FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 10 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-206-M
v.	:	
DAWES RIGGING & CRANE RENTAL	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves a single citation issued to Dawes Rigging and Crane Rental ("Dawes") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Citation No. 6502467 alleges that Dawes' workers failed to stay clear of a suspended load as required by the mandatory safety standard in 30 C.F.R. § 56.16009.[1] The Administrative Law Judge affirmed the citation and the unwarrantable failure designation, concluding that three workers were within the suspended load's spin/arc/fall path in violation of the standard. 34 FMSHRC 2012, 2024-25, 2028-29 (Aug. 2012) (ALJ).

While we affirm the finding of a violation and the assessed penalty, we conclude that the Judge erred in finding an unwarrantable failure.[2] We find that the Judge erred in his analysis of the extent of the violation, the length of time the violation existed, and whether the operator was put on notice that greater efforts were necessary to achieve compliance with the standard. In addition, in light of these errors, the Judge failed to give proper weight to the fact that the one worker who traveled directly under the suspended load did so to prevent an imminent threat to another worker.

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[1] 30 C.F.R. § 56.16009 provides that "[p]ersons shall stay clear of suspended loads."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

I.

Factual and Procedural Background

Dawes was contracted to provide, assemble, and operate a Manitowoc Model 21,000 mobile crane at Tilden Mine's pellet plant in Marquette County, Michigan. On May 27, 2010, Dawes was attempting to connect a 93,000 pound, 150 foot long lattice boom to the body of the Model 21,000 crane with the help of a smaller Manitowoc Model 14,000 crane. 34 FMSHRC at 2017, 2030. This process, referred to as the "boom-to-foot connection," required the smaller crane to lift the lattice boom precisely into place so that the boom and body of the larger crane line up and pins could be inserted to connect the two components. *Id.* at 2017, 2021. The assembly of the crane was overseen by Assembly/Disassembly Director William Rahmlow, a veteran in crane operation and assembly with over two decades of experience at Dawes. *Id.* at 2019.

Dawes employed seven men to complete the boom-to-foot connection. Jeffery Eick and an oiler were tasked with holding tag lines to help stabilize the elevated boom. Eick was positioned two to seven feet to the east of the boom on the end of the boom closest to the body of the Model 21,000 crane, and the oiler was on the west side of the boom on the opposite end. Rahmlow was immediately adjacent to the west side of the boom, across from Eick, giving instructions to the crew to help guide the boom into place. *Id.* at 2020-21, 2024-25; Dawes Ex. 12. Two men were located on the body of the large crane where they would make the final pin connections when the boom was in place. 34 FMSHRC at 2017; Tr. 162. Cleve Mozley was operating the Model 21,000 crane, and Randy Gilbertson was operating the Model 14,000 crane. 34 FMSHRC at 2017.

While the lattice boom was being lifted into place, a gust of wind caused the boom to swing to the east towards the cab of the large crane where Mozley was working. *Id.* at 2018. To avoid a collision, Rahmlow instructed Eick to cross under the boom to pull the boom away from the cab. *Id.* at 2025; Tr. 169, 170. Eick complied, and with Rahmlow's assistance, was able to pull the tag line and re-stabilize the boom. 34 FMSHRC at 2025.

MSHA Inspector Dominic Vilona observed Dawes' assembly of the crane from inside a van parked atop a hill 150 yards away. *Id.* at 2014, 2014 n.2. From the inspector's vantage point, it appeared that Rahmlow was working directly under the boom. Tr. 26-27. Vilona also observed another miner (Eick) on the northeast side of the boom holding a tag line. Tr. 27. Vilona then had the van driver go to the site, where he observed that the person with the tag line had moved to the northwest side of the boom. Tr. 31-32. Accordingly, Vilona issued a citation alleging a violation of section 56.16009 for the two men's failure to stay clear of a suspended load. Tr. 45; 34 FMSHRC at 2015.

