

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

June 9, 2008

HAINES & KIBBLEHOUSE, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. PENN 2006-143-R
v.	:	Citation No. 6029599; 03/01/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Pyramid Materials
ADMINISTRATION (MSHA),	:	Mine ID 36-08977
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2006-288-M
Petitioner	:	A. C. No. 36-08977-94161
v.	:	
	:	
PYRAMID MATERIALS-DIV/HAINES	:	
& KIBBLEHOUSE, INC.,	:	Pyramid Materials
Respondent	:	

DECISION

Appearances: Linda Thomasson, Esq. and Paul Marone, Esq., U.S. Department of Labor, Philadelphia, PA, on behalf of the Secretary

John Austin, Jr., Esq., Patton Boggs, LLC, Washington, DC, on behalf of Haines & Kibblehouse, Inc.

Before: Judge Barbour

These are consolidated contest and civil penalty proceedings brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”) (30 U.S.C. §§ 815, 820). In the contest proceeding (Docket No. PENN 2006-143-R) the company, Haines and Kibblehouse, Inc. (H&K), contests the validity of Citation No. 6029599, issued pursuant to section 104(a) of the Act (30 U.S.C. § 814(a)).¹ The citation, which was issued on

¹Section 104(a) states in pertinent part:

March 1, 2006, charges the company with a violation of 30 C.F.R. § 56.16009, a mandatory safety standard for metal and non-metal surface mines stating: “Persons shall stay clear of suspended loads.” The citation also charges the violation was a significant and substantial (S&S) contribution to a mine safety hazard, in that it resulted in a fatal injury. Further, it asserts the violation was caused by the company’s high negligence. H&K contends the citation does not set forth a violation of section 56.16009, or, if it does, the citation’s allegations of gravity and negligence are erroneous.

In the civil penalty proceeding (Docket No. PENN 2006-288-M), the Secretary petitions for the assessment of a penalty of \$42,000 for the alleged violation of section 56.16009. The Secretary asserts the violation not only occurred and contributed to the death of one miner, but was reasonably likely to fatally injure two others. The company denies the allegations.

Following docketing of the cases, answers were filed. The matters were assigned to me and I consolidated them for trial. I heard them in Westchester, Pennsylvania.

STIPULATIONS

At the hearing the parties agreed to the following stipulations:

1. H&K is an operator as defined in Section 3(d) of . . . [the Act] at the Pyramid Materials Quarry [(the Quarry)] where the [citation] . . . at issue in this proceeding were issued.
2. The operations of the . . . [q]uarry are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the . . . Commission and its designated Administrative Law Judge pursuant to Sections 104 and 113 of the Mine Act.

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a . . . mine subject to this Act has violated . . . any mandatory health or safety standard . . . or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

4. Inspectors from the Mine Safety and Health Administration [(MSHA)] were acting as representatives of the Secretary of Labor [(Secretary)] when they issued the citation . . . to [H&K].
5. The [citation] . . . [was] properly served by a duly authorized representative of the Secretary . . . upon the agents of [H&K].
6. True copies of the citation . . . were served upon H&K, or its agents, as required by the Mine Act.
7. The Assessed Violation History report reflecting the history of violations of H&K is an authentic copy and may be admitted as a business record of . . . [MSHA].
8. The imposition of the proposed civil penalty of \$42,000 will have no effect on H&K's ability to remain in business.
9. The appropriateness of the penalty, if any, to the size of [H&K's] business should be based on the fact that in 2005, Pyramid Materials Mine had 13,176 hours worked and H&K had [473,375] hours worked.^[2]
10. H&K was assessed a total of 21 citations based on 13 inspection days in the 24 months immediately preceding the issuance of the [citation] . . . in this case.
11. The . . . [citation and continuations] issued to H&K, contained in Government Exhibits 5 through 8, are authentic copies of the . . . [citation and continuations] at issue in this proceeding, and may be admitted into evidence for the purpose of establishing their issuance.
12. [H & K] stipulate[s] to the authenticity of all the

²Counsel for the Secretary stated she initially erred in reporting the number of hours worked at H&K's facilities. The actual number was 473,375, not 226,753 as she first stated. Tr. 372. Stipulation No. 9 was amended on the record to conform to the actual number. Tr. 373-374.

government exhibits and to the admissibility of government Exhibits 1 through 17 and 34 through 45.

