FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 4, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2009-1558 A.C. No. 46-08921-183472 K232
v.	:	
BECKLEY CRANE & CONSTRUCTION, INC., Respondent	:	Mine: Surface Mine #7

DECISION

Appearances: Noah AnStraus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner,
Eric Fry, Esq., Flaherty Sensabaugh Bonasso, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge McCarthy

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Beckley Crane & Construction Company, Inc. ("Beckley Crane" 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").

Respondent operates Surface Mine #7 in Boone County, West Virginia. This case involves one section 104(a) citation. An evidentiary hearing was held in Beaver, West Virginia on December 6, 2010. The parties introduced testimony and documentary evidence, although there was no motion for sequestration of witnesses. For the reasons set forth below, I find that the Secretary established a violation of the mandatory safety standard cited and that the violation was significant and substantial.

I. FINDINGS OF FACT

On March 16, 2009, MSHA Inspector Larry B. Woodie issued Citation No. 8078572 to Beckley Crane for an alleged violation of section 77.210(c) of the Secretary's mandatory safety

standards for surface coal mines.[1] The citation states that:

> The ground man was observed working at the powder storage area beside a suspended load. No tag line was being used to work clear of the load.

(G. Ex. 2). Inspector Woodie determined that an injury was reasonably likely to occur and could reasonably be expected to be fatal. Further, he determined that the violation was significant and substantial ("S&S"), that one person was affected, and that the violation resulted from moderate negligence. The Secretary proposed a penalty of $392 for this citation.

A. Background and Summary of Testimony

1. The Witnesses

Larry Woodie has been a surface coal mine inspector with MSHA District 2 in Madison, West Virginia since May 2007. (Tr. 25). From 1976 to 2007, Woodie worked primarily for Eastern Associated Coal LLC (Eastern), a subsidiary of Peabody Energy, in various positions as underground miner, surface electrician, preparation plant supervisor, lead plant foreman, and manager, and coal preparation manager. (Tr. 26-27). Woodie has operated cranes on numerous occasions for low lifting and unloading. (Tr. 27-28, 52). He received formal training in crane safety from Eastern and from the MSHA Mine Academy. (Tr. 28-29). Although familiar with the importance of using a tagline to stabilize a suspended load, Woodie conceded on cross examination that loads move differently, that he is unfamiliar with the movement of suspended prail bins as a crane operator, and that the prail bin at issue is the only one he has ever witnessed being set. (Tr. 54-55). Moreover, this is the only citation he has ever written for failure to use a tagline. (Tr. 55-56).

William Nichols has been a surface mine specialist with MSHA since 2009. (Tr. 87). He has eleven years of mining experience, having worked as a truck driver, equipment operator, foreman, and supervisor for movement of heavy equipment. Although he has taken an MSHA, multi-day, crane operator class, he has never operated a crane. (Tr. 88).

Douglas E. Arthur has been a certified crane operator for about 25 years. He has set approximately 50 prail bins for Respondent over the last three years, has never had an accident operating a crane, and has never injured anyone nor seen anyone killed or nearly injured while installing a prail bin. (Tr. 96-97, 102-104).

2. The Events of March 16, 2009

On March 16, 2009, Inspector Woodie traveled with MSHA surface mine specialist William Nichols to Surface Mine #7 to conduct a required biannual inspection. (Tr. 31-32). Woodie could not recall the weather that day, although the unrebutted testimony of Arthur was that it was a "pretty nice day" with no wind. (Tr. 72, 104).

Woodie testified that while traveling as a passenger in Nichols' silver Chevy Blazer down a

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[1]Section 77.210(c) requires that "[t]aglines shall be attached to hoisted materials that require steadying or guidance." See also R. Ex. 1.

sloping haul road to inspect the powder bin storage area about 200 to 300 feet away, he observed a ground man holding the base of the leg of a hoisted powder bin at about chest height. (Tr. 32-33). Similarly, Nichols testified that as he drove down the gravel haul road toward the powder storage area, he had an unobstructed view of the ground man holding the bottom of a leg of the suspended bin at chest height while it was being moved or hoisted by crane from one location to the concrete pad for setting. (Tr. 89-90). The mutual observation lasted a short period of time, and the inspectors arrived at the bin less than a minute later. (Tr. 72, 90).[2] By then, the bin had been lowered real close to the ground. (Tr. 33). It is undisputed that no tagline was used during transport of the hoisted bin by crane for resetting in six to eight inch bolts on a concrete pad or slab about 40 feet away, a process that took five or six minutes. (Tr. 23, 34-35, 99, 111, 122).[3]