In his decision below, the Judge found that Eick, Rahmlow, and Mozley had failed to stay clear of the area in which the boom could have moved, spun, or fallen in violation of the

standard. 34 FMSHRC at 2024. Although Rahmlow and Mozley were never directly under the suspended boom, the Judge noted that their proximity to the boom placed them both at risk of serious injury were it to move or fall unexpectedly. *Id.* at 2024-25.

Dawes filed a petition for review, which the Commission granted. It contends that the cited standard does not apply to the assembly of a crane, and even if it does, the regulations should not be interpreted to prevent the assembly crew from working alongside the suspended boom. Dawes further argues that the Judge erred in finding an unwarrantable failure as its conduct did not rise to the level of aggravated conduct or a reckless disregard or indifference to the safety of its workers.

II.

Disposition

A. Whether Section 56.16009 Applies to Suspended Components During Equipment Assembly

The cited standard, 30 C.F.R. § 56.16009, appears in the regulations governing metal and nonmetal mines, under Subpart O entitled "Materials Storage and Handling." Dawes asserts that the crane is "machinery" rather than "material" and hence is not covered by the standard.

Regulatory language cannot be construed in a vacuum but must be read in its context and with a view to its place in the overall regulatory scheme. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). When a regulation is ambiguous, traditional tenets of regulatory interpretation permit examination of the heading of the section in which the regulation falls to assist in resolving doubt about its meaning. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 710 (8th Cir. 2013) (citing *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)).

Although ambiguity may exist in the scope of the regulation's application, we find the term "materials" sufficiently broad to encompass the suspended boom in question. "Materials" is defined, inter alia, as the "substance or substances out of which a thing is or can be made" or the "[t]ools or apparatus for the performance of a given task." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1079 (4th ed. 2009); *see also Robert Hardin*, 19 FMSHRC 1233, 1237 (June 1997) (defining the term "smoking materials"). We are not persuaded by Dawes' contention that the suspended boom is beyond the purview of the regulation. The placement of the regulation does not exclude suspended equipment from coverage. *See Jim Walter Res., Inc.*, 7 FMSHRC 493, 495-96 (Apr. 1985) (finding a regulation governing the transport of "materials" to include the transport of coal, despite the Judge's finding that a more appropriate standard existed). Additionally, Subpart O contains other regulations that address equipment such as overhead cranes (§§ 56.16014, 56.16015), forklifts (§ 56.16016), and tag lines, hitches and slings (§ 56.16007).

We decline to read a limitation into the standard where none exists. We find the standard applicable to the case at hand.

B. Whether Dawes' Conduct Violated Section 56.16009

The question of whether an operator has violated section 56.16009 is dependent on whether a person was not "clear of" the suspended load. The inspector issued Citation No. 6502467 based on the belief that both Eick and Rahmlow had failed to stay clear of the suspended load because they had gone directly under the boom. The Judge discounted the inspector's testimony concerning Rahmlow's location directly under the boom based on the contrary testimony by Dawes' witnesses and the inspector's distance from the assembly site. 34 FMSHRC at 2024-25. However, the Judge interpreted "stay clear of" to prohibit persons from working in the suspended load's possible arc or radius and the area that would be affected should the load fall. *Id.* at 2024. Accordingly, the Judge found that not only were Eick and Rahmlow in violation of the standard, but that Mozley, who was operating the Model 21,000 crane, was also not clear of the boom.

All parties agree that it is not safe to stand directly under a suspended load. *See* Tr. 86, 121, 146, 160, 173, 179, 189; Sec'y Ex. 15 at 2-20, Fig. 2-4. Further, we have held that "stay clear of" requires more than simply staying out from directly underneath a suspended load. *Anaconda Co.*, 3 FMSHRC 299, 301 (Feb. 1981). As explained below, the record in this case does not permit further elaboration on the principle in *Anaconda*.