13. On February 13, 2006, Charles R. Davis, III was the victim of a fatal accident that occurred at the . . . [q]uarry.
14. The accident occurred on the catwalk platform of the Gator jaw crushers A and B, located at the secondary plant at the . . . [q]uarry.
15. The handrail of the lower crushing section was approximately four feet tall, and had a gap approximately four feet wide to allow access to the flight of metal stairs.
16. At all relevant times herein, Mr. Davis was a supervisory employee of [H&K] at the . . . [q]uarry.
17. On the day of the accident, Mr. Davis reported to work at 7:00 a.m., his normal starting time.
18. Mr. Davis' planned work for the day included dismantling the . . . [B] crusher . . . for repairs.
19. Mr. Davis discussed this task with [H&K] employees Michael S. Yorden, a loader operator; and David A. Velas, a mechanic.
20. Prior to the accident, Mr. Davis, Mr. Yorden, and Mr. Velas removed snow and ice from the lower crushing section catwalk platform, and removed guards from the . . . [B] crusher in preparation for the work.
21. The pitman assembly body was constructed of heavy cast metal with an assembly weight of 7,100 pounds.^[3]

³A "pitman" is defined as "the vertical member linking the eccentric shaft with the toggles between the frame and the lower end of the movable jaw" of a jaw crusher. American

22. A single . . . lifting lug was . . . on top of the pitman assembly [*see* Gov't. Exh. 43].
23. Thomas Heenan was the operator of the crane involved in the accident.
24. At the time of the accident, Mr. Heenan had worked as a crane operator for 18 years. ⁴
25. Mr. Heenan ha[d] several crane operator certifications.
26. On the day of the accident, Mr. Heenan arrived at the crane at approximately 10:00 a.m.
27. After the crane was set up to perform the work, five crane picks were made. [⁵]
28. The first pick was to remove a ladder that provided access to the screen deck above the crusher; the second pick was to remove a steel plate at the crusher; the third and fourth picks were to remove the bearing caps on the pitman assembly; and the fifth and final pick was [to remove] the pitman assembly.
29. At the time of the accident, as the pitman assembly was being lifted, it swung and struck Mr. Davis.
30. Mr. Davis died . . . as a result of the . . . accident.
31. Mr. Davis' death was caused by crushing

Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* (2d ed. 2006) 409 (*D.M.M.T.*). The pitman at issue was between four to five feet long. Tr. 239.

⁴ The crane was owned by AmQuip Corporation. *See* **RELATIONSHIP BETWEEN H&K AND AMQUIP**, *infra*. Heenan had been employed by Amquip for 13 years. Tr. 169.

⁵ A “crane pick” involves the crane operator positioning the crane boom over and above an object, the crane operator lowering the hoist line to the object, a miner attaching the hoist line to the object, and the crane operator activating the hoist to lift and move the object. The crane’s “boom” is essentially a “beam attached to [the crane].” *D.M.M.T.* at 60. It allows a crane to lift distant and elevated objects.

blunt force trauma due to being struck by the pitman assembly.

Joint Exh. 1; Tr. 31-36.

RELATIONSHIP BETWEEN H & K AND AMQUIP

_____ H&K hired AmQuip Corporation (AmQuip) to provide the crane and crane operator at the quarry. As a result of its investigation of the accident, MSHA issued citations to AmQuip, charging violations of various safety standards. These citations were contested by AmQuip in Dockets No. PENN 2006-293-M and PENN 2007-11-M. The cases were at one time consolidated with the subject cases. However, prior to the hearing, the Secretary and AmQuip settled Dockets No. PENN 2006-293-M and PENN 2007-11-M, and the AmQuip dockets were dismissed. AmQuip is not a party to the present proceeding.

THE EVENTS OF FEBRUARY 13, 2006

On February 13, 2006, Michael Yorden and Charles Davis arrived at the mine at 7:00 a.m. Davis, the foreman and supervisor, instructed Yorden on the job duties for the day. He told Yorden a crane was coming to remove the pitman from the Gator B crusher, and the area should be made ready. Although he never had removed a pitman before, Yorden was trained and experienced in the operation and maintenance of the crusher. Tr. 146, 151; *see also* Tr. 307-308. The first task was to clear snow and ice from the work area, including the base of the steps leading to the crusher platform, the steps, and the work platform (a deck that measured approximately 10 feet by 15 feet (Tr. 196)). Tr. 130. Removing the snow and ice took approximately an hour.

