism); and *Brighton Sand & Gravel*, 13 FMSHRC 127 (Jan. 1991) (ALJ) (upholding a violation of section 56.4203 by relying upon the low gauge reading).

Inspector Robertson came to MSHA in 2015, having worked in the mining industry for 21 years, with experience and training in diesel engine maintenance and fire suppression. Tr. 16-18. He had performed approximately 160 MSHA inspections, and cited fire extinguisher and guarding violations. Tr. 17-19. Robertson testified that on May 26, he inspected the cab of a Southern Aggregates excavator that had been operated recently, and observed that the gauge on a five-pound fire extinguisher displayed "recharge."[2] Tr. 24, 45, 62; Exs. P-1 at 2, P-2 at 1; Ex. R-1 at 5. He stated that the extinguisher showed no signs of damage, that the firing pin and zip-tie were intact, that he was not told that it had been used, and that Southern Aggregates diligently performs preshift examinations. Tr. 30, 45-46. He opined that the excavator operator was exposed to burn and smoke inhalation hazards because the extinguisher, possibly partially or even fully inoperable, may have been ineffective in timely extinguishing a fire. Tr. 28-29. He determined that such injury would have been unlikely, however, because the excavator operator

[2] Robertson's testimony variously refers to the gauge as indicating either "discharge" or "recharge." Both terms have the same meaning and effect.

would have been able to leave the cab in the event of a fire, and other fire extinguishers were accessible. Tr. 29.

He testified that section 56.4203 requires operators to replace or recharge fire extinguishers that have been discharged, and that section 56.4200(b)(2) requires operators to maintain fire extinguishers in ready-to-use condition. Tr. 24. He explained that a fire extinguisher is operated by removing the firing (or retaining) pin, which breaks the zip-tie holding the pin in place, thereby allowing the trigger to be squeezed to release the fire extinguishing chemical. Tr. 47-49. Finding an intact zip-tie and firing pin, without more, he testified, is an insufficient basis for concluding that the extinguisher had not been discharged, considering that he has personally encountered extinguishers that have leaked propellant because of being jostled around. Tr. 67-71, 73-74. Nor would such leaks be detectible by weighing the extinguisher, he stated, because propellant weighs very little compared to the extinguishing chemical which accounts for most of its weight. Tr. 75. Instead, he explained, miners are trained to rely upon the gauge reading, which indicates the pressure of the gaseous propellant that dispenses the extinguishing chemical and, even in a fire emergency, miners would seek an alternative to using an extinguisher indicating that it needs recharging. Tr. 25-26, 70-71.

VP Kevin Black testified that he instructed an employee to deliver the cited extinguisher to him on the day of the inspection. Tr. 85. He opined that the gauge was on "recharge" because it may have been faulty, as opposed to the extinguisher having been discharged. Tr. 87. He reached that conclusion because the fire extinguisher was in good condition, the firing pin and zip-tie were intact, its weight was consistent with that of a fully charged extinguisher, the preshift examination noted no defects and, based upon his management position, any event requiring its discharge would have been reported to him. Tr. 82-86. Furthermore, he noted that miners would have replaced the extinguisher had the "recharge" gauge reading been observed. Tr. 104.

Robertson and Black both testified that during the later post-inspection close-out meeting, Black told Robertson that he had weighed the fire extinguisher and found the weight to be consistent with that of a fully-charged unit, i.e., slightly less than five pounds. Tr. 30-31, 49-50, 86. Robertson also corroborated Black's testimony that he offered to discharge the extinguisher to prove it operable, but that Robertson declined to consider its weight or a discharge test because of his uncertainty as to whether the extinguisher had been switched. Tr. 50, 88-89. Black stated that he was of the impression that Robertson would be issuing the citation in any case and, therefore, he did not discharge it. Tr. 88-89.

It is uncontested that the pressure gauge of the fire extinguisher was in the "recharge" position, that the extinguisher was otherwise in good condition, that its weight was slightly less than five pounds, and that the firing pin and zip-tie were intact. I credit Black's testimony that he would have been made aware of any event involving its intentional discharge and, in conjunction with Robertson's testimony attesting to Southern Aggregates' diligence in performing examinations, and Black's assertion that the May 26 preshift examination revealed no defects on it, I find that the low pressure reading manifested some time after the preshift

examination, and that the cause was other than intentional discharge. Simply put, the Secretary has not presented sufficient evidence to establish that Southern Aggregates discharged the fire extinguisher, triggering a duty to recharge or replace it, as opposed to the "recharge" indicator being a condition of leaked propellant or a faulty gauge. Therefore, I find that the Secretary has failed to establish a violation of section 56.4203.