It is undisputed that, at Rahmlow's direction, Eick crossed directly under the suspended load in order to pull the wayward boom away from the cab where Mozley was working. In doing so, Eick placed himself in danger of potentially fatal injuries were the crane's rigging to fail and the 93,000 pound boom to fall. Although in some emergency situations there may be instances where an operator is justified in violating a standard to prevent an impeding greater hazard, *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 n.2 (Dec. 1983), Eick's conduct cannot be excused by citing the threat the boom posed to Mozley. This was an emergency of Dawes' own making by virtue of the number and placement of tag lines attached to the boom. Had Dawes employed additional tag lines or made effective use of the two existing tag lines, the crane assembly crew would have been better situated to counteract the effect of the sudden gust of wind without resorting to Eick moving under the boom. Eick's travel beneath the boom clearly violated the regulation.

The case regarding the placement of Rahmlow and Mozley is not as straightforward. Much of the testimony of the Secretary's sole witness, Inspector Vilona, was not credited by the Judge because of the inspector's distance from the assembly site and his relative inexperience with the crane assembly process. 34 FMSHRC at 2014 n.2, 2025 n.14. Whether a person is clear of a suspended load must be determined by considering the particular facts surrounding the violation. The case cannot rest on a vague observation that suspended loads move in unpredictable ways. Tr. 46.

No evidence was presented that either Rahmlow or Mozley was ever beneath the boom, and it is not clear from the evidence whether they were located in positions in which they were in danger from the movement or falling of the boom. The Secretary did not produce any evidence as to the area which would be affected if the boom fell.[3] In any event, Eick's unquestioned movement under the boom clearly violated the standard and we affirm the Judge's finding of a violation.

C. Whether the Judge Erred in Finding an Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

Having reviewed the Judge's application of those factors, we vacate the Judge's unwarrantable failure determination. As set forth below, the factors relevant to an unwarrantable failure determination do not support a finding of an unwarrantable failure.

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[3] Because Vilona issued the citation based on his belief that persons worked directly underneath the suspended boom, there is scant evidence in the record explaining what area posed a risk to persons, beyond that directly under the boom. The inspector evidently did not believe that Mozley was exposed to the hazards posed by the boom. Tr. 44-45. Similarly, the inspector did not appear to believe that Rahmlow's position next to, but not under, the boom placed him at risk of immediate injury. Tr. 84. When Vilona reached the crane assembly site, Rahmlow was standing very close to the boom guiding the boom-to-foot connection. Tr. 38; Sec'y Ex. 4 at 1.

The extensiveness of the violative conduct has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued. *See E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) (the purpose of the extensiveness criterion is to account for the magnitude or scope of the violation); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992) (finding five accumulations of loose coal identified during a single inspection to be extensive). In some situations, though, extensiveness depends on the number of persons affected by the violation. *See Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 681 (July 2002). As discussed above, the evidence establishes that Eick engaged in violative conduct and that his presence under the boom only endangered himself. Given the relatively small scope of the hazard, the violation was not extensive.

An operator's past practices are not relevant to the consideration of the extensiveness factor in an unwarrantable determination analysis. To the extent the Judge based his unwarrantable failure finding on Dawes' past practices, he erred. However, even considering past practices, the record does not support a finding that the violative conduct was pervasive. Dawes is a contractor that operates at work sites beyond MSHA jurisdiction, which are governed by regulatory schemes with different rules regarding how close persons can work in relation to suspended loads. The record only indicates that Dawes worked at one other mine prior to its work at Tilden Mine, and there is no testimony as to the type of work performed at mines in the past. *See* Sec'y Ex. 14. In light of the fact that the record establishes a relatively discrete violation in this case, and without past examples of Dawes employees failing to stay clear of suspended loads at MSHA regulated work sites, there is no basis for finding that the violative conduct was extensive.[4]

Similarly, the record does not support the Judge's presumption that Eick was in dangerous proximity to the boom for a significant amount of time. Eick was only under the suspended boom for a matter of seconds. Tr. 54. Although his actions placed him in danger of serious injury were the rigging to fail, Eick's exposure to this danger was very brief. Accordingly, the extensiveness and duration of the violative condition weigh against a finding of an unwarrantable failure.

