FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 3, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-712-M
Petitioner,	:	A.C. No. 40-02937-190347
	:	
v.	:	
	:	
U.S. SILICA COMPANY,	:	
Respondent.	:	Mine: Jackson Plant

DECISION

Appearances: Matthew Shepherd, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Bob Dailey, Safety Director, U.S. Silica Company, Jackson Tennessee, for Respondent.

Before: Judge Miller

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 U.S. Silica Company ("U.S. Silica" or "Respondent"), 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 three citations issued by MSHA under section 104(a) of the Mine Act at the Jackson Plant located in Jackson, Tennessee. The parties presented testimony and documentary evidence at the hearing held on September 9, 2010, in Nashville, Tennessee. A decision was issued on the record at the conclusion of the hearing. Portions of the transcript, with necessary edits and amendments, are included in this decision. The parties stipulated that, at all pertinent times, U.S. Silica was a mine operator subject to the provisions of the Mine Act. Stip. 2-3.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

U.S. Silica is the owner and operator of the Jackson silica plant (the "plant" or "mine") in Jackson, Tennessee. On June 2, 2009, Kenneth Large, a twenty-five year veteran MSHA inspector, conducted a regular inspection at the mine. Large has worked in the mining industry for 42 years. Prior to working for MSHA, Large worked for a number of mine operators and held numerous positions, including assistant mine superintendent.

The mine operates three shifts, i.e., two production shifts and one maintenance shift. The mine processes sand that is hauled to the processing plant by trucks. During the inspection Large was accompanied at various times by Anna Walters and Dan Simms, both representatives of the Respondent.

Transcript pages 96-97:

> In the case of the U.S. Silica Company, Docket No. SE 2009[-]712, I make the following finding[s]: U.S. Silica Company is the owner and operator of the Jackson silica plant located in Jackson, Tennessee. The parties have entered into stipulations that have been accepted into the record, and those stipulations refer to the jurisdiction of the Mine Safety and Health Administration to conduct an inspection at the plant, as well as the jurisdiction of the Review Commission to hear the case and issue a decision. I accept the stipulations and enter those into the record at this time.
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> The stipulations also refer to a number of the penalty criteria, including the fact that the proposed civil penalties will not affect U.S. Silica's ability to . . .[continue in] business. I find that the Jackson plant is a medium-sized sand operation, but it is owned by a large company. U.S. Silica Company is, indeed, a large operator within the meaning of the Mine Safety and Health Act.
>
> On June 2nd, 2009, Inspector Kenneth Large conducted a regular inspection at the U.S. Silica Jackson plant. He was accompanied, at least during part of his inspection, by a representative from the plant. Inspector Large has many years' experience -- over 40 years' experience in the mining industry and many years' experience with the Mine Safety and Health Administration.

a. Citation No. 6517158

As a result of the investigation Large issued Citation No. 6517158 to U.S. Silica alleging a violation of 30 C.F.R. § 56.14112(a)(2), which requires that "[g]uards shall be constructed and maintained to . . . [n]ot create a hazard by their use." The citation described the violation as follows:

The guard on Conveyer #13 which feeds Mill #1, was loose at the head pulley and sharp edges were exposed. The area is easily accessed and is accessed by the Mill operator at least six times a day for regular equipment checks. The guard had created a hazard to the miners and a cut injury could occur.

Large determined that the violation was reasonably likely to result in an injury, that it was significant and substantial("S&S"), that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $150.00 has been proposed for this violation.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal* Co., 6 FMSHRC 2094, 2097 (Sept. 1984). In *Thompson Bros.*, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. Guards are designed to prevent accidents. The fact that no employee has ever been injured by an unguarded or inadequately guarded area is not a defense because there is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions . . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Large explained that the edges protruding from the guard were a hazard since persons are in the area and could, with little effort, brush against the sharp edges and be cut. The mine operator agrees that the guard had sharp edges protruding but denies that it was a hazard. The mine submits that access to the sharp edges was prevented by the belt pulley and shaft guards.

