FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 14, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST-2011-0749-M X A.C. No. 35-03702-245915
v.	
ROCK N ROAD QUARRY, Respondent	Rock N Road Quarry

DECISION

Appearances: Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Lee Bissell, Rock N Road Quarry, Culver, Oregon, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Rock N Road Quarry, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Portland, Oregon.

One section 104(a) citation was adjudicated at the hearing. The Secretary proposed a total penalty of $108.00 for this matter.

I. Citation No. 8599814

On January 1, 2011, MSHA Inspector Benjamin Burns issued Citation No. 8599814 under section 104(a) of the Mine Act, alleging a violation of section 56.11001. The citation stated:

> A safe means of access was not provided to the Thunderbird screen deck. The screen was being accessed by a 24 ft. extension ladder for fluid level checks, v-belt maintenance, and screen changes. Miners were tying off with a Miller retractable lanyard 9 ft. X 1 in. X .06 In. Polyester with a 3 1/2 ft. arresting distance to frame work of the over screen conveyor and shimmying along I-beams to change screens and access bolts. From ground level to the top of the deck was approx. 14 ft. This condition creates a fall hazard and could result in a permanently disabling injury. This practice

has existed for some time and the operator did not recognize this as a hazard.

(Ex. G-3). Inspector Burns determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was moderate, and that one person would be affected. Section 56.11001 of the Secretary's safety standards requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

For the reasons set forth below, I modify Citation No. 8599814.

Discussion and Analysis

I find that Respondent did not maintain safe access to the Thunderbird screen deck of the cited crusher because it did not correctly instruct miners upon proper use of safety equipment. Section 56.11001 requires that operators both provide and maintain safe access. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001). To comply with section 56.11001, "the standard requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Id* at 708. Respondent did not uphold safe access to the cited area because although it provided proper equipment, it did not train miners to properly use that equipment. Inspector Burns testified that he issued Citation No. 8599814 because to maintain the crusher, miners climbed a 24 foot retractable ladder, tied off with a safety line and lanyard, and then side-stepped along an I-beam that was 6 or 7 feet above the ground. (Tr. 14-15, 37). Respondent did not dispute the inspector's testimony regarding its procedure. Although there was more than one point to tie-off, only one point was used when miners accessed and moved across the beam. (Tr. 48). Respondent does not dispute that the inspector correctly stated the substance of its procedure. Respondent argues, and the Secretary does not dispute, that the ladder, the harness, and the lanyard in use at the cited area all worked properly and were not defective. (Tr. 43). If used properly, Respondent's safety equipment could provide safe access to satisfy section 56.11001. Respondent's procedure for using the equipment, however, allowed miners to move horizontally across an I-beam and work a significant distance away from their static tie off point. Working several feet away from a static tie-off point could allow a falling miner to swing into the structure of the crusher, which is unsafe. Respondent did not provide safe access to the cited area.

To maintain safe access, Respondent can utilize the same ladder, harness, and lanyard at issue here, but must train its miners to use that equipment safely.[1] Although Respondent

[1] Section 56.11001 does not specify a means of abatement. Any efforts that create safe access to the cited area can therefore abate Citation No. 8599814. Respondent asserts that the inspector advised it that Citation No. 8599814 could only be abated by buying a bucket truck or lifter or installing a catwalk. (Tr. 46). The inspector did not testify regarding this assertion and Respondent did not address the issue when it questioned the inspector. Regardless of whether the inspector insisted upon an abatement procedure, I find that Respondent's existing equipment, if used properly, could abate Citation No. 8599814.

provided adequate equipment to facilitate safe access to the cited area, it did not maintain safe access in accordance with section 56.11001 because it did not properly instruct its employees to use the equipment that it provided. Respondent must maintain safe access with proper training and enforcement of the implementation of that training.

