FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 17, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2009-334-M A.C. No. 39-00024-178265
v.	:	
SPENCER QUARRIES, INC., Respondent	:	Spencer Quarries, Inc.

DECISION

Appearances: Ronald S. Goldade, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner; Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Spencer Quarries, Inc., ("Spencer") 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"). The case involves two citations issued at the quartzite quarry operated by Spencer in Hanson County, South Dakota. An evidentiary hearing was held in Sioux Falls, South Dakota, and the parties introduced testimony and documentary evidence.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 6328706

1. Summary of the Evidence.

On January 27, 2009, Inspector Daniel Scherer issued Citation No. 6328706 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 56.11016 as follows, in part:

> The elevated walkway located along the surge feed belt had not been sanded, salted, or cleared of snow or ice prior to miners traveling it. This elevated walkway is on a grade of approximately

> 28% and is approximately 200 feet long. Tracks were visible where a miner had slid down the length of the walkway. This walkway is accessed daily at various times. A miner sliding down this walkway is exposed to injuries . . . .

The inspector determined that an injury was reasonably likely to occur and that any injury would likely be fatal. He determined that the violation was of a significant and substantial nature ("S&S")and that the company's negligence was moderate. Section 56.11016 provides that "[r]egularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." 30 C.F.R. § 56.11016. The Secretary proposes a penalty of $334.00 for this citation.

Inspector Scherer testified that Spencer employs approximately 20 employees. (Tr. 12). When he first arrived at the quarry he met with the woman who was the scale operator. Jim Zens, another Spencer employee, joined them a few minutes later. The inspector was advised that the scale operator and Mr. Zens were the only two people working at the quarry that day because the remaining employees were getting their annual MSHA-required training that day at an off-site location. (Tr. 14). The inspector testified that it was his understanding that Zens was the assistant superintendent but that he primarily worked in the loadout area and the stockpile area. (Tr. 17). The quarry had operated the previous day, but it was not operating on January 27. Indeed, the gate on the fence that surrounds the perimeter of the pit and plant was locked on January 27 and Zens had to unlock it for Inspector Scherer. (Tr. 57).

Inspector Scherer testified that there was snow on the ground when he arrived at the quarry on the morning of January 27. (Tr. 20). He issued Citation No. 6328706 because he was concerned about some snow and ice that had built up on the walkway located alongside the surge feed belt. He stepped up onto the walkway and quickly determined that it was slippery. (Tr. 23). The inspector observed two tracks on the walkway that came from the top and went to the bottom in "one continuous slide." *Id.* He determined that the walkway was about 200 feet long and was at a grade of about 28 percent. The photograph that the inspector took shows the two tracks on the walkway. (Tr. 25; Ex. G-2 p. 5). Based on these tracks, Inspector Scherer concluded that someone had slid down the entire length of the walkway on the ice and snow that had accumulated there. *Id.* (Tr. 62, 67). The inspector did not observe anyone on the walkway and he did not talk to anyone who saw or heard that a miner slid down the walkway. (Tr. 53, 55).

Scherer testified that Zens told him that someone had probably walked along the walkway at the end of the shift on January 26 to clean up or do some light maintenance. (Tr. 27). Zens told him that it was company policy to clean off ice and snow at the beginning of every shift. Inspector Scherer testified that he based his gravity and S&S determinations on the fact that the walkway is used everyday, there were tracks on the walkway, the slick conditions, and the angle of the walkway. (Tr. 29-30). In addition, Inspector Scherer testified that he talked to some miners the following day and that one miner told him that the walkway can be "real nasty" because it is so steep. (Tr. 34). The citation was abated after the walkway was cleared of ice and

snow and Spencer agreed that it would clear the walkway "as frequently as necessary as conditions warranted throughout the course of any shift." (Tr. 31, 60). When he arrived at the plant on January 28, the walkway had already been salted and cleared of snow. (Tr. 59-60). Spencer uses salt and sand as part of the process of keeping the walkway clear. Scherer testified that he was told that, before the citation was issued, Spencer only cleared the walkway at the beginning of each day. (Tr. 32).

Mark Sedlacek, the crusher operator, testified for Spencer. He said that he worked at the crusher on January 26, the day before the citation was issued. (Tr. 87). He said that he swept the cited walkway with a broom that day. There were about two inches of loose snow on the walkway. This walkway was in good shape on the morning of January 26, but it started snowing during the afternoon. (Tr. 88). He testified that he decided to clean off the walkway before he left work that day. He swept the walkway but did not salt it because the crusher would not be operating the following day. (Tr. 88, 91). The idea was that the sun might melt any remaining snow on January 27 and that it would be salted the morning of January 28, if needed. *Id.* He estimated that he cleaned off the snow at about 3:30 p.m. on January 26. He said that no other person went up the walkway that day after he cleared it. Sedlacek testified that the two tracks that Inspector Scherer observed on the walkway on the morning of January 27 were the tracks he made when he was cleaning off the walkway on January 26. He did not slide down the walkway, he simply shuffled his feet as he walked back down the walkway. (Tr. 90). He said that he was not out of control when he walked down the walkway on January 26. (Tr. 91). He also said that he was holding onto the handrail with one hand and sweeping with the other. (Tr. 97). He testified that the walkway was in good shape at the end of the workday on January 26 and that no other employee traveled on the walkway that day. The temperature dropped over the night of January 26-27, so it is not surprising that the walkway was slippery the morning of January 27. (Tr. 93, 103-04). In addition, it may have continued snowing overnight. (Tr. 93). Sedlacek testified that Spencer employees cleaned walkways of ice and snow whenever it was needed, not just at the beginning of the shift. (Tr. 100).