The multi-ton, cone-shaped bin was constructed of sheet metal and was used for storing ammonium nitrate. (Tr. 35, 54). It about 30 feet high from the base of the 12-15 foot H-beamed legs to the top of the bin. (Tr. 35, 100). Arthur testified that there were four chains or straps connected to the prail bin during the five or six minutes it took to transfer the bin to the set-up location. These straps had 12 and one-half ton shackles attached to the ends and bolted on all four corners. (Tr. 102) Each of the four straps was good for five times 12,900 pounds. The bin weighed 13,000-14,000 thousand pounds. (Tr. 119). On cross, Arthur testified that the possibility of a strap failing is zero because they are inspected before use, but he conceded that if a strap failed, the load could shift. (Tr. 119-120).

Woodie testified that when he observed the alleged violation, he anticipated issuance of a section 107(a) imminent danger order, but when he and Nichols arrived at the set-up location, the bin had been lowered and the imminence of danger removed. (Tr. 50-51). Upon arrival, Woodie immediately spoke to the ground man (lead man Joe Critchley) and the crane operator (Douglas Arthur) about the failure to use a tagline. (Tr. 37-38, 73-74) Woodie testified that a tagline was necessary to stabilize and prevent the suspended load from swinging or shifting, and to keep the ground man clear of the load as it was being moved to the point where it could be fastened down on bolts and stabilized. (Tr. 36-37). Woodie also testified, however, "in moving the load," everyone was to "stay clear of the load until it's in the location to be set." (Tr. 41-42).

With respect to the citation written, Woodie testified that by grabbing the base of a leg of the suspended load at chest level without using a tagline, the ground man was exposed to a pinch point hazard should the suspended bin fall, topple over, or shift during crane operation.[4] (Tr. 44-

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[2]On cross, Woodie was asked how long he watched the prail bin "being moved?" He responded, a very short period of time, less than a minute.

[3]Woodie's contemporaneous notes state that the ground man was observed working without a tag line beside the powder storage tank, which was suspended about four feet above the ground, and he was using his hands to steady the load. The notes further indicate in cryptic fashion that the lead man "knew." They further indicate that the event lasted less than five minutes, and that and it was "reasonably likely the ground man guided the suspended load with his hands." G. Ex. 1. The notes do not indicate that Nichols was present.

[4]On direct, Woodie testified that the ground man was exposed to a hazard by being "under" the suspended load and it was reasonably likely that a serious injury could occur. (Tr. 39). The

45). Woodie testified that such an event was reasonably likely to occur for a variety of reasons, including improper set up or rigging of the crane, mechanical failure of connections to the load, or operator error concerning movement or lowering of the load. (Tr. 39-43). Woodie further testified that given the size, location and weight of the multi-ton load, and the ground man's proximity to the pinch point he was holding, a fatal or crushing accident was likely to occur should the suspended bin fall, topple over, or suddenly shift and strike the ground man. (Tr. 39-46, 71; G. Ex. 2, box 10).

Woodie determined that the operator was moderately negligent because the ground man was exposed to the hazard and both the crane operator and ground man should have been trained to ensure that a tagline was used when "moving the bin." (Tr. 46, 50; G. Ex. 2, box 11). Woodie determined that mitigating circumstances existed that ruled out high negligence because the operator had never been cited previously for such a violation and Woodie had never spoken to the ground man or the operator about safe operation of the crane. (Tr. 72).