While Yorden and Davis were cleaning the work area, or shortly after they finished, mechanic David Velas arrived to assist in changing out the pitman. The men gathered the necessary tools, brought them to the platform, and began to remove parts of the crusher so the pitman could be lifted. They were able to take off the shims, tension rods, toggle plates, guards over the flywheels, and a catwalk in front of the box containing the pitman (the "stone box"). Tr. 134. They also had to remove a ladder going to the primary screen platform, two bearing caps, and two pieces of the stone box. *Id.* Because these items could not be removed without using the crane, the men waited for the crane to arrive. Tr. 134-135.

After the crane reached the area, it was positioned to lift the items. Yorden testified, when facing the crusher, the crane was located to the crusher's right. Tr. 136; *see* Gov't Exh. 38. The stairway from the ground to the work deck was between the crusher and the crane. Tr. 137. The boom of the crane extended from the crane over the stairway to a point above the crusher. *Id.*; Tr.159-161.

As stated in Stipulation 28, the crane's first pick was the ladder leading to the platform on the primary screener. Yorden testified the hoist cable was attached to the ladder by a sling or

chain (he did not remember which), and the ladder was burned free of the crusher structure with an acetylene torch. Heenan then was given a hand signal to hoist.⁶ Heenan lifted and swung the boom, which in turn lifted and swung the ladder off the crusher structure. Heenan lowered the ladder to the ground. Tr. 137-138.

The next pick was the front of the stone box.⁷ The front was bolted into the sides of the box. Yorden attached the hoist cable to the front, and the men proceeded to remove the bolts. A hand signal was given to Heenan, who lifted the front and set it on the ground. Tr. 139, 279

There still was another piece of the box that had to be removed before the pitman could be lifted. Again, the bolts holding the piece to the remaining parts of the box were loosened, the hoist cable was attached to the piece, and it was lifted, swung away from the crusher, and set on the ground. Tr. 140.

Next, the bolts holding the bearing caps in place were removed. The hoist cable was hooked to the caps, which were picked up by the crane and set down on the platform. Tr. 144-145. All of the lifts by Heenan required a number of hand signals. Tr. 279. Davis and Yorden gave some of those signals, and Velas also gave some. *Id.* Heenan followed all of the signals, and he did so shortly after they were given to him. Tr. 189. Yorden had worked with Heenan on prior occasions and never found him to work unsafely. Tr. 164. Heenan testified none of H&K's employees complained about the way he did his job. Tr. 189.

Once the bearing caps were removed, the pitman was ready to be lifted. The deck was not entirely clear of other equipment. In addition to the bearing caps, it contained shims for the crusher, a bucket holding an impact gun, and equipment that either was a part of a guard for a flywheel or a part of the crusher. Tr. 142-145; Gov't Exh. 34.

To lift the pitman, the men first attached the hoist cable to the pitman's lifting lug. Tr. 145. The operation and maintenance manual for the crusher contained an illustration titled "Pitman Removal and Replacement." Gov't Exh. 3 at 29/58. Yorden described the illustration as "recommended rigging for removing a pitman." Tr. 150. The pitman was not rigged as

⁶Hoisting means "the raising or lowering of the boom." *D.M.M.T.* 263. Velas did not recall who gave the signal to hoist (Tr. 278), but he explained signals were necessary so the crane operator would "know what to do." Tr. 225.

⁷Velas thought the next pick was "possibly the guards." Tr. 279. It seems likely Velas was referring to the front of the box. (The stipulation describes it as "a steel plate." Stip. 28.) Whatever the object was, it weighed between 50 and 70 pounds. It was about four feet long and two feet wide. Tr. 289.

depicted in the illustration.⁸ Tr. 151.

From the operator's compartment of the crane, Heenan could see the platform where Davis, Yorden, and Velas were working. Tr. 164. Upon being signaled, Heenan hoisted the pitman approximately ten inches. The lift was slightly off vertical because the cable was deflected about a foot by the end of the upper catwalk for the primary screener.⁹ Tr. 151-152. Because the deflection of the hoist cable was visible, Yorden thought Davis was aware the pitman could not be lifted in a completely vertical manner. Tr. 152.