Dennis Ruden is the jaw operator for Spencer. He said that he observed Mr. Sedlacek sweeping the walkway. (Tr. 106, 109). Mr. Sedlacek was the last person to walk on the walkway until the MSHA inspector observed the walkway the next day. Moreover, he testified that on January 27, the day of Inspector Scherer's inspection, most of Spencer's employees were in Mitchell, South Dakota, for eight-hour MSHA-required annual refresher training. (Tr. 107). When Ruden returned to work on January 28, he salted the walkway at 7:00 a.m. that morning as one of his first tasks. (Tr. 108-109). He was not told to salt the walkway; he just did it prior to the start of production as part of his ordinary job duties.

Ward Tuttle, Spencer's production foreman, testified about the annual refresher training. He testified that there was no production at the mine on January 27. (Tr. 135). The quarry and plant were behind a locked fence that day. (Tr. 138). Someone unlocked the gate on the morning of January 27 so that Inspector Scherer could conduct his inspection. He said that all but two employees were at the offsite annual training. (Ex. R-1). The only employees working

that day were an employee in the scale house and Jim Zens, who normally works in the quality control laboratory, but who also uses a loader to load customer trucks with product, when necessary. (Tr. 128, 146-147). Zens does not work in the production area of the mine and would have little knowledge of Spencer's practices or policies in the production areas. (Tr. 129). Tuttle testified that the quarry was only open for the purpose of allowing customers to obtain material from existing stockpiles. (Tr. 146). When the quarry was operating, Zens would not normally enter the area of the pit and plant. (Tr. 155). He would go into the plant area once a month to check the fire extinguishers. *Id.* Neither Zens nor the employees in the scale house would have any reason to walk up the cited walkway. (Tr. 156).

Tuttle testified that it was company policy to keep the walkway at the surge feed belt clean. (Tr. 133). The area would be swept as needed and salted as needed. (Tr. 134). He testified that Spencer did not change its policy with respect to cleaning and salting the walkway following the issuance of the subject citation. *Id.* Tuttle testified that it is possible someone could slip or fall when walking down the cited walkway. (Tr. 150). He also admitted that the photographs that Inspector Scherer took of the walkway show snow and ice. (Tr. 161).

Richard Waldera, Spencer's general manager, testified that it has always been the company's policy to clean snow-covered walkways whenever it is necessary. (Tr. 167-168). The company did not change its policy after it received this citation. (Tr. 168, 175).

2. <u>Analysis.</u>

I find that the Secretary did not establish a violation. The quarry was closed on January 27 and the evidence clearly and unequivocally shows that nobody would have walked up the cited walkway on that date. Inspector Scherer inspected the walkway the morning of January 27. I cannot assume that the conditions he saw were the same as Sedlacek experienced when he cleared the walkway at 3:30 p.m. on January 26. For example, additional snow could have fallen and the walkway could have frosted over during the night. When Ruden arrived on the morning of January 28, he immediately salted the walkway without being told to do so. There is no evidence to show that he salted the walkway in order to abate the citation.

The evidence establishes that Spencer complied with the requirements of the safety standard. Although the subject walkway was not used all that frequently, I find that it was "regularly used" as that term is used in the safety standard. Sedlacek cleared the snow on the afternoon of January 26 near the end of the shift. There is absolutely no evidence that anyone was on the walkway after it was cleared that day. There is evidence that the quarry was experiencing snow flurries on the afternoon of January 26. Spencer salted the walkway first thing in the morning the next business day. I credit the testimony of Spencer's witnesses with respect to the events of January 26 through January 28. The evidence demonstrates that, at all pertinent times, the walkway was "sanded, salted, or cleared of snow and ice as soon as practicable." *See e.g. Empire Iron Mining Partnership*, 19 FMSHRC 1912, 1922 (Dec. 1997) (ALJ). There was no need to sand, salt, or clear the snow on the morning of January 27 because

the plant was shut down for the day. Neither Zens nor anyone working in the scale house would have entered the production areas of the quarry that day and, even if they did, they certainly would never have traveled up the walkway alongside the surge feed belt.

A number of extraneous issues were raised at the hearing. The Secretary contends that, before the citation was issued, Spencer's employees only cleaned off the walkways in the morning, even if snow and ice developed later in the day. That issue is not on point here because the evidence establishes that the subject walkway was cleared near the end of the shift on January 26 and again at the start of the shift on January 28, thereby meeting the requirements of the safety standard. In addition, I credit Spencer's witnesses that the walkways were cleaned more frequently than once a day when conditions warranted. Another issue that was raised concerned whether the decking used on the walkway was appropriate for that application given the grade of the walkway. The surface of the cited walkway is what is called "tread plate," "diamond plate," or "deck plate." (Tr. 42). That issue is not before me. Citation No. 6328706 is hereby vacated.

B. Citation No. 6328712

1. Summary of the Evidence.

On January 28, 2009, Inspector Scherer issued Citation No. 6328712 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 46.12(a)(2) as follows, in part:

> The mine operator failed to provide the independent contractor whose employees were working at the mine site of the contractor's obligations to comply with MSHA regulations including the requirements of Part 46 of 30 CFR. The contractor has been doing construction of mine facilities at the mine site for approximately one year and had employed up to 11 new miners. These miners were exposed to mine hazards and none of these employees had received their new miner training.

The inspector determined that an injury was reasonably likely to occur and that any injury would likely be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 46.12(a)(2) provides that "[e]ach production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part." 30 C.F.R. §46.12(a)(2). The Secretary proposes a penalty of $1,304.00 for this citation.

Spencer admitted that the citation states a violation of the regulation. (Tr. 217). It contends that the violation was not S&S. Inspector Scherer testified that Spencer did provide the independent contractor with a list of the mine-specific hazards. (Tr. 181). Records of this training were maintained. Spencer failed to make sure that the contractor and its employees were

aware of MSHA's safety standards and training requirements. (Tr. 182). The contractor, O.L. Bussmus Construction, Inc., was building a new screen wash plant and other mine facilities. The construction project had begun during the spring of 2008. Bussmus had up to eleven employees at the site. These employees were exposed to the hazards that are generally found at surface mines. (Tr. 183). One Bussmus employee was injured on the job at the quarry in July 2008 when some material fell from a flat-bed truck. The inspector testified that an untrained miner is a hazard to himself and to other miners working at the quarry.

Inspector Scherer determined that the violation was serious and S&S because the condition created a discrete hazard and it was reasonably likely to result in an injury of a reasonably serious nature. (Tr. 185). The inspector testified that Mr. Waldera thought that he had complied with MSHA training requirements when Spencer gave them a list of site-specific hazards. (Tr. 185-186). Inspector Scherer also issued several citations to Bussmus. (Tr. 187; Ex. G-11). Scherer said that Mr. Bussmus told him that he would have gladly complied with MSHA's regulations had he known about them. (Tr. 188).

Mr. Waldera testified that Spencer provided site-specific training to the Bussmus employees. (Tr. 200; Ex. R-8). The training forms used by Spencer lists the typical hazards encountered by vendors, salesmen, delivery men, and repair men. (Ex. R-8). Waldera admitted that new miner training is different from site-specific hazard training. (Tr. 205). He also admitted that, if a contractor is unaware of MSHA's training requirements, it would be unable to develop a training plan for its employees.

2. Analysis

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I find that the Secretary established that this violation was S&S. The Secretary established all four elements of the S&S test. Although it is true that many of the hazards that the contractor's employees faced would not be substantially different from the hazards they normally face on construction projects, the mining environment presents challenges that are not typically present at other construction sites. As stated above, the third element of the S&S test requires that the secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. Spencer did not advise Bussmus that it had to have a training plan in place so that its employees could receive new miner training. As a consequence, the employees of Bussmus had not completed MSHA-required training while they worked at the quarry. Bussmus apparently knew nothing about MSHA or its regulatory requirements. Based on the evidence presented at the hearing, I find that, if the violative condition had not been abated, there was a reasonable likelihood that it would have contributed to an injury of a reasonably serious nature. I also affirm the inspector's gravity and negligence determinations. As Inspector Scherer stated, an untrained miner is a hazard to himself and to others. The training regulations are a key part of the mine safety program established by the Mine Act.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Spencer had five paid violations at this quarry during the two years preceding this inspection. (Ex. G-13). Only one of these violations was S&S. The mine worked about 41,375 employee-hours in 2008 and 41,250 employee-hours in 2009, making it a relatively small operation. The violation was abated in good faith. No evidence was presented to show that the penalty assessed in this decision will have an adverse effect on Spencer's ability to continue in business. The violation was serious and Spencer's negligence was moderate. Based on the penalty criteria, I find that the Secretary's penalty of $1,304.00 is appropriate.

III. ORDER

For the reasons set forth above, Citation No. 6328706 is **VACATED** and Citation No. 6328712 is **AFFIRMED**. Spencer Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,304.00 within 30 days of the date of this decision.[1] Upon payment of the penalty, this case is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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