Crane operator Arthur testified that normally once he lifted a load off the ground and spun it around in the direction it needed to go, no one would guide the load. (Tr. 97).[5] Arthur testified that he would then swing the load over nice and easy[6] to the concrete pad where the ground man would have to hold on to the prail bin to "guide" it down over the bolts because the ground man could not control it with a rope [tagline] when standing away from it. (Tr. 97). Respondent's counsel then queried, are you guiding or just making sure it is in the right place. Arthur replied, just positioning to set it on the ground. Tr. 98. According to Arthur's understanding, a tagline (rope) is used to guide and control the suspended load, such as in windy conditions, or when working high off the ground, where the crane swings the load in and the rope can be held for positioning and lowering the load. (Tr. 98, 99-100, 116). In Arthur's opinion, a tagline was not necessary and served no purpose for what the operator was doing, namely, setting up or installing the prail bin. (Tr. 99-100, 103). While admitting that a tagline would have kept Critchley further away from the suspended bin, Arthur maintained that Critchley could not control the bin with a rope if he was standing away from it. Rather, he testified that Critchley had to physically hold on to the bin to ease it down to the bolts. (Tr. 97-99).

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citation and Woodie's notes, by contrast, indicate that the ground man was observed working "beside" the suspended load. On cross examination, Woodie conceded that ground man was holding the legs of the bin beside the suspended load, but still exposed to the pinch-point hazard. (Tr. 68-69).

[5]Arthur testified that he would usually raise the load an average of two or three feet off the ground depending on terrain, but since the bin was being moved 40 feet and uphill to the concrete pad at an elevation five to seven feet higher for set-up alignment with the bolts, he probably came up with the lift (cabled or boomed it up) to avoid hitting the ground. (Tr. 108-09, 111-112). Arthur admitted on direct, however, that after the lift, ground man (Critchley) spun the load around in the direction it needed for placement on the pad and then walked along the side of the bin to the pad and set the bin on the pad. (Tr. 99). Respondent's counsel then asked, so other than positioning it, did you need him to guide it or set it, and Arthur said no. (Tr. 99).

[6]On cross, Arthur admitted that just a slight movement of the lever inside the crane would have a big effect on where the prail bin was located. (Tr. 120).

Arthur further testified, somewhat inconsistently, about the process of setting up a prail bin. He testified that he would hook onto the load, lift it up, and clear everyone out of the way until the load swings steady (plumb-bob).[7] Then the ground man would walk over and "just spin it around a bit to get it in the direction we're going in." (Tr. 101). Given the size of the bin, the "little spin" was really a "good push." (Tr. 125). Then Arthur would swing the bin steady to the pad where the ground persons grab a hold of the bin and ease it down on the pad to line it up for bolting. (Tr. 101-102).[8] During the transport, Critchley did not do anything with the bin. (Tr. 126), he just walked over to the elevated pad about 40 feet away. (Tr. 126-127).

On cross, and in response to my questioning, Arthur testified that at the concrete pad, the bin was grabbed and spun around again by the ground man to line it up and position it in the direction that it needed to be in prior to lowering it down for setting. (Tr. 112-13, 115, 126). At the pad, the ground man would take one of the legs and move the bin to the proper location to set it in line with the bolts. (Tr. 115). Also on cross, Arthur testified that the ground man had the strength to spin the suspended load by grabbing hold of one of the legs and spinning it. However, he also confirmed that the ground man [or ground persons for that matter] could spin the suspended load with a tagline. He further conceded that the purpose of spinning was to line it up (Tr. 114), but then maintained on questioning from the undersigned at the end of the hearing, that the tagline could not have been used to spin the bin to line it up to set it. (Tr. 127).

Judge: Could a tagline have been used to spin the bin?

A: Not to line it up to set it.

Judge: Could it have been used initially to spin the bin when you first picked it up?

A: I'm sure you probably could have used a tagline to spin when I initially picked it up.

Judge: Why wouldn't a tagline have been effective or be used to position the bin after you had moved it the 40 feet?

A: Well, you got a small area to sit something that big down on using a rope. I mean, if you pull on that thing just a foot, it's going to take off spinning. And if you've got to go back down there and pull on it again it's going to spin it. There's no way. You got to physically get a hold of the bin to line it up and set it down that you're going to line it up because it's going to be moving around too much. If you pull on that rope ---.

Judge: So when you position the bin after you got up to the concrete pad, how far off the ground was the bin at that point?