After being lifted about ten inches, the base of the pitman was still not freed of the crusher. Its lower part was jammed against the toggle seats. Heenan estimated the pitman was stuck for a little more than an hour. Tr. 193-194. During that time, Heenan was given "multiple signals" ("it was up and down, it was traveling, it was swinging") as Davis, Yorden and Velas worked to free the pitman. *Id.* Heenan could see the H&K employees trying to pry the pitman loose. Tr. 194; *see also* Tr. 153-154, 243-247, 280. At one point, Heenan saw Davis throw his pry bar to the deck. Tr. 195.

Finally, one of the lifts freed the pitman. Heenan raised it several inches. Tr. 154; *see also* Tr. 155. Although the pitman was hanging free and three-fourths of it was above the upper edge of the crusher frame, one-fourth of it remained inside the frame, the practical effect of which was confinement of the pitman by the frame. Tr. 253-254.

According to Velas, the cable continued to contact the outside edge of the overhead catwalk, and because, as he stated, it "never [was] good to have a crane cable on an object," the men agreed to have Heenan move the boom of the crane (to have him "boom up") and, thus, to have him move the cable away from the edge of the overhead walkway. Tr. 254-255. Yorden stated he had no reason to believe Heenan would actually move the pitman while the miners were on the platform. Tr. 165.

At this point, Velas, who was standing against the handrail of the deck, gave Heenan the signal to boom up.¹⁰ Tr. 255-256. Heenan responded, and Velas stayed on the deck to make sure

⁸This fact was not amplified on by the parties and apparently was not a significant causal factor in the events that followed.

⁹Yorden was not sure the deflection was caused by the cable touching the upper catwalk platform. Tr.153. He testified, the cable could be "an inch off that catwalk so your cable isn't rubbing and still not be a vertical pick." Tr. 152-153. However, Velas was sure. He maintained that during the entire time the men were conducting the lifts, the crane's cable was contacting the outside edge of the upper catwalk. Tr. 242. Velas also testified he told Davis about it. Tr. 243.

¹⁰According to Heenan, Davis gave the signal, but Velas's testimony was more detailed and persuasive regarding the events of February 13, and I credit his account. Tr. 207.

the pitman was coming out of the crusher frame. The pitman rose a few inches and Velas started to head for the stairs.¹¹ Tr. 258-259; *see also* Tr. 297.

Heenan raised the boom, which caused the pitman to rise above its restraints. Freed from them, the pitman started to swing in a pendulum-like motion. Tr. 208; 216-217. Heenan saw the men “scattering,” and he tried to lift the load above their heads. Tr. 197.

Prior to the pitman being lifted, Yorden, like Velas, started walking toward the stairs. He intended to get off the platform. Just before he reached the stairs, he turned and saw the pitman coming toward him. He dropped to the platform. The pitman grazed his ear and moved on. Tr. 155-156.

Davis was standing at the top of the stairs. Velas moved toward him to go down. Davis allowed Velas to go first. Tr. 259. When Velas was at the first step, the pitman pushed him, and he was thrown about three-fourths of the way down the stairs. Tr. 259-260. He landed a few steps from the bottom. Tr. 261. Velas looked back and saw Davis, who was near the top of the stairs, falling toward him. Tr. 262. Velas also saw Yorden lying on the deck. Tr. 263. Velas caught Davis and carried him to the ground. Davis was unconscious. Tr. 263. Yorden got up and rushed to help Velas. Velas and Yorden waited for an ambulance to arrive. Davis was taken to a hospital, where he was pronounced dead.

Davis, as the company’s supervisor, was “in charge . . . for safety, for production, for maintenance. Everything.” Tr. 305. He was responsible for training miners. He took refresher training classes like everyone else, including Yorden and Velas. Tr. 313, 317; Gov’t Exh’s. 18 at 2, 25, 26, 27. One of the topics of their training was “Crane Safety.” Tr. 323; Gov’t Exh. 19 at 53. The instructional booklet for the training listed “safe work practices [that] should be followed to prevent accidents when using an overhead crane.” Gov’t Exh. 19 at 55. Among the practices was “[p]osition hoists directly over the load to keep lines vertical and to prevent loads

¹¹Velas described the critical moments of the final lift as follows:

After we had cabled up the last time, I saw everything looked good, I believe I turned to the crane operator and gave him the signal to boom up. Then we had all started walking towards the steps.

