FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 11 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2016-81
v.	:	
SIMS CRANE	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The single citation at issue alleges that the manner in which a Sims Crane employee exited the cab and descended from a crane on a lowboy trailer violated the fall protection standard at 30 C.F.R. § 56.15005.[1]

Sims argued below that the employee's method of egress was consistent with safe access standards issued by the International Organization for Standardization ("ISO") and incorporated by the Mine Safety and Health Administration (MSHA). The Administrative Law Judge found that Sims failed to provide certification of ISO compliance which he believed was directed by MSHA guidance, rejected Sims' argument, and found a violation. 39 FMSHRC 116, 124-25 (Jan. 2017) (ALJ).

On appeal, Sims claims that the Judge found a violation based solely on Sims' failure to provide documentation of ISO compliance, and that this constitutes legal error. Sims argues that a lack of ISO documentation is not a proper basis for a violation of the standard, and that the Judge improperly shifted the burden of proof by requiring Sims to establish compliance rather than requiring the Secretary to establish a violation.

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[1] The standard states: "Safety belts and lines shall be worn when persons work where there is a danger of falling." 30 C.F.R. § 56.15005. This may be satisfied by compliance with the Occupational Safety and Health Administration's fall protection standard, which requires employees working at a height of six feet or more to be protected from falling by the use of guardrails, safety nets, or personal fall arrest systems. Ex. R-3 (MSHA Program Policy Letter No. P14-IV-02 (Mar. 25, 2014)).

For the reasons below, we find that the Judge improperly shifted the burden of proof, reverse the Judge's decision, and vacate the citation.

I.

Factual and Procedural Background

A. Factual Background

The events at issue took place at a phosphate rock mine and processing facility in Florida, operated by Mosaic Company ("Mosaic"). Sims Crane is a contractor that was providing crane rental and services to Mosaic at the time of these events.

In September 2015, MSHA Inspector Robert Peters was driving to Mosaic's administrative offices when he saw a crane on a lowboy trailer on the side of the road.[2] The crane was being prepared for transport by William Nasrallah, a Sims employee. Peters saw Nasrallah move from the cab of the crane toward the left front fender. Peters turned away for a moment to park, and when he looked back, Nasrallah had descended to the ground. The entire process took less than a minute. After parking, Peters approached the crane and issued a citation alleging a violation of section 56.15005.[3] He testified that he issued the citation because the fender was narrow and not designed for use as a walkway, creating a danger of falling, and that Nasrallah had not used fall protection such as handholds while crossing.[4] Tr. 42, 52, 71-72.

At the time, the inspector assumed that Nasrallah had descended via the crane's valve bank. Tr. 37-40. It was later determined that Nasrallah left the cab, took two or three steps on a walkway across the fender area, then descended by way of a ladder at the front of the crane as it was positioned on the lowboy trailer. The crane had three ladders: one at each front corner and one under the cab. The inspector was unaware of the front ladders when he issued the citation. Tr. 63-64, 78.

Nasrallah maintained three points of contact while exiting the cab and descending the ladder, but conceded that handholds were not available while crossing the fender. He stated that this was his normal procedure for exiting this type of crane when loaded on a lowboy trailer and that his procedure felt safer than using the ladder directly beneath the cab, which had a 34-inch drop from the last step to the ground. Tr. 116.

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[2] A lowboy trailer has two drops in deck height, which allows the deck to be extremely low compared to other trailers.

[3] The inspector also issued an imminent danger order pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a). The Judge found the operator did not timely contest the imminent danger order and it was therefore not before him. 39 FMSHRC at 119 n.4. The order was subsequently reopened and vacated. Unpublished Order, No. SE 2017-97-RM (Dec. 7, 2018) (ALJ) (finding that the miner's descent from the crane could not reasonably be expected to result in imminent serious harm).

[4] MSHA subsequently proposed a civil penalty of $270 for the alleged violation.

The area Nasrallah crossed while travelling from the cab to the ladder was approximately seven feet above the ground, six feet in length, three feet wide, and covered in anti-skid material. Tr. 43-44, 51, 98-99, 113, 124-28. The inspector initially estimated the width at 20 inches, but conceded that he did not measure the width or look closely at the crane. Tr. 43-44, 71, 80. He was apparently unaware of the anti-skid coating when he issued the citation. Tr. 73.

Robert Berry, Sims' Safety Director, testified as to the feasibility of various forms of fall protection when accessing or egressing this model of crane. He explained that tying-off is not feasible because a standard seven foot lanyard offers no protection for someone seven feet above the ground. He agreed that it is impossible to maintain three points of contact when crossing the deck; however, he testified that the crane was manufactured in compliance with ISO standards regarding safe access and egress. Specifically, the crane has non-skid surfaces, handholds at key locations, and ladders at the front and at the cab. Tr. 93, 97-98, 103.