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[7]Arthur testified that no one was near the bin when he lifted it up, because that is when the bin can move a little bit and slide one way or the other. But once the load was lifted and stopped swaying, he considered it safe, without possibility of swinging and hitting or injuring anyone. (Tr. 105-06). Arthur then testified that in his experience there was zero percent chance of the load swaying and swinging when moved plumb-bob. (Tr. 103). He admitted, however, that "it would take a pretty good gust of wind to move . . . a load of that size (Tr. 104).

[8]Arthur testified that normally there is more than one ground man, but Critchley was the only ground man present during the alleged violation. (Tr. 101).

A: As we set it on the slab --- I mean, when we set it on the slab it was down at the time.

Judge: Well, when Mr. Critchley spun it at that location, how high was it?

A: It was about probably two to maybe three feet.

Judge: Two to three feet?

A: Yeah. I'd say the ground was on like --- it was like a slope.

Judge: Was the prail bin still hoisted at that time?

A: When I first picked it up?

Judge: No, when you're at the end of the process and you're getting ready to place it into the bolts.

A: Yes, it's hoisted off the ground maybe 18 inches.

Judge: Did it require steadying or guidance at that point in time to place it into the bolt?

A: It had to be steadied to set down in the holes. But a tagline, you couldn't use a tagline to do that.

Judge: But I think you testified that you could have used a tagline to spin the bin when you first lifted it up?

A. Right.

(Tr. 127-129).

On the other hand, Arthur testified that the ground man could not guide the load because it was too heavy, and the crane was needed to move the load to the proper position. (Tr. 105) On cross, Arthur denied that spinning was guiding the bin to the location. He explained that the crane would have to be moving the load with the ground man traveling along with it for guiding to take place. (Tr. 114)

When inspector Woodie approached, Arthur testified that he had left the crane to join Critchley, who was bolting down the bin on the pad. (Tr. 106, 122).[9] The suspended load was three to five inches off the ground at this point. (Tr. 108). The bolts extended six to eight inches above the concrete slab. (Tr. 108). According to Arthur, Woodie introduced himself and wanted to know why Respondent was not using a tagline. Arthur asked, why do we need a tagline. (Tr. 123). At that point, Woodie pulled out his book and explained that all suspended loads shall have a tagline. (Tr. 107, 123). Arthur explained that "you almost have to have a hold of the bin to set it." He asked Woodie if there was any difference if the load was several inches or several feet off the ground. According to Arthur, Woodie rejoined, "you got to use common sense." (Tr. 107-108). Woodie then wrote the instant citation. (Tr. 124).

Arthur testified that the ground man had to physically hold the bin to set it over bolts on the pad. As noted, Arthur explained that one could not set the bin holding a tagline because "[y]ou can't hold a rope and line something up like that." (Tr. 116). He conceded, however, that if the bin was hoisted several feet above the ground, a tagline could be used to place the bin in the general location necessary so that the load could be lowered about six to eight inches off the ground, where final

[9]Arthur did not see Nichols. (Tr. 107).

adjustments were made. (Tr. 117).

II. LEGAL FRAMEWORK AND CONCLUSIONS OF LAW

A. Significant And Substantial Principles

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. As a general proposition, a violation is properly designated as significant and substantial (S&S) in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

> 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained its *Mathies* criteria as follows:

> 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 (Aug. 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 Company Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996). The Commission has explicitly rejected a finding of an S&S violation based on the "potential" that an injury could occur. *Texas Gulf, Inc.*, 10 FMSHRC 498, 500-01 (Apr. 1988); *Ziegler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993). However, the Secretary is not required to show that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The S&S nature of a violation and the gravity of a violation are not synonymous. The

Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSRHC 1541, 1550 (September 1996).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). Furthermore, the question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texas Gulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). Furthermore, the Commission and courts have held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.2d 133, 135-36 (7th Cir. 1995).

B. Civil Penalty Principles

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority 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 "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) and 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 and 2700.44. The Act requires that, "[i]n 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600, *citing* 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty

assessment criteria." *Thunder Basin Coal Co.,* 19 FMSHRC 1495, 1503 (Sept. 1997).

C. Application of Legal Principles to the Facts

1. The Violation

The cited safety standard requires that "[t]aglines shall be attached to hoisted materials that require steadying or guidance." 30 C.F.R. § 77.210(c); see also R. Ex. 1. I have found no reported Commission cases addressing this standard.

Although the Secretary's MSHA regulations do not define "tagline," Respondent relies on OSHA safety and health regulations for construction cranes at 29 C.F.R. § 1926.1401, which state that "[t]agline means a rope (usually fiber) attached to a lifted load for purposes of controlling load spinning and pendular motions or used to stabilize a bucket or magnet during material handling operations."[10]

It is undisputed that no tagline was attached to spin the multi-ton bin that was hoisted by crane operator for resetting in six to eight inch bolts on the concrete pad about 40 feet away. The issue is whether the suspended multi-ton bin required "steadying or guidance." I credit the mutually corroborative testimony of Inspectors Woodie and Nichols that ground man Critchley held the base of the leg of the hoisted bin at about chest height. I find that this occurred after the load reached the pad given that less than a minute transpired between the observation and the inspector's arrival at the storage bin area. I also note, however, that Arthur admits that Critchley spun the suspended bin immediately after it was lifted up by crane by grabbing a hold of a leg and giving it a good push. In addition, Arthur admitted that Critchley grabbed the leg of the bin to spin it for proper alignment with the bolts prior to lowering of the bin on the concrete pad below.

The dictionary defines "guidance" as "an act of guiding: the superintendence or assistance rendered by a guide: DIRECTION, LEADING." *Webster's Third New International Dictionary* 2328 (1993). As explained above, the record establishes that the hoisted bin needed spinning, and act of guidance, from the ground man for direction and alignment in the proper location under the bolts on the concrete pad prior to lowering the suspended load.[11] Thus, although both are not

[10]The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines "tagline" as "a cable running from a crane boom "to a bucket for steadying the bucket." *Webster's Third New International Dictionary* 2328 (1993). Given Respondent's reliance on the OSHA regulatory definition that specifically defines the term "tagline" in the context of safety standards for construction cranes, I find that definition appropriate here and generally consistent with the dictionary definition of tagline.

[11]Moreover, consistent with Arthur's testimony, it appears obvious that after such spinning, the large suspended load must be steadied to keep it from spinning too far and to line it up for setting. (Tr. 128-29).

required, I find that the hoisted material required guidance *and* steadying by the ground man, both after initial hoisting and prior to actual setting, and a tagline was necessary. Since no tagline was used, I find the violation of section 77.210(c).[12]

2. Significant and Substantial (S&S) and Gravity

I find that the violation was S&S under the four *Mathies* criteria. See 6 FMSHRC at 3-4. As noted above, there was a violation of the mandatory safety standard as alleged by the Secretary for failure to attach a tagline to the hoisted multi-ton bin that required guidance. This was a serious violation, which contributed to a discrete safety hazard that the ground man would be crushed or otherwise killed at the pinch point should the suspended, multi-ton bin fall, topple over, or shift during crane operation.[13] The effect of the hazard, if it occurred, would have been grave, indeed fatal.

With respect to the third element of the *Mathies* criteria, Inspector Woodie testified that such an event was reasonably likely to occur for a variety of reasons, including improper set up or rigging of the crane, mechanical failure of connections to the load, or operator error concerning movement or lowering of the load. I agree with the Secretary that during the continuance or normal mining operations, it was reasonably likely that the ground man would suffer a fatal injury through exposure to the pinch point by failure to use a tagline.

First, I note that Woodie qualifies as an experienced MSHA inspector specifically trained in safety procedures concerning suspended loads. I accord substantial weight to his opinion that the violation is S&S. *Harlan Cumberland Coal Co.*, 20 FMSHRC at 178-79; *Buck Creek Coal, Inc. v. MSHA*, 52 F.2d at 135-36.

Furthermore, the Commission interprets safety standards to take into consideration ordinary human carelessness. *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consequently, the construction of mandatory safety standards, which involve miner behavior cannot

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[12]While I am somewhat sympathetic to Respondent's argument that as a practical matter the prail bin could not be set without grabbing a hold of the bin (Tr. 116; R. Br. at 4-5), section 101(c) of the Act provides that Respondent may request modification of the existing standard and MSHA may approve the requested modification if the alternate method proposed will guarantee no less than the same measure of protection afforded by the existing standard. Respondent presented no evidence that it sought such a modification here. Moreover, Arthur's testimony established that during the instant violation Respondent had departed from its "normal" practice to use more than one ground man (Tr. 101), who may have been able to set the prail bin effectively by each using a tagline.

[13]Although Woodie did not explain what he meant by a pinch point, I note that a pinch point can occur anywhere a part of the body can get caught between two objects. Thus, anywhere equipment is transmitting energy, there is a pinch point. Given the force of certain mining equipment and machinery, particularly the instant bin, a pinch point injury can be serious and disabling, and can cause amputations, or even death.

ignore the vagaries of human conduct. See, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc*., 3 FMSHRC 2526, 2531 (November 1981). This analysis requires consideration all relevant exposure and injury variables.

Even a skilled crane operator such as Arthur, who has never had an accident, may suffer a momentary lapse of attentiveness from fatigue or environmental distractions, which results in slight, improper movement of crane controls and a corresponding large and unexpected movement of the multi-ton bin. Should such occur, there is a reasonable likelihood of injury to the ground man caught in the pinch point holding the hoisted load without using a tagline. Similarly, during the course of normal mining operations, the load is at ongoing risk of being rigged improperly, or the operator could just plain forget to inspect the straps, resulting in rigging or connection error, and injury should the load shift or topple over during the set-up process used by Respondent. In the words of the recent Lexus commercial, "Accidents don't announce themselves." See also Pet. Br. at 12 ("The history of mining is filled with casualties caused by operators thinking too highly of their skills and thus taking shortcuts. . . . Equipment fails all the time for reasons both expected and unexpected. . . . The lack of an accident in the past is no guarantee that the future will be accident free."

In sum, the confluence of factors here, including the guiding and steadying of the hoisted load, the exposure to the pinch point hazard, the enormous size and weight of the load, and the ongoing vagaries of human behavior that could result in operator error or rigging failure, persuade me that during the course of normal mining operations, there is a reasonable likelihood that Respondent's continued practice of setting prail bins without use of a tagline will result in a pinch point injury to the ground man.[14]

Finally, with regard to the fourth element of *Mathies*, I agree with Inspector Woodie that given the size, location and weight of the multi-ton load, and the ground man's proximity to the pinch point hazard while holding the hoisted load, a fatal or crushing accident was likely to occur should the suspended bin fall, topple over, or suddenly shift and strike the ground man during the set up process.

3. Negligence

The Secretary's regulations at 30 C.F.R. § 100.3 (d) provide the following with regard to negligence under the Mine Act:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous

[14]As noted, Arthur testified that he set approximately 50 prail bins and a tagline was unnecessary and could not be used to set the bin. (Tr. 97, 99, 116). Thus, I infer that but for the instant citation, Respondent would have continued to set prail bins without the use of a tagline.

> conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table X.

The Secretary's regulations categorize negligence as "moderate" when [t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3, Table X.

Inspector Woodie testified that he determined the Respondent to be moderately negligent because the ground man was exposed to the hazard and both the crane operator and ground man should have been trained to ensure that a tagline was used when moving the bin. Woodie ruled out high negligence and determined that mitigating circumstances existed because the Respondent had never been cited previously for such a violation and crane operator Arthur was not looking at ground man Critchley when Woodie observed the violation. I find that Woodie's negligence findings are consistent with the regulations and supported by the record. Accordingly, I affirm his finding of moderate negligence.

4. Appropriate Civil Penalty

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The parties stipulated that Respondent demonstrated good faith in the abatement of the citation; that the imposition of the proposed civil penalty of $392.00 will have no effect on Respondent's ability to remain in business; that the appropriateness of the penalty to the size of Respondent's business should be based on the fact that Respondent worked 15,344 hours in 2008; and that Respondent was not assessed any citations in the 15 months preceding the instant citation. Given these criteria, my finding that the gravity of the violation was S&S, I conclude that the Secretary's proposal is appropriate, and I assess a civil penalty of $392.00.

III. ORDER

For the reasons set forth above, Citation No. 8078572 is **AFFIRMED**, as written. Within 40 days of the date of this decision, Beckley Crane & Construction Company, Inc. is **ORDERED** to pay a civil penalty of $392.00 for the violation found above. Upon payment of the penalty, this proceeding is **DISMISSED**.

Thomas P. McCarthy
Administrative Law Judge

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