Such is not the case, however, when analyzing the facts under the alternatively pled standard, section 56.4200(b)(2), which requires Southern Aggregates to maintain its fire extinguishers in fire-ready condition. Robertson offered credible, unrebutted testimony that miners are trained to rely on the gauge and, therefore, would forego use of a fire extinguisher indicating "recharge" in the event of an emergency. This position is persuasive, given that fire emergencies generally leave no time for testing of firefighting equipment. Southern Aggregates' reliance on sections of the Standard for Portable Fire Extinguishers, cited to contend, in essence, that a fire extinguisher may be fire ready even if the gauge is malfunctioning, is misplaced. Those sections merely enumerate criteria for inspecting fire extinguishers, including weighing the units and checking their gauges; they do not establish that fire extinguishers are fire ready where the gauges indicate otherwise. Similarly, none of the cases cited by the operator undermines the central importance of reliance on the pressure gauge to determine fire readiness. On the contrary, the citation in *Manter* was vacated precisely because the inspector failed to check the gauge. Thus, Robertson's sole reliance on the fire extinguisher's gauge is consistent with the reasonable proposition that an extinguisher cannot be fire ready where a miner cannot rely upon the visual cue provided, especially during an emergency, to alert him immediately to its condition. Moreover, by Southern Aggregates' own account, its miners would have replaced the extinguisher had they noticed the gauge reading. Accordingly, the Secretary has established a violation of section 56.4200(b)(2).

2. Gravity and Negligence

The record establishes the unlikelihood of the excavator operator suffering injuries resulting in lost workdays or restricted duty from smoke inhalation and burns in the event of a fire, because of ease of egress from the cab and accessibility of other fire extinguishers. The Secretary argues that Southern Aggregates was moderately negligent under either standard because, as mitigation, it examines its fire extinguishers daily. Sec'y Br. at 8. As noted above, the preshift examination of the fire extinguisher was unremarkable, and the "recharge" indicator developed as the excavator was operating during the shift. No prudent operator, exercising reasonable care, would have known of the gauge movement under these circumstances and, accordingly, I find that Southern Aggregates was not negligent in violating the standard.

B. Citation No. 8964281

Inspector Robertson issued 104(a) Citation No. 8964281 on May 26, 2016, alleging a violation of section 56.14112(a)(1) that was "unlikely" to result in an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by

Southern Aggregates' "moderate" negligence.[3] The "Condition or Practice" is described as follows:

> Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and shall be securely in place while machinery is being operated except when testing or making adjustments which cannot be performed without removal of the guard. The guard for the p gravel stacker belt had fallen off exposing the rotating shaft on the head pulley. The opening on the guard measured 3 ft. wide x 4½ ft. long. Miners come in this area as needed to do maintenance and repairs. A miner could receive entanglement type injuries from contacting rotating machinery.

Ex. P-3. The citation was terminated on May 26, when Southern Aggregates secured the guard in place.

1. Fact of Violation

The Secretary contends that a head-pulley guard had detached from its mounting points, creating an opening for miners to inadvertently contact moving parts. Sec'y Br. at 9-10. The Secretary cites two cases in which violations were found under section 56.14112(b) to support his contention that evidence of the detached guard, by itself, is sufficient to find a violation under section 56.14112(a)(1). Sec'y Br. at 10-11 (citing *Washington Rock Quarries, Inc.*, 28 FMSHRC 1080 (Dec. 2006) (ALJ); and *Jamieson Co.*, 13 FMSHRC 1500 (Sept. 1991) (ALJ)).

Southern Aggregates argues that there is no evidence that the guard had not been designed or maintained to withstand normal operation, and that the citation should be vacated. Resp't Br. at 10-12 (citing *Lakeview Rock Products, Inc.*, 19 FMSHRC 321 (Feb. 1997) (ALJ) (vacating a section 56.14112(a)(1) order where no evidence was presented that the tail-pulley guard came out of place as a result of normal operation)).

Robertson testified that section 56.14112(a)(1) requires guards to be constructed and maintained to protect miners during normal equipment operation. Tr. 33. He stated that on May 26, while the plant was operating, he climbed the catwalk of the pea gravel belt, an incline stacker beltline, until he reached the head-pulley area, situated approximately 20 to 25 feet above ground, and that miners would periodically enter this area to perform maintenance or repairs. Tr. 33, 35, 36, 39, 52-53. He was shown two photographs that he took during the inspection, which he described as depicting a metal guard that was leaning against the head-pulley mechanism and, thus, was not positioned in its designated place. Tr. 34, 37; Ex. P-4 at 1-2. He testified that the guard showed no signs of wear and tear, and was not bent, only rusted from age.

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[3] 30 C.F.R. § 56.14112(a)(1) provides that "[g]uards shall be constructed and maintained to [w]ithstand the vibration, shock, and wear to which they will be subjected during normal operation."

Tr. 55. He determined that the guard had come askew because the tabs (zip-ties or tie wire) securing it to the frame had broken sometime before the inspection. Tr. 34, 37. He discussed this condition with Bull Lanier, who told him that miners had been working in that area a couple of days before the inspection. Tr. 39. Robertson testified that he could not remember whether, in fact, Lanier told him that the guard had been removed in order to perform maintenance but, he surmised, maintenance "very likely" explained the guard's detachment. Tr. 56, 74.