B. Summary of Relevant ISO Standards

The International Organization for Standardization develops and publishes international standards for a wide variety of products, services and systems. Certification of compliance with an ISO standard is conducted by external certification bodies. Two standards have been referenced in this matter.

The primary standard at issue is ISO 2867, titled "Earth-Moving Machinery Access Systems." The standard requires in part that all access system surfaces used for walking must be slip resistant. The standard also encourages the use of three-point support when ascending, descending, or moving while more than one meter above the ground, but states that two-point support is acceptable for stairways, ramps, walkways and platforms. Ex. R-5, §§ 4.1.5, 4.1.6.

ISO 2867 has been incorporated into MSHA's guidance through Public Information Bulletin ("PIB") No. P10-04, titled "Safe Access, Fall Prevention and Fall Protection involving Self-Propelled Mobile Equipment." Ex. R-2. The PIB lists methods for reducing the risk of falls from mobile equipment, such as: inspecting equipment for icy, wet or oily areas; ensuring that walkways are no narrower than their original manufactured widths and have slip-resistant surfaces; and ensuring that handrails are within easy reach at critical locations. The PIB then states that, "[i]n addition, equipment manufacturers may be providing safe access, fall prevention and fall protection by complying with ISO 2867." The PIB notes that "Operators are responsible for providing documentation to verify that their equipment is ISO 2867 certified," which inspectors may then consider in determining whether safe access has been provided. *Id.*

ISO 11660, titled "Cranes – Access, Guards and Restraints," addresses general safety requirements for crane access systems, dependent on whether the access relates to control stations or maintenance. For example, the standard outlines the appropriate dimensions and characteristics for ladders, handrails, walkways, and other access system elements. Ex. R-7. As discussed below, the Judge declined to consider ISO 11660 in his decision because it has not been incorporated by MSHA into the regulatory program. Sims has not contested that determination.

C. The Judge's Decision

The Judge found that Nasrallah crossed the walkway on the fender of the crane to get from the cab to the front ladder—a distance of six feet at a height of seven feet—without handholds or other forms of fall protection. 39 FMSHRC at 121-22.

The Judge then addressed Sims' argument that Nasrallah's method of egress did not violate section 56.15005 because it was consistent with ISO and MSHA guidance. The Judge was persuaded that the method of egress was consistent with ISO 2867, and found that this standard had been incorporated by MSHA. However, he held that PIB No. P10-04 requires operators to provide documentation certifying that equipment is ISO compliant and that Sims had failed to provide such documentation for the crane at issue. Accordingly, the Judge rejected Sims' compliance argument and found a violation. *Id.* at 122-25. He stated that if Sims had provided documentation that the crane was ISO certified, then pursuant to MSHA guidance, he would not have found a violation.[5] *Id.* at 127.

The Judge also reduced the likelihood of injury to "unlikely." He found that the violation contributed to a falling hazard, but that the Secretary failed to establish that taking two or three steps across a three-foot wide, slip-resistance surface was reasonably likely to result in a fall. *Id.* at 126. Finally, the Judge reduced the negligence to none and imposed a $100 penalty. *Id.* at 126-27.

II.

Disposition

The Mine Act imposes on the Secretary the burden of proving an alleged violation by a preponderance of the evidence. *See, e.g.*, *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). In other words, the Secretary must convince the trier of fact that the allegation is more probable than not. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). To prove a violation of section 56.15005, the Secretary must show by a preponderance of the evidence that person(s) were working where there was a danger of falling without adequate fall protection. If the Secretary fails to meet this burden then there is no violation, irrespective of any counterarguments. We find that the Judge in this instance centered his analysis on the strengths and weaknesses of Sims' counterarguments without first determining whether a preponderance of the evidence supported the Secretary's claims. Accordingly, we find that the Judge improperly shifted the burden of proof.

The Judge did find as a factual matter that Nasrallah walked across the left fender—a distance of six feet at a height of seven feet—without handholds, and noted that the "Secretary thus argues that Nasrallah's travel across the fender wheel well without maintaining three points

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[5] The Judge was also persuaded that the method of egress was consistent with ISO 11660, but found that the standard had no bearing on the violation because it had not been incorporated by MSHA. 39 FMSHRC at 124.

of contact constitutes a violation of section 56.15005." 39 FMSHRC at 122. However, he then moved directly into an analysis of Sims' claim that the method of egress complied with MSHA guidance.[6] Despite finding persuasive evidence that the crane complied with ISO 2867, the Judge ultimately rejected Sims' argument, because Sims had not provided the documentation required by MSHA's guidance incorporating this ISO standard.[7] The Judge concluded: "In the absence of such certifying documentation, I reject Respondent's argument that Nasrallah's egress procedure complied with MSHA's recommendations in PIB No. 10-04. I therefore find that a technical violation occurred." 39 FMSHRC at 122-25.

