FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 13, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-1238
v.	:	
CONNOLLY-PACIFIC COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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 Department of Labor's Mine Safety and Health Administration ("MSHA") issued three citations and a section 107(a) withdrawal order to Connolly-Pacific Company ("Connolly"), alleging that it did not properly maintain two sections of highwall at its mine.

The Administrative Law Judge upheld all three citations and the order. 33 FMSHRC 2270 (Sept. 2011) (ALJ). The Commission granted the operator's petition for discretionary review. For the following reasons, we affirm the Judge's decision.

I.

Factual and Procedural Background

Connolly has owned and operated the Pebbly Beach stone quarry on Catalina Island, California, since the 1950s. 33 FMSHRC at 2271. The 480 North and South sections of the quarry consist of a 300-foot highwall. Connolly's method of mining involves bringing down rock by blasting and gathering rock brought down by secondary causes, such as rainfall and gravity. *Id.*; Tr. I at 33-36, 49. Connolly maintains that the highwall cannot be scaled. *Id.* at 2271-72; Tr. I at 33, 34, 49, 72, 84-85.[1] It is undisputed that Connolly has never used benches or

[1] Scaling involves removing loose rock threatening to break or fall from the mine roof or walls.

scaling in the 480 North and South sections of the quarry. *Id.* at 2274-75; Tr. I at 33, 34, 49, 72, 84. Instead, Connolly uses a system of spotters and supervisor observations to determine if any changes have occurred on the highwall and if it is safe to work under it. *Id.* at 2273-74; Tr. I at 127, 128, 131, 147.

Over the years, Connolly has utilized photographs and management inspections to observe long-term changes in the highwall and predict the fall of material. *Id.* at 2275. Photographs of the highwall show cracks and protruding rock above the working area. *Id.* at 2272; Tr. I at 170.

The talus pile, an accumulation of rock and material that has slid down the highwall, is the primary work location for the loader operator, who mucks the talus pile back to the toe of the highwall. *Id.* at 2274. The loader operator relies on the spotter to warn him in case of a rock fall. *Id.* at 2273-74; Tr. I at 145. The South section had a 70-foot tall talus pile at a 45 degree angle of repose. *Id.* at 2278; Tr. I at 21-22, 30-31, 65, 221; Tr. II at 18. The North section had no talus pile but had evidence of tire tracks leading up to the toe of the highwall. *Id.*; Tr. I at 23.

On May 24, 2011, MSHA Inspector Chad Hilde issued three section 104(a) citations and a section 107(a) imminent danger order based on his observation of conditions involving the highwall sections. 30 U.S.C. §§ 814(a); 817(a); 33 FMSHRC at 2272. Citation No. 8607224 alleged that the 480 South highwall was not properly maintained under 30 C.F.R. § 56.3130[2] because the loader operator was working under a 300-foot highwall at a 72-90 degree slope with loose and unconsolidated materials, and a 70-foot tall talus pile at a 45 degree angle of repose. 33 FMSHRC at 2278-79. The citation also alleged that the 480 North section had recent activity under overhanging material with no action taken by the operator to determine or maintain the stability of the highwall. 33 FMSHRC at 2278-79.

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[2] Section 56.3130 provides that:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

30 C.F.R. § 56.3130.

Citation No. 8607225 alleged a violation of 30 C.F.R. § 56.3131[3] in that the highwall above the talus pile in the South section, which was approximately 230 feet tall, had loose and unconsolidated material that had not been sloped to the angle of repose. 33 FMSHRC at 2284-85. In both the North and South sections, the operator was also cited for failing to correct fall-of-material hazards. *Id.* at 2285.

Citation No. 8607226 alleged that, in violation of 30 C.F.R. § 56.3200,[4] the operator failed to correct hazardous ground conditions by not posting warning signs or barricading the area to restrict access. 33 FMSHRC at 2287-88. Although the North section was not currently being mined, it had no talus pile, and material was cleaned up to the base of the highwall, where there was evidence of vehicle traffic in the area. *Id.* at 2287. Connolly did not dispute that it had no warning signs or barriers, and its safety director testified that the mine had intended to barricade the North section to keep employees out, but had not had enough time to do so before the inspector's arrival. *Id.* at 2288.

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[3] Section 56.3131 provides that:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

30 C.F.R. § 56.3131.

[4] Section 56.3200 provides that:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200.

Withdrawal Order No. 8607223 alleged that an imminent danger existed pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a),[5] and directed Connolly to cease all mining operations in the 480 South and North sections of the highwall. 33 FMSHRC at 2290-91. Connolly did not abate the violations but instead moved its operations to another area of the mine. 33 FMSHRC at 2293.

The Judge upheld the three citations and the withdrawal order and found that fatal injury was reasonably likely, that the violations were significant and substantial ("S&S"),[6] and that the violations resulted from moderate to high negligence. 33 FMSHRC at 2281-84, 2286-87, 2288-90, 2292-93. The Judge raised the penalty amounts from the proposed $555 penalty for two of the three citations, to $1,000 each for Citation Nos. 8607224 and 8607226, and imposed the $555 penalty proposed by the Secretary for Citation No. 8607225. *Id.* at 2293-94.