Tr. 285.

Velas thought he had started for the steps shortly before he gave the signal to boom up. *Id.*

from swinging when hoisted.” *Id.* All three miners had taken the training a few weeks before the accident.

MSHA’S INVESTIGATION

MSHA assigned Inspector James Logan to lead its investigation of the accident. Tr. 42-43. Logan arrived at the mine on February 14, 2006, between 7:00 and 7:30 a.m. Upon his arrival he met with John Dagner and Tom Shilling, two other MSHA employees, who briefed him on the accident. Tr. 43-44. Other MSHA employees, Robert Carter, Phil McCabe, and Mike Shaughnessy, soon arrived to assist with the investigation. In addition, two persons from MSHA’s Education Field Services Department came to review the company’s training records. Tr. 44, 47.

During the course of the investigation, Logan and the other MSHA personnel interviewed those involved in the accident and management officials. MSHA officials also asked Heenan to place the boom and the cable in the same positions they had been in at the time of the accident. *See* Tr. 199-200. In addition, McCabe, a mechanical engineer employed by MSHA’s Mine Equipment Safety Division, examined the equipment involved. He found no mechanical defects. Tr. 337-338.

Logan met with Frank Bardonaro, the general manager of AmQuip. Bardonaro told Logan it was not possible for the pitman to have “popped loose” from the frame in which it was lodged. Had it done so, as the hoist line took the load “it would have overloaded the 9,000 pound capacity and put the crane into an overload situation.”¹² Tr. 329; *see also* Gov’t Exh. 13 at 11-12. Since loads can only be lowered in an overload situation, it would have been impossible for Heenan to have hoisted and swung the pitman after the accident, something he did.¹³ Tr. 329; *see also* Tr. 332.

Logan concluded the accident occurred because the location of the upper catwalk above the crusher did not allow a vertical pick. Therefore, when the load was lifted, the deflection of the cable caused the pitman to travel horizontally. *See* Tr. 72-73; Gov’t Exh. 1. Logan also concluded a violation of section 56.16009 occurred because the workers had not cleared the work area prior to signaling the crane operator to move the pitman. As a result, they “expos[ed]

¹²Although the pitman weighed 7,100 pounds, Logan believed the combined weight of the pitman, “the rigging pieces, the hook of the crane, and the . . . portion of the crane cable between the pitman and the top of the boom” had to be near the crane’s 9,000-pound capacity. Tr. 330.

¹³Logan explained, “From my understanding of cranes . . . when a crane goes into an overload situation, the only thing that the system in the crane will allow the operator to do is lower it to the ground to make it safe. It will not allow . . . [the operator] to hoist . . . [the load], to swing it, [or] do any other motions with it.” Tr. 332.

themselves to the suspended load.”¹⁴ Tr. 68.

Logan believed the violation was caused by the company’s high negligence. Davis, a properly trained supervisor, allowed workers to be in harm’s way because once lifted and freed of restraint, the pitman had to travel across the work platform towards the stairway the employees were required to use to exit. Tr. 78. Davis failed to ensure that the employees were clear of the area before the signal was given to lift the pitman. Logan believed Davis and the others should have known the direction the pitman would travel once the boom up signal was given. Tr. 80-81.

THE ISSUES

The primary issues are whether H&K violated section 56.16009, and, if so, the amount of the civil penalty that must be assessed. The penalty must be based on the statutory civil penalty criteria. While the parties have stipulated to some of the criteria, the gravity of the violation and the negligence of H&K remain at issue and must be determined. In addition, a finding must be made as to the S&S nature of the violation.

THE VIOLATION

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
6029599	03/01/2006	56.16009	\$42,000

Citation No. 6029599 states:

A fatal accident occurred at this mine on February 13, 2006, while workers were dismantling the crusher at the secondary plant. A crane was being used to lift the pitman assembly from the crusher. As the pitman assembly was being lifted, it swung,

¹⁴Robert Carter, a supervisory inspector for MSHA, sat in on some of the interviews MSHA conducted during the investigation. He also reviewed and commented upon MSHA’s draft accident report. Tr. 354-355. Carter, who at the time of the hearing had 29 years of experience with MSHA, also believed the cause of the accident was “the result of the crane operator moving the pitman prior to the employees leaving the platform.” Tr. 356. In Carter’s opinion, if an experienced crane operator received a signal to move equipment while people were in the area, he or she should not do so while people were present. *Id.* Moreover, Carter believed Davis had not met his responsibility to make sure procedures were in place keeping persons clear of suspended loads, and he did not ensure the platform was clear of persons before the hoisting of the pitman commenced. Tr. 358-360.

and struck the supervisor. The task proceeded although the supervisor and two co-workers were not clear of the suspended load.

Gov't Exh. 5.

The Secretary maintains the facts squarely fit the words of the standard. She begins by noting those words: "Persons shall stay clear of suspended loads." She argues the definitions of "load" and "suspended" clearly encompass the pitman. Sec. Br. 17. She then notes the Commission's judges in applying the words "stay clear of" have looked to whether employees are located in an unsafe area, and argues "the path which a suspended load would necessarily travel would be an unsafe area." *Id.* at 15. She further asserts the record contains "ample evidence" Davis, Yorden, and Velas failed to stay clear of a suspended load as the pitman swung along the deck. *Id.*, Sec. Br. 17-19.

H&K argues the Secretary did not meet her burden of proving the violation by a preponderance of the evidence. Rather, the Secretary presented "contradictory evidence" regarding how the accident occurred, first by maintaining the load suddenly broke free and swung, striking and killing Davis, and second by maintaining the load was hanging free and loose when H&K's employee gave a hand signal to move it. H&K Br. 4. H&K continues: "Because in the first instance [*i.e.*, the load suddenly broke free] there would be no violation of [section 56.16009], the Secretary has not proven it is more likely than not that a violation occurred." *Id.* In H&K's view, "[t]he case . . . is not about a matter of evidence presented by the Secretary being opposed by . . . [H&K], but rather is one in which the evidence offered by the Secretary was in stark contradiction to other evidence also introduced by the Secretary," and "[w]hen the Secretary's evidence is contradictory, the Secretary has failed to show that it is more likely than not that one of the versions is correct and the citation should be vacated." *Id.* at 4-5; *see also* H&K Br. 7. Put another way, "[t]he Secretary has the burden of proving by a preponderance of the evidence that a violation of the cited standard occurred . . . [and] when the Secretary presents conflicting testimony on the existence of a violation, the Secretary has not carried her burden." *Id.* at 5.

H&K also states, "[j]ust prior to the accident, the crane operator freed the pitman from the housing so that it was hanging freely, but it was still between the side panels of the crusher housing." H&K Br. 8. Because it was then "within the confines of the two side walls of the housing" it was "clearly not 'suspended' within the meaning of the 30 C.F.R. § 56.16009." *Id.* Thus, at the time the employees turned to leave the platform, there was no suspended load. Finally, even were it decided the Secretary could prove by a preponderance of the evidence the pitman was a "suspended load," the Secretary did not prove that Davis, Yorden, and Velas failed to stay clear of the load to the extent required by the regulation, because persons working around a load when it becomes suspended have a reasonable amount of time to move away before they can be said to not be clear of the load. *Id.* at 10. "Being near a suspended load during the brief

period of time it takes to move from the area does not constitute a violation of 30 C.F.R. § 56.16009.” *Id.* Rather, the regulation requires the miners to clear the area once a load becomes suspended, which is what Davis, Yorden and Velas were doing when the accident occurred. *Id.* at 11. In H&K’s view, the accident was the result of Heenan’s “unfortunate choice to exercise poor judgment at a critical moment.” *Id.*

ANALYSIS

I agree with H&K that analysis of whether a violation occurred should begin with the words of the regulation, but that is where our agreement ends, for I conclude the Secretary has successfully established a violation of the standard, and that she has done so on two equally plausible bases.

THE FIRST BASIS

When confronting a matter involving regulatory interpretation, judges begin with the words of the regulation and, unless the words are otherwise defined, interpret them “as taking their ