

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Petitioner,

v.

FREEPORT-MCMORAN MORENCI,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-766-M
A.C. No. 02-00024-317732

Mine: Freeport-McMoRan Morenci, Inc.

DECISION

Appearances: Robert D. Ankeney, CLR, MSHA, U.S. Department of Labor, Denver, Colorado and Luis Garcia, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California for Petitioner;

Brian Lamana, Sr. Safety Specialist, Freeport-McMoRan Morenci, Inc., Morenci, Arizona for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) against Freeport-McMoRan Morenci, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves two citations, with penalties assessed pursuant to section 110(i) of the Mine Act, which are in dispute. The parties presented testimony and evidence at a hearing held on January 22, 2014 in Phoenix, AZ.

The parties agree that Freeport-McMoRan Morenci, Inc., is an operator as defined by the Act, and is subject to the jurisdiction and provisions of the Mine Safety and Health Act. A stipulation has been reached regarding Citation No. 8755004, leaving Citation No. 8596482 for decision.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector Ernesto Vasquez issued Citation No. 8596482 on January 11, 2013. The Secretary asserts that the Respondent violated 30 C.F.R §56.11002, which requires stairways to be of substantial construction and maintained in good condition. The citation states, in pertinent part, as follows:

The stairway located at the P-5 conveyor, adjacent to the drive motors, was found not being maintained in good condition. The eighth step, (from top to bottom), was found to be showing damage, in that the outside edge was bent downward approximately three quarters of an inch for approximately twenty five inches alongside the outer edge of the step.

Inspector Vasquez indicated that the violation was significant and substantial and the negligence was moderate. The proposed assessed penalty amount is \$1,111.00.

The mine does not dispute that the step was in the condition described by the inspector, and agrees that the violation occurred as cited. The parties agree that the stairway was of substantial construction, was provided with handrails, and that the step at issue was the eighth step from the top. Moreover, they agree that, for approximately twenty-five inches along the outside edge of the step, it was bent downward approximately $\frac{3}{4}$ of an inch. The condition is shown in Sec'y Ex. 2. The area is used as a passageway and is accessible 24 hours a day, seven days a week. The stairs were free of mud and other slippery conditions at the time the citation was issued. Hence, I find that violation of the cited standard existed.

While the Respondent does not dispute the fact of violation, it does dispute that the condition is significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the 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). This evaluation is made in consideration of the length of time that the

violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Mine Inspector Ernesto Vasquez had been an inspector for two years and, prior to that time, he worked in the mining industry for 15 years. Vasquez explained that Morenci is a large copper mine that he has inspected a number of times. Morenci is a surface, open pit mine with approximately 2,500 employees. Vasquez was at the mine with a number of other inspectors on January 11, 2013 when he issued this citation for the bent step that he observed. Vasquez went up the steps with a safety representative from the mine and, when he returned down the steps, he stepped on the bent step and felt himself lose his balance. He grabbed the handrail and did not fall, but testified that he lurched forward and that the step made a significant difference in his ability to safely move down the steps. He did not notice the bent step when he first traveled up the stairway. However, on his return trip down, he lost his balance and subsequently turned to look at the step, took photographs, Sec'y Ex. 2 pp. 1-5, and took measurements. Vasquez explained to the representatives from the mine that the step was a problem and that he would issue a citation. He did not know how long the step had been bent, but he surmised that something very heavy had to have been dropped on the step to bend it in such a fashion.

As illustrated by the photograph in Sec'y, Ex. 2, pp. 1-5, the step is made of a heavy wire mesh and is 36 inches wide. The middle 23- inch portion of the step was bent down and was uneven. Each step is eight inches apart from the step above and below it. If a miner were aware that the step was uneven in the middle, that portion of the step could be avoided by stepping along the side. However, as Vasquez explained, a miner would have to remember that it was bent each time he went down in order to avoid the damaged part. The miner would also be required to hold the handrail in order to avoid tripping on the step. Vasquez observed a number of miners, often carrying tools or equipment, walking up and down steps without holding on to the rail.

The step that was damaged was about three-quarters of the way up the set of stairs, and a slip and fall would result in a tumble ten feet to the bottom of the steps. Anyone who fell would fall into those walking down ahead, which in turn would cause the others to fall some distance. A miner using this set of stairs expects the step to be flat and even. Vasquez opined that if you step down, and are not prepared to step on a damaged step, it is easy to fall. The inspector does not know how long the condition existed but the step was not closed off or barricaded and it was available for use. Given that the stairs are used every shift to access the conveyor and drive motors, miners carry tools up and down, do not always use the handrail, and cannot avoid the damaged step unless fully concentrating on walking to the side, Vasquez believed that the condition would inevitably lead to an accident resulting in a serious injury.

Sullivan Heber, a member of the Morenci safety department, accompanied Vasquez when he observed the step. Heber did not believe it was likely that someone would fall as a result of the damaged step. Instead, he explained that there are other ways to access the work platform,

even though he agreed that these stairs are used on a regular basis for maintenance. Heber said that the inspector paused, but did not fall, and then continued down the stairs before turning to look at the step. Heber had not noticed the damaged step prior to the time the inspector paused on his way down, and he had no idea how or when the step was damaged. Heber explained that there is a light above the stairway, a handrail, and only the middle portion of the step was damaged, leaving the edges for someone to safely step around. He believed that the stairs and handrail were in sound condition, there were no obstructions or work being done on the steps, and he did not feel unsafe in using the steps.