Conspicuously absent from the Judge's decision is any analysis of the Secretary's underlying claim that travelling across this particular walkway without maintaining three points of contact violates section 56.15005. Rather than requiring the Secretary to prove by a preponderance of the evidence that the scenario at issue presented a danger of falling (particularly in light of the additional evidence presented by Sims), it appears that the Judge apparently inferred that the scenario was presumptively violative and then turned his attention to Sims' counterargument.

Upon rejecting the counterargument, the Judge then found a violation, without returning to the Secretary's underlying claim. By doing so, the Judge improperly placed on Sims the burden of proving that the method of egress was compliant (to establish a non-violation), rather than requiring the Secretary to meet his burden of proving that it was unsafe (to establish a violation).[8]

In addition to raising its burden-shifting argument, Sims claims that the Judge legally erred by finding a violation based solely on Sims' failure to provide documentation of ISO compliance. We agree that Sims' interpretation is a reasonable one, given the Judge's factual

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[6] The Judge's analysis described herein is embedded in the "significant and substantial" discussion within the decision. 39 FMSHRC at 122-25; *see Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). There is no separate discussion solely addressing the fact of the violation.

[7] It is not clear that the PIB at issue actually *requires* such documentation, and the language of the PIB strongly suggests that any such requirement arises in the context of a demand for documentation *by an inspector*. It states that compliance "may" indicate adequate fall protection, inspectors "may" consider documentation of such compliance when deciding whether to issue a citation, and that operators are "responsible" for providing such documentation to inspectors. Ex. R-2. In effect, it simply states that *if* an operator wishes an inspector to consider ISO compliance, then the operator (presumably as the party with access) should provide the relevant documentary evidence.

[8] The Secretary suggests that Sims' compliance argument is an affirmative defense, such that the burden of proving the defense falls on the party asserting it. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008). This is not a circumstance where the burden-shifting framework applies, and regardless, under such a framework the Secretary must still prove his prima facie case.

findings regarding the relative safety of the equipment and his statement that he would not have found a violation had Sims produced the required document.[9] *Id.* at 127.

However, the Judge's error is more fundamental. The Judge was not bound by the PIB to find a violation simply because of a lack of documentation of compliance with the PIB, just as he would not have been bound to find no violation if documentation had been provided. Rather, the Judge was required to consider the PIB for what it is: a public guidance document that informs the agency's judgment on the danger of falling from mobile equipment.

The PIB itself makes clear that the ISO and J185 practices are alternative, and not exclusive, means of demonstrating that miners are appropriately protected against accidental falls. The PIB expressly states that manufacturers may comply with these industry standards "in addition" to the measures set forth in the PIB. Inspectors may use certification documents to ascertain whether operators are "providing safe access, fall prevention and fall protection." Ex. R-2.

In this case, the Secretary failed to establish that fall protection beyond that provided by the design of the equipment and the practices followed by Mr. Nasrallah (features and practices that the PIB identifies as exemplary) was necessary. Moreover, the operator provided evidence that its actions were in fact consistent with the recommendations in the PIB.

While it would constitute legal error for a Judge to consider the PIB binding, compliance with ISO and/or MSHA guidance can and should be considered to the same degree as any other evidence. Partial or full compliance may have a bearing on the level of safety (similar to an expert opinion or industry standard), which is relevant in determining whether a danger of falling existed.

If the Judge relied on the lack of compliance documentation as Sims suggests, then his error was not that he considered compliance at all, but rather that in considering compliance, he treated the absence of documentation as dispositive. However, we need not determine whether the Judge improperly relied on the lack of documentation to find a violation because we find that he improperly shifted the burden to the operator. Rejection of a counterargument should result in a violation *only if* the Secretary has successfully met his burden of proof—that is, by at least providing substantial evidence to support his position. For the following reasons, we find the Secretary has not done so in this instance.

Under the particular facts of this case, the limited evidence put forward by the Secretary does not establish a danger of falling by a preponderance of the evidence. The inspector emphasized that he found a violation because the fender of the crane was narrow and not

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[9] An alternative reading of the Judge's opinion, as suggested by the Secretary, is that the Judge found a violation based on the height of the fender and lack of handholds, and only relied on the lack of documentation to reject the compliance defense. However, as discussed *supra*, whether the Judge relied on the lack of documentation to find a violation or to reject a defense is ultimately irrelevant. This decision turns on the Secretary's failure to meet his burden of proof.

designed for use as a walkway (despite referring to it as such), so that a stumble or misstep could result in a fall. Tr. 42-44, 52, 71-72. However, he conceded that he did not actually examine the crane. Tr. 80. This may explain why the inspector incorrectly estimated the fender's width at 20 inches rather than 36-42 inches (Tr. 43-44, 98-99, 125) and was apparently unaware of either the anti-skid coating or the ladders at the front of the crane (Tr. 63-64, 73, 78).