I find that the Secretary did not fulfill his burden to show that Citation No. 8599814 was S&S[2] because the condition cited in Citation No. 8599814 was not reasonably likely to lead to an injury and such an injury was not reasonably likely to be serious. I credit Bissell's testimony concerning the measurements and procedures in place at the mine.[3] The Secretary relied heavily upon the inspector's estimated measurements to support his reasonably likely designation. Even if I credited the testimony of Inspector Burns, however, these measurements alone do not explain how the hazard was reasonably likely to injure a miner. The inspector did not explain how far a miner could travel from a tie off point before facing a hazard, or how that distance would affect the likelihood of an injury. *Id.* A miner is unlikely to swing like a "pendulum" the entire distance back to the tie-off point; the fall protection would arrest a miner close to the beam and stop the miner from falling. (Tr. 17). At worst, a miner would slide along the side of the crusher to the tie off point, but the miner would not swing into that point with 6 feet of momentum. The fall protection would stop a miner quickly if he lost his footing and the inspector provided no explanation of how injury was likely to occur. I also note that miners only accessed this area two to three times per year, making an injury less likely. (Tr. 49-50, 54). The Secretary did not fulfill his burden to show that the hazard contributed to by the violation was reasonably likely to result in an injury.

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[2] 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) (2006). 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). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

[3] Inspector Burns did not see miners performing work upon the screen; he based his testimony upon "what was gathered" from Lee Bissell, the owner of Rock N Road. Bissell, however, undermined many of the statements made by Inspector Burns at the hearing. Bissell testified that the I-beam upon which miners walked was 10 inches wide and not 6 inches as the inspector believed. (Tr. 14-15, 38-40). Miners did not use the I-beam to access and maintain the v-belt, the upper bolts, or the oil as the inspector suggested. (Tr. 39). Miners only followed the cited procedures to use air guns to tighten the lower bolts, which were underneath the "Thunderbird" logo. (Tr. 38-39; Ex. G-4 at 3). Bissell testified that the distance from the tie-off point that a miner could travel was only 5 to 6 feet, while the inspector believed that distance reached 9 feet. (Tr. 65). The scale of the photograph of the crusher that the Secretary himself submitted as evidence also supports Bissell's testimony. (Ex. G-4 at 3).

The Secretary also did not fulfill his burden to show that the injury contributed to by the cited condition was reasonably likely to be serious. A miner tripping, or at worst bumping into the crusher and sliding back to the tie-off point would most likely receive scrapes and bruises. The fall protection would stop the miner from falling or gaining momentum to swing into the crusher, preventing a serious injury, especially a permanently disabling injury. Citation No. 8599814 is not S&S.

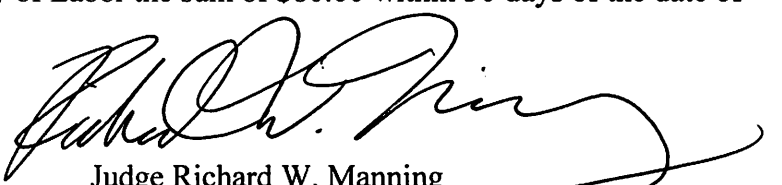
I find that Respondent's low negligence caused Citation No. 8599814. Respondent supplied all the necessary equipment to provide safe access and believed that its procedure complied with section 56.11001. Previous inspectors, furthermore, asked Respondent to explain its procedure and did not issue any citations as a result. (Tr. 56). I hereby **MODIFY** Citation No. 8599814 to low negligence and non S&S; I also reduce the gravity. A penalty of $80.00 is appropriate for Citation No. 8599814.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which were submitted by the Secretary. (Ex. G-5). Respondent had no history of previous violations in the two years preceding the issuance of the subject citation. At all pertinent times, Respondent was a small mine operator. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon the ability of Rock N Road Quarry to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

For the reasons set forth above, I **MODIFY** Citation No. 8599814. Rock N Road Quarry is **ORDERED TO PAY** the Secretary of Labor the sum of $80.00 within 30 days of the date of this decision.[4]



Judge Richard W. Manning
Administrative Law Judge

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[4] 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.