Transcript pages 97-99:

> As a result of his investigation on June 2nd, [Large] issued Citation No. 6517158 for a violation of . . . [30 C.F.R. § 56.14112(a)(2)], which requires that guards shall be constructed and maintained to not create a hazard by their use. He issued the citation based upon observation of a guard that had come loose or out of its place and had exposed sharp edges. Inspector Large determined that it was reasonably likely that a violation would result in an injury, that the violation was S and S, one employee would be affected and negligence would be moderate.
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> I credit Inspector Large's testimony, that he observed that the guard was loose, had jagged edges sticking out. Exhibit 2 is a photograph of the guard with the jagged edges, and Exhibit 3 is a photograph of the guard after the violation was terminated.
>
> The guard was located at the head of the conveyor belt. The conveyor belt was used to carry material into the mill. It was made of expanded metal. Jagged edges were sticking out a couple inches away from the guard.

> Someone at -- there is at least one employee working in the area and passes through this area at least six times per day. I believe Inspector Large's testimony was that he was told that someone walked through the area, that is shown in Exhibit 5(a), at least six times a day, every hour and 20 minutes. When Inspector Large entered the area, the violation was obvious to him. Although he did not touch it, he could see that the edges were sharp. I understand that one of -- the operator believes that the edges were burred and were not sharp. But a look at the photograph, Exhibit 2, particularly, makes it clear that those edges would cut someone if they came in contact with [them]. So I credit Inspector Large's testimony in that regard.
>
> Large stated that the hazard was obvious, that it should have been pre-shifted, and that it was most likely there for a number of shifts in order for it to get in that condition. He also testified that the area is open and that it would be easy for someone to come in contact with it.
>
> I will note that the Commission interprets safety standards to take into consideration ordinary human carelessness. And in the case of Thompson Brothers Coal, the Commission held that a guarding standard must be interpreted to consider whether there is a reasonable possibility of contact[] [that would result in] injury, including contact stemming from an inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.
>
> In this particular case, the area is open, and certainly there is a reasonable possibility of contact and injury, including contact from inadvertent stumbling, falling, momentary inattention, or carelessness. If someone were specifically standing in the area talking to someone and moved back out of the way, they would come in contact with the guard. Therefore, I find that the violation is established as alleged by the Secretary, based on – primarily on the testimony of Inspector Large and the testimony of Mr. McKibbin, who was not present during the inspection, but did agree that the guard was in the condition as cited by the inspector.

i. Significant and Substantial

A 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:

[i]n 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*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of persons walking by, or working in, the area and contacting the jagged metal edges. Third, the hazard contributed to will result in an injury as a result of someone coming in contact with the sharp edge. Finally, given the sharpness, and the fact that any cut or gash would be caused by metal, the injury would certainly be serious.

Transcript pages 100-103:

Next, is the issue of whether or not this particular violation is significant and substantial. The Review Commission has indicated that a significant and substantial violation is a violation of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The violation is properly designated S and S . . .[if] based upon the particular facts . . . [s]urrounding that violation, there exists a reasonable likelihood that the hazard could contribute to or result in an injury or illness of a reasonably serious nature.

In order to establish the violation as significant and substantial, I must first find that there is an underlying violation of the mandatory safety standard, which I do in this case. I have already found that there is a violation.

Next I must find that there is a discrete safety hazard, that is a measure of danger to safety contributed to by the violation. And I find in this case that the -- that there is a discrete safety hazard and measure of danger to safety, and that hazard is those sharp edges of the guard sticking out in an area where someone may come in contact with

them. And if, in fact, someone does come in contact with those edges, an injury is likely to result, and that injury would be of a serious nature.

. . . Inspector Large testified that the injury would result in lost workdays or restrictive duty. I credit[] his testimony in that regard. The Commission and Courts have observed that an experienced MSHA inspector's opinion that a violation [is] significant and substantial is entitled to substantial weight. [*Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995).] Inspector Large . . . qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial, and explained that it is likely that someone would come in contact with the sharp edges of the guard, and that as a result, someone would suffer a serious scrape or cut.

In making his determination, he relied upon his experience as a mine inspector, and particularly in a recent accident investigation that he had conducted, wherein a miner had been scraped by the sharp edge inadvertently, accidentally, of expanded metal and as a result suffered a serious injury, including the amputation of his leg.

In his view, it's reasonably likely this violation was reasonably likely to lead to an event that causes a serious injury, and that serious injury could be as serious as the amputation of a leg or an arm.

. . . [T]he mine operator . . . [argues] that the violation is not significant and substantial for a number of reasons, including that the guard -- the sharp edges of the guard are not next to the walkway, that the walkway is -- somehow is back and that the guard is set back under. . . . [T]he photograph shows that the walkway is not far away, and certainly it is an open area up to the guard. If it were somehow blocked -- it's not blocked by something else that I can see in the photograph.

. . . I find that this violation is significant and substantial as Inspector Large indicated. I credit his testimony in that regard. I find -- I also agree with Inspector Large that the negligence for this violation is moderate. The guard was visible. Inspector Large saw it immediately upon entering the area. In his view, it should have been detected and repaired immediately. If it continued to exist, it would again contribute to an accident or an injury. There were

> two shifts. People were walking by it on both of those production shifts and most likely on the maintenance shift for the third shift. I find that the facts of this violation clearly lead to a significant and substantial finding.

With regard to the penalty, the parties have stipulated to the history, which I -- this mine has a stellar history, and I give the mine credit for having such a good history and such a good safety record . . . .

> The mine -- U.S. Silica is a large mine operator. A penalty will not affect its ability to continue its business. It engaged in a good faith abatement of the violation. The gravity is, as I described above, in the significant and substantial discussion, and the negligence was moderate, as the inspector indicated. The violation was obvious. No one knows how long it existed, but it certainly didn't get in that condition overnight. The condition should have been seen and corrected, or should have been noted at least on a pre-shift. I assess a $500 penalty for this violation.

b. Citation Nos. 6517159 and 6517160

As a result of the investigation Large issued Citation Nos. 6517159 and 6517160 to U.S. Silica alleging violations of 30 C.F.R. § 56.20003(a), which requires that "[a]t all mining operations . . . [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." Citation No. 6517159 describes the violation as follows:

> On top of 7BIN2 there was material build up and in some areas the build up was over the toe board. There were footprints on top of the bin which shows that someone had been in the area. An injury could occur from a slip, trip or fall.

Large determined that it was reasonably likely that the violation would result in an injury, that the violation was S&S, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $150.00 has been proposed for this violation. The Secretary moved to modify the citation to non-S&S based upon the testimony at hearing and I accept the Secretary's modification.

Citation No. 6517160 describes the violation as follows:

> On top of 7BIN15 there was material build up and in some areas the build up was over the toe board. This area is only accessed by maintenance personnel and hasn't been accessed in over a month. An injury could occur from a slip, trip or fall.

Large determined that it was unlikely that the violation would result in an injury, that the violation was non-S&S, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $100.00 has been proposed for this violation.

The cited standard does not require that the area be a "travelway," i.e., a passage, walk or way that is *regularly used* and designated for persons to go from one place to another. Rather, as pertinent to this matter, the area need only be a workplace or passageway. Section 56.2 of the Secretary's regulations defines "working place" as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. The Secretary's regulations do not define "passageway." The dictionary defines "passageway" as "a way that allows passage," while "passage" is defined as "a way of exit or entrance: a road, path, channel, or course by which something passes," or alternatively as "a corridor or lobby giving access to different rooms or parts of a building or apartment." *Webster's New Collegiate Dictionary* (1979) at 830.

A number of the Commission's judges have addressed in similar cases the issue of what constitutes a workplace or passageway. In *USS, a Division of USX Corp.,* 13 FMSHRC 145, 153(Jan 1991) (ALJ), the judge determined that section 56.20003 applied to "all workplaces and passageways, even though no work was being performed at the time of the cited violations, and even though the passageways were not designated or regularly used as such." Similarly in *Brubaker-Mann Inc.*, 8 FMSHRC 1482, 1483 (Sept.1986) (ALJ), violations were affirmed where the inspector observed a build up of powdery fines, which created a slipping and tripping hazard, on top of a storage tank.

With regard to both citations, Inspector Large testified that sand and fine material were located on top of the bins. Gov. Exs. 8, 9, 14. The bins are used to store sand. There is an access ladder to the top of the bins, a catwalk around the top of each bin, and a catwalk leading to other bins. There is a footprint in the accumulated material on top of the one bin cited in Citation No. 6517159. Gov. Ex. 11. Workers travel around the bins to conduct inspections, and maintenance persons access the area to do routine maintenance and repairs. The accumulated material was as deep as 12 inches in places and was over the toe board at points. *Id.* The material constituted a tripping hazard.

There is no dispute that the accumulations existed as cited by the inspector. The Respondent, however, argues that the area is not a "workplace" or "passageway" as required by the standard. There are twelve bins, connected by walkways and ladders. According to the

Respondent, employees perform limited work on top of the bins. Occasionally, persons climb the ladder to the top of a bin to inspect piping and ensure that it is not clogged or, if clogged, to unclog the pipes. At times an electrician may walk on top of the bins to do repair work. In addition, workers regularly climb up to the area to clean it when the dryer operation is complete.

Transcript pages 103-106:

> The next two violations I'll talk about together. Citation No[s]. 6517159 and [6517]160 are both violations of the same standard, . . . [30 C.F.R. § 56.20003(a)], which requires that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." There is no question, and I don't think the mine disputes, that there was an accumulation of sands on the top of those bins, and certainly they were not kept clean and orderly.
>
> The issue in both of these citations is whether or not the bins were a workplace, passageway, store room, or service room. I will focus on the issue of workplace or passageway. And I would note for the record -- I believe it's already in there – that originally one of the citations was S and S, but the Secretary has moved to modify, so both of these violations are non S and S. And I will just address the issue of the violation and the penalty.
>
> The photographs in evidence clearly show the accumulation of material on top of the bin. The issue then is whether or not they were a workplace or passageway. I looked at the cases regarding this particular standard. There are no Commission decisions that address what -- the workplace or passageway, as it's used in this standard. There are ALJ decisions, and there are decisions of the Commission that address this language under other standards.
>
> In this particular area, there is an access ladder to the top of the bin. There's a catwalk leading to other bins. There were footprints indicating, at some point, whether before or after the spill, someone was up there. The testimony is clear that people do work on there. It may only be -- I think, the inspector mentioned -- he was told once a month, but people do go up there, workers go up to inspect, maintenance people go up on top of the bin, and certainly people access it, pass through it, and perform work there.
>
> It doesn't have to -- the work doesn't have to be ongoing -- doesn't have to be going on when the inspector visits or sees the

> violation, nor does someone have to be walking through there at the time of the violation. Based on the inspector's testimony and the testimony of Mr. McKibbin, I find that the area is a passageway and a workplace, that both things occur in that area, that the Commission has interpreted that language in a broad sense. And the case law[] by the administrative law judges that I read found it was not a workplace or passageway in areas that were under a belt -- under a belt where no one would go for any reason that -- or in a grease pit, in certain areas that people just really would not travel in any sense for work.
>
> . . . I find that it is a passageway or a work way. I find that there is a violation as alleged in both citations, 6517159 and 657160 as alleged by the Secretary. Both of the violations are non S and S. I've already discussed the mines -- the penalty criteria with regard to these. I find I agree with the inspector's indication that the negligence was moderate. Even though some of the spill could, in the inspector's view, be seen from below the bin, I would still indicate negligence to be moderate, and the – that neither of them are S and S. The gravity of the violation then would be low -- would not be very high. . . . I would assess $100 penalty for each of those violations.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(I).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history is normal for this size operator. I accept the Secretary's finding of low negligence. Finally, I find that the Secretary has established the gravity as described in the citations.

Transcript page 106:

> [B]ased on the criteria in Section 110[(i)] of the Act, the proposed penalty is $500 for the first violation, [and $100 dollars each] for the other [two] violations, for a total [penalty] of $700.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $700.00 for the violations. U.S. Silica is hereby **ORDERED** to pay the Secretary of Labor the sum of $700.00 within 30 days of the date of this decision.[1]

Margaret A. Miller
Administrative Law Judge

Distribution:

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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.