Black testified that miners access the head-pulley monthly to perform greasing. Tr. 92. When shown Robertson's two photographs of the guard, he testified that the guard was askew because the ties, either zip-ties or tie wire, holding it in place had "broke." Tr. 91, 95; Ex. P-4 at 1-2. Finally, he stated that he did not know whether maintenance had been performed in the head-pulley area before the inspection, but implied that Lanier would know. Tr. 111-12.

Commission judges have upheld section 56.14112(a)(1) violations where there is credible evidence that the conditions of normal equipment operation caused the guards to dislodge. For example, in *Northshore Mining Company*, a violation of section 56.14112(a)(1) was found upon the inspector's testimony that normal operation included exposure to corrosion from wet processes and belt vibrations which caused the guard's failure. 36 FMSHRC 426, 431-32 (Feb. 2014) (ALJ); *see also Carder Inc.*, 27 FMSHRC 839, 842-44 (Nov. 2005) (ALJ) (finding a violation of section 56.14112(a)(1) where the inspector testified that vibrations from normal operation caused the guard to become loose). Conversely, citations have been vacated where such causal evidence was lacking. For example, in *Lakeview*, a violation of section 56.14112(a)(1) for an out-of-place rear tail-pulley guard and side guard was vacated because the Secretary's evidence was limited to the danger posed by the openings between the dislodged guards, and there was no evidence that the guards detached due to vibration, shock, or wear from normal operation. 19 FMSHRC at 355-57. Similarly, in *Lehigh Southwest Cement Company*, a violation of section 56.14112(a)(1) for a damaged guard on the tail-pulley was vacated because the inspector's notes and operator's testimony indicated that the guard had been damaged by a Bobcat skid-steer loader, an abnormal event unrelated to normal operation. 33 FMSHRC 340, 352 (Feb. 2011) (ALJ).

In this case, prior to the inspection, the ties securing the guard in place had broken or been severed, and the guard had dislodged from its originally designated position. The guard was observed to be in good condition, without signs of wear or tear, and I credit Robertson's account of what he was told, that maintenance had been performed a few days prior to the inspection. Critically, no evidence was introduced as to the actual cause of the ties' compromise, and Robertson could only speculate as to the probability that the guard was displaced due to recent maintenance. Here, as in *Lakeview*, there is no evidence of the stress generally imposed on the guard by normal operation, let alone any evidence that operational stress specifically caused the ties to break. Therefore, the record provides no basis from which to conclude that the guard dislodged due to normal operation of the beltline, rather than from some abnormal incident, as in *Lehigh*, or from deliberate severance of the ties during recent maintenance. Furthermore, notwithstanding the exposure to the moving parts of the head-pulley, there is no evidence that the guard, detached and leaning against the head-pulley, would not be able to

withstand the vibration, shock, and wear of continued normal operation. I note, at this juncture, that Southern Aggregates was not cited under the standard requiring that guards be secured in place. Accordingly, I find that the Secretary has failed to establish a violation of section 56.14112(a)(1), and Citation No. 8964281 must be vacated.[4]

III. PENALTY

While the Secretary has proposed a civil penalty of $114 for Citation No. 8964279, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Southern Aggregates is a small operator employing 11 miners, with an overall history of violations that is neither a mitigating nor aggravating factor in assessing appropriate penalties (in the 15 months preceding the inspection, the operator had been cited for eight violations, unrelated to any standard at issue in this proceeding). As stipulated, Southern Aggregates demonstrated good faith in achieving rapid compliance after notice of the violations. Jt. Stip. 7. Since Southern Aggregates has not put forth any evidence that imposition of the proposed penalty would adversely affect its ability to remain in business, "it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)).

The remaining criteria involve consideration of the gravity of the violation, and Southern Aggregates' negligence in its commission. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalty is set forth below.

Respecting Citation No. 8964279, it has been established that this violation of section 56.4200(b)(2) was unlikely to cause injuries resulting in lost workdays or restricted duty, that Southern Aggregates was not negligent in violating the standard, and that it was timely abated. Based on these factors, and considering the operator's lack of negligence, I find that a penalty of $50.00 is appropriate.

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[4] The Secretary's reliance on *Washington Rock* and *Jamieson* is misplaced because those cases arose under a distinguishable standard, section 56.14112(b), requiring that guarding be secured in place, whereas section 56.14112(a)(1) requires that guards be constructed and maintained to withstand stresses of normal operation.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 8964281 (Docket No. CENT 2016-463-M) is **VACATED**, and that Citation No. 8964279 (Docket No. CENT 2016-519-M) is **AFFIRMED**, as modified, to "no negligence."

It is further **ORDERED** that Southern Aggregates, LLC, **PAY** a civil penalty of $50.00 within thirty (30) days of the date of this Decision.[5] **ACCORDINGLY**, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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[5] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.