The Judge determined that although there is no requirement to use benches to protect miners from falling material, in the absence of benches "the mine must employ some alternative methods to maintain stability of the wall." *Id.* at 2279. The Judge concluded that a rock fall hazard existed and had not been corrected in both sections of the highwall. She also concluded that although "the mine understood that there was a hazardous condition," the presence of tire tracks at the toe of the North highwall indicated recent operations in the area. *Id.* at 2286, 2288. She further found that the inspector did not abuse his discretion in issuing the imminent danger order because it was reasonable to believe that a fall of rock or debris was imminent, and neither benching nor scaling could be conducted due to the extreme height of the highwall. *Id.* at 2291-92.

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[5] Section 107(a) provides that:

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

[6] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

II.

Disposition

On review, Connolly argues that the Judge's findings regarding the instability of the highwall are not supported by substantial evidence. Connolly contends that the rocks only appeared loose and cracked, and that it is not feasible for it to scale the highwall or construct benches. Connolly claims that the use of spotters allowed for adequate time to warn the loader operator to move away. Connolly further argues that the Judge erred in how she applied the standards in question. Finally, Connolly raises procedural errors purportedly committed by the Judge during the hearing and in writing her decision.

A. The Judge Correctly Interpreted and Applied the Standards in Question.

The language of the relevant standards is clear. Sections 56.3130, 56.3131, and 56.3200 state respectively that "[m]ining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks;" that "conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected;" and that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." 30 C.F.R. §§ 56.3130, 56.3131, 56.3200.

Taken together, these standards require that an operator must maintain highwall stability and correct hazardous conditions before work or travel takes place. As the Judge found in her decision, "a reasonably prudent person familiar with the mining industry would recognize the requirements of the standard." 33 FMSHRC at 2276-77.[7] *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 711 (Aug. 2008); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (question of whether violation occurred is measured against the standard of whether a "reasonably prudent person" familiar with the factual circumstances would recognize that a hazard existed within the purview of the applicable standard).

Connolly's method of mining does not comply with the plain language of the standards. It necessarily involves rock sliding down the highwall to be removed by the loader operator. This method does not maintain wall stability; Connolly instead utilizes a spotter to warn the loader operator when the wall is unstable. Similarly, Connolly's reliance on a spotter to timely

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[7] Connolly further argues in its brief that this enforcement action deprived it of fair notice and due process. Br. at 31-33. Pursuant to section 113(d)(2)(A)(iii) of the Mine Act and Commission Procedural Rule 70(g), we do not reach the issue of fair notice and due process because it was not raised by Connolly in its Petition for Discretionary Review. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(g). Connolly mentioned the "reasonably prudent person" standard with regard to the correct interpretation of the regulations, but specifically distinguished it from, and did not raise, the issue of fair notice. PDR at 9.

warn the loader operator and the operator's supposed ability to move away in time before getting hit by rock fall does not constitute a correction of the fall-of-material hazards.

MSHA's prior lack of enforcement of these standards at the mine does not demonstrate an absence of violations or hazardous conditions. Connolly argues that in more than 50 years of using this method of mining, it never had an accident caused by rock falls, and it had never been cited by MSHA. However, this historical account cannot be used to prevent MSHA or this Commission from enforcing clearly written standards. *See Austin Powder Co.*, 29 FMSHRC 909, 920 (Nov. 2007) (a past inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding to apply the correct interpretation of a standard).

B. Substantial Evidence Supports the Judge's Findings Regarding Highwall Stability.

We further conclude that substantial evidence supports the Judge's determination that the mining methods used by Connolly do not maintain highwall stability in conformity with the standards.[8] Relying on photographs taken at the mine, and the expert testimony of the MSHA inspector and engineer, the Judge found that cracked pieces of rock and loose material overhung the loader operator's working area. 33 FMSHRC at 2272, 2279.

Although the Judge "relied upon the expert testimony of both parties" *(id.* at 2279), she found the "Secretary's witnesses to be more convincing, reliable and objective." *Id.* at 2281. MSHA engineer Steven Vamossy accompanied inspector Hilde on May 24, 2011. *Id.* at 2272. Vamossy testified that there was a potential for sliding or toppling of smaller slabs of rocks, and that the highwall is a hazard in its present condition. *Id.* at 2280-81. Connolly's expert, engineer Jeffrey Johnson, testified that a hazard only comes into play when a secondary force, such as an earthquake or rain, is added into the equation. *Id.* at 2280-81; Tr. II at 111-12.[9] The Judge found "Vamossy's conclusions regarding the condition of the highwall to be consistent with the photographs and the general tenor of the testimony of all witnesses. . . . While Johnson and his team also viewed the area, Vamossy did it with an eye to mine safety, unlike the engineers for the operator who have no experience in the mining industry." *Id.* at 2281.

The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Consolidation Coal Co.*, 35 FMSHRC 2326,

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[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] Johnson recognized that rainfall can cause rock falls which occur days or even weeks after the actual rainfall. Tr. II at 116; 33 FMSHRC at 2284.

2329 (Aug. 2013) (citations omitted). We find no evidence in the record that compels us to take the extraordinary step of overturning the Judge's credibility determinations. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). Therefore, we affirm the Judge's conclusion that Connolly's mining methods do not maintain the stability of the highwall.

C. The Judge Properly Concluded that the Inspector Did Not Abuse His Discretion in Issuing the Imminent Danger Order.

Section 107(a) of the Act provides in relevant part that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. Section 3(j) defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated*" (emphasis added.) 30 U.S.C. § 802(j). The Commission has held that "there must be some degree of imminence to support a section 107(a) order." *Utah Power and Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991). It further explained that "imminent" means, among other things, "impending . . . : hanging over one's head: menacingly near." *Id.* (citation omitted). However, "[t]he concept of imminent danger is not limited to hazards that pose an immediate danger." *Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006), *aff'd sub nom. Cumberland Coal Res., LP v. FMSHRC*, 515 F.3d 247 (3rd Cir. 2008).

An inspector's issuance of a section 107(a) imminent danger order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-47 (Mar. 1993); *Utah Power*, 13 FMSHRC at 1627. A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47.

Connolly's main argument has been that the condition of the highwall cannot feasibly be abated, and that is the reason for Connolly's mining method and precautionary measures. Although it may seem unusual that a condition which has been in place for many years can one day be cited as an imminent danger, the circumstances here involve extremely hazardous conditions which cannot be abated within the meaning of section 3(j).

Inspector Hilde testified that the operator did not maintain the stability of the highwall and that the top of the wall had loose and unconsolidated materials and boulders. 33 FMSHRC at 2278, 2282; Tr. I at 24-25, 48-51. Hilde further testified that the spotter system "does not stop or mitigate the likelihood of material coming off the wall. It just lets the guy watch it happen." Tr. I at 82. Hilde explained that he issued the section 107(a) order because of the overhanging material and -- regarding the 480 North section -- "because it was imminent that someone could go back there to work." Tr. I at 29. The Judge found it was reasonable for the inspector to "believe that a fall of rock or debris was imminent, thereby threatening the safety of the miners working below." 33 FMSHRC at 2292. We conclude that substantial evidence supports the Judge's conclusion that the inspector did not abuse his discretion. Given Connolly's mining

method and the extraordinary height of the highwall, abatement of the hazardous condition was not possible.

D. The Operator's Procedural Error Arguments Lack Merit.

We reject Connolly's contention that the Judge committed procedural errors in not allowing its expert witness to answer certain questions, and by enforcing time limits on some cross-examinations. Upon review of the record, we find that the Judge's rulings during the hearing were within her discretion and did not constitute prejudicial procedural error. *See Medusa Cement Co.*, 20 FMSHRC 144, 150 (Feb. 1998) (citing *Desjardins v. Van Buren Community Hospital*, 969 F.2d 1280, 1282 (1st Cir. 1992) (judge's request that counsel not be repetitive and follow proper procedures in asking questions was not an abuse of discretion)).

We further conclude that the Judge's reliance on an extra-record publication in her decision was, at most, harmless error due to the general applicability of the principles mentioned by the Judge and the discussion of these principles during the hearing. The Judge "[took] notice of a number of MSHA and NIOSH publications that describe highwall stability and generally refer to a wall that is up to 100 feet high as the outer limit of acceptable height." 33 FMSHRC at 2282. The Judge then quoted and cited a publication discussing general good practices of highwall stability and the dangers inherent to highwalls of great height. *Id.* at 2282, 2284.[10] In any event, the Judge introduced the cited publication at the hearing and questioned a witness about the publication's conclusions without objection from Connolly. Tr. II at 143-44.

Connolly's argument that it was deprived of the opportunity to address principles regarding the outer limit of acceptable highwall height is likewise without merit. *Id.* at 2276; Br. at 30-31. We note that the record includes discussion of this topic during the hearing. *See* Tr. I-175 (discussing the Oregon Rockfall Study addressing highwalls up to 80 feet high and concluding that higher slopes produce more variable rockfalling distances); Tr. I-77 (asking the inspector if "there was no outright prohibition of having a 300 foot highwall"); Tr. II-157 (emphasizing that the Oregon Study's lack of research beyond 80-foot highwalls does not indicate the maximum safe height of a highwall). This discussion indicates that both parties were aware that the highwall in this case was uncommonly high, that this highwall's height was at issue, and that generally most highwalls did not exceed 100 feet. Therefore, the issue was directly raised, and Connolly had the opportunity to respond.

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[10] *Citing* Christopher Mark Ph.D. & Anthony T. Iannacchione Ph.D., *Ground Control Issues for Safety Professionals*, in Mine Health and Safety Management 365 (Michael Karmis ed., 2001).

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision. We conclude that the operator did not comply with the standards in question and did not correct hazardous conditions before permitting its employees to work under the highwall. We also find that the record supports the Judge's conclusion that the hazardous conditions presented an imminent danger.

Mary Lu Jordan, Chairman

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