Based on Heber's testimony, the arguments made at hearing, and the documents submitted after hearing, the mine argues that this violation is not S&S for several reasons. First, there is a handrail that would prevent a fall and, second, the ¾ inch bend did not affect the safety of the entire step and, rather, there were several inches on each side of the step to use safely. The mine also points out that the bend in the step was not significant, there are several access routes to the conveyor, the remaining steps were in good condition, the inspector did not fall, it is unlikely that ice or debris would build up on the step because it is of grate construction, there is ample light, few tools are carried each day, and the defect was likely in place for only a short period of time since there were no signs of rust.¹ There is no question that the stair was substantially constructed, and that the handrails were in place and in good condition. Further, there were no other obstructions on the steps. However, the many factors listed by the mine are not enough to take away from the gravity of the violation. Additionally, the allegedly mitigating conditions noted by the company are required in many instances by other MSHA standards.

The Commission has determined that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Vasquez reaffirmed that environmental conditions, along with complacency in not using the handrail, as well as the expectation by miners that the step would be flat and even, lead him to believe that it is likely that an accident will occur. He lurched forward when he stepped down and, although he did not fall, it is reasonably likely that someone would. The step is six feet above the ground, but the distance down the steps is about ten feet, and a fall from ten feet would result in broken bones, cuts, or even trauma to the head or back. The resulting injury was reasonably likely to result in an injury that would be permanently disabling.

Other Commission judges have found that a bent stair was a significant and substantial violation. In *Lakeview Rock Products*, 19 FMSHRC 321 (Feb. 1997) (ALJ), the judge found that the company committed an S&S violation for failing to maintain two sets of stairs leading down to a cone crusher and screen plant. The judge found that, given the bent condition of the steps, it was reasonably likely that a worker would fall. The Courts and the Commission have addressed the matter of other safety precautions, similar to those raised here by the mine, and found that, even though "after-the-fact safety systems" were in place, the existence of other safety measures

¹ A number of these issues were not addressed by the testimony of the witness and, therefore, are technically not in evidence. However, because the operator appeared pro se, I have considered all arguments raised in making my decision.

to deal with the violation does not mean the violation is not a serious safety hazard. *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th cir. 1995); *See Black Beauty Coal Co. v. Federal Mine Safety and Health Review Com'n*, 703 F.3d 553 (D.C. Cir. 2012), affirming *Black Beauty Coal Co.*, 33 FMSHRC 1482 (June 2011) (ALJ). The Commission, likewise, determined that a violation was S&S in spite of the operator's arguments that the violation was not S&S because of the presence of other safety devices. *AMAX Coal Co.*, 19 FMSHRC 846 (May 1997).

I credit Inspector's Vasquez' description of the defects and associated hazards. While there were no adverse conditions on the day Vasquez was at the mine, anything from an untied shoe to simple inattention, combined with the bent and uneven stair, would easily result in a fall of ten feet down the stairs. I find that there is a violation and that the condition cited, the bent and damaged stair, would cause someone to stumble and fall as they descend the stairs. The stairs are used daily, and there is no indication that the mine had a plan to repair the stair, leading me to believe that it would have remained in that bent condition for some time. Falling the ten feet down the stairs would result in a broken bone, or a head or back injury, which are very serious injuries. Therefore, I find that the violation is significant and substantial.

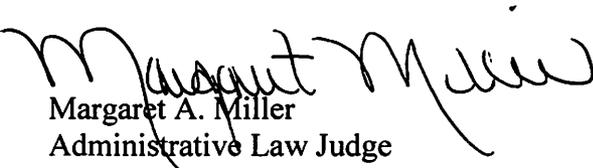
II. PENALTY

The parties have agreed to settle Citation No. 8755004 by reducing the gravity to non-S&S and the penalty amount from \$1,657.00 to \$249.00. At hearing the parties agreed that the Respondent would have presented evidence that the back brace on the ladder was bent, but it was otherwise in good condition and used only in the shop. Therefore, it is not likely that a miner would be hurt using the ladder and, as a result, the parties agree to amend the citation to remove the "Significant and Substantial" designation, to modify the gravity of injury from "Reasonably Likely" to "Unlikely," and reduce the proposed penalty from \$1,657.00 to \$249.00. I accept the stipulations of the parties and assess a penalty of \$249.00.

The principles governing the authority of Commission administrative law judges 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 and its judges "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), 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. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 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), aff'd, 736 F.2d 1147 (7th Cir. 1984). 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 of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In the instance case, for Citation No. 8596482, the operator is large, has no unusual history of these types of violations, and abated the condition in good faith. The inspector indicated that the negligence was moderate and, given the facts as discussed above, I agree. I have discussed the gravity and S&S nature above and find that the \$1,111.00 penalty proposed by the Secretary is appropriate in these circumstances.

Given my above findings, I assess a total penalty of \$1,360.00 for both the stipulated citation and citation addressed at hearing. Freeport-McMoRan Morenci Inc., is hereby **ORDERED** to pay the Secretary of Labor the sum of \$1,360.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

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