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) ("a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction") (citations omitted). "The purpose of evaluating the number of past violations is to determine the degree to which those violations have 'engendered in the operator a heightened

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[4] Given that substantial evidence only supports the finding that Eick violated the standard, the Judge erred insomuch as he considered Rahmlow's and Mozley's conduct in his unwarrantable failure analysis. *See* Slip op., *supra,* at 4-5.

awareness of a serious . . . problem.'" *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (quoting *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)).[5]

The Judge suggests that the operator was indirectly on notice that greater efforts were necessary where the regulation and its intent were clear. 34 FMSHRC at 2029. However, the evidence demonstrates that Dawes had a good safety record. In the 15 months prior to the issuance of the citation, Dawes had only been cited for two violations by MSHA, neither of which alleged a violation of section 56.16009 or a danger posed by a suspended load. Sec'y Ex. 14. There is nothing in the record to suggest that MSHA had previously spoken to Dawes about its crane assembly process or that Dawes was alerted in any other way that employees failing to stay clear of suspended loads represented an ongoing problem requiring corrective measures. Accordingly, we determine that substantial evidence does not support the Judge's finding of notice and conclude that this factor also weighs against a finding of unwarrantable failure.

Finally, as we have discussed, the Judge's findings regarding extensiveness, duration, and notice were erroneous. In light of this, we conclude that the mitigating circumstances present here outweigh the remaining factors the Judge relied on to find unwarrantable failure. Most importantly, we agree that Eick's explanation for why he did not stay clear of the suspended load should be considered as a mitigating factor. The evidence indicates that Eick only crossed under the boom in order to address an imminent threat to Mozley. While such a consideration does not negate the violation, it significantly militates against a finding that Dawes was indifferent to the safety of its employees.

D. Penalty Determination

Although we vacate the unwarrantable failure designation, we find the Judge's application of the civil penalty criteria in assessing a penalty of $2,500 is not an abuse of

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[5] A significant difference exists between the forms of notice that inform an operator of the Secretary's interpretation of a standard and the forms of notice that inform an operator that greater efforts at compliance are needed for purposes of an unwarrantable failure analysis. An operator is on notice of the Secretary's interpretation of a regulation when it is, or reasonably should be, aware of the standard's requirements or is aware of other regulatory enforcement announcements, such as the Rules to Live By initiative. However, such notice of a regulatory interpretation does not place an operator on notice that its mine is failing to comply with MSHA's regulations for the purposes of the unwarrantable failure analysis. In that context, it is well settled that we examine the operator's history of violations, warnings from inspectors, and other forms of specific warnings to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1262 (Aug. 1992) (past preshift examinations placed operator on notice of a problem); *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) (past discussions with MSHA placed operator on notice of a problem); *Lion Mining Co.*, 18 FMSHRC 695, 700 (May 1996) (history of similar violations and recent roof falls placed operator on notice of a problem).

discretion. The Secretary proposed a penalty of $3,000, which the Judge reduced to $2,500. The penalty assessed by the Judge falls within the range of his discretion given the high level of danger the 93,000 pound boom posed; the fact that Rahmlow, a supervisor, instructed Eick to cross under the suspended load; and that Dawes' decision regarding the number and placement of tag lines to control the suspended load precipitated the need to go beneath the suspended load.

III.

Conclusion

For the reasons set forth above, we (1) affirm in result the Judge's finding that Dawes violated section 56.16009, (2) vacate the unwarrantable failure designation, and (3) affirm the $2,500 penalty assessed by the Judge.

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Commissioner

William I. Althen, Commissioner

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