Since the inspector was still under the impression during the hearing that Nasrallah must have climbed down the valve bank, he apparently also failed to confirm the method of egress with Nasrallah during their ten-minute conversation after he approached the crane. Tr. 78, *see also* Tr. 35-36. The only accurate information provided by the inspector, i.e., the only evidence put forward in support of the violation, is the height and length of the fender, and the absence of handholds.

Conversely, Sims' witnesses provide a detailed description of both the method of egress and the crane, including a discussion of the manufacturer's safety specifications. Nasrallah testified that he had handholds while exiting the cab (wheel and door handle), took two to three steps from the cab to the front ladder without handholds, and then had handholds as he turned around and descended the ladder at the front. Tr. 114, 120, 135. He testified that the relevant portion of the crane deck was three to three and half feet wide, six feet long, covered in anti-skid coating, and free of ice, rain, or debris. Tr. 98-99, 113, 124-25, 128-29.

Sims' Safety Director testified that standard methods of fall protection such as safety harnesses are not feasible when only seven feet above the ground; therefore manufacturers provide alternative safety measures (present in the crane at issue) such as anti-skid walking surfaces and handholds at key locations. Tr. 93, 97-98, 103. And yet, the Secretary conducted no cross-examination regarding the accuracy or efficacy of these alternative safety measures, apparently relying on a simple statement from the inspector that even if anti-skid coating was present it "wouldn't have any bearing." Tr. 73.

In sum, the Secretary would have the trier of fact find a danger of falling based solely on the seven-foot height of the fender, the lack of handholds, and a general statement that there is always some danger of falling. This is so despite the bulk of the testimony indicating that Nasrallah took two steps across a flat, three-foot wide, skid-resistant surface which was designed for use as a walkway and which complies with safe access standards created by the ISO and implemented by manufacturers. Given the record, we find substantial evidence does not support the decision that a danger of falling was more probable than not.[10]

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[10] We do not suggest that working at a certain height without handholds would never be sufficient to establish a violation, or that working at a height of seven feet is inherently safe. This is particularly the case where a miner is performing work rather than merely taking two or three steps across a slip-resistant walkway, or where there is testimony as to a specific danger (for example wet conditions), where the facts could support a violation of the fall protection standard. We also do not go so far as to positively find that there was no danger of falling. Nothing in our decision may be taken as a diminution of the importance of fall protection for the safety of miners. We only find that in this specific case, the Secretary has failed to establish by a preponderance of the evidence that taking two or three steps across a flat, three-foot wide, skid-

The Judge's factual findings below are consistent with this determination.[11] Crediting Nasrallah's and Berry's testimony regarding the crane, the Judge noted that the three-foot width and anti-skid coating suggest that the fender was intended for use as a walkway, and that such characteristics "can reduce mobile equipment slip and fall accidents." 39 FMSHRC at 124, 126. He was also persuaded that the crane was compliant with the ISO safety standards as a factual matter, finding only that the crane failed to comply with his understanding of the documentation requirements of the incorporating PIB. *Id.* at 124-25. Essentially, the Judge's factual analysis of the record suggests that the conditions on the crane *likely were not* dangerous. In contrast, all the Secretary offers is the height of the crane, the lack of handholds, and the inspector's "opin[ion] that a person readying a crane for transport could stumble at any time." *Id.* at 126.

The Judge ultimately found a violation, apparently due to Sims' failure to demonstrate compliance with the PIB. Putting aside the Judge's legal conclusions, however, his factual analysis clearly indicates that the Secretary failed to establish a danger of falling by a preponderance of the evidence. Accordingly, we reverse the Judge's finding of a violation and vacate the citation.[12] *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand is not necessary when the record supports no other conclusion).

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resistant surface which was designed for use as a walkway to reach a ladder with handholds at a height of seven feet created a danger of falling.

[11] Some of the factual findings discussed herein are found in the Judge's S&S analysis. We recognize that the relevant standards differ, and that a finding of no reasonable likelihood in the S&S context cannot be borrowed wholesale to find no danger of falling. We do not draw on the Judge's S&S analysis, only his factual findings.

[12] Because we have vacated the citation, we need not address Sims' argument that imposing a penalty in this instance would violate the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq. However, we note that the Paperwork Reduction Act explicitly does not apply to the collection of information "during the conduct of . . . an administrative action or investigation involving an agency against specific individuals or entities." 44 U.S.C. § 3518(c)(1)(B)(ii). This would presumably include the issuance and adjudication of citations issued to specific mine operators pursuant to the Mine Act.

III.

Conclusion

For the foregoing reasons, we conclude that the Judge erred by finding a violation where the Secretary had failed to meet his burden of proof. Accordingly, we reverse the Judge's decision and vacate Citation No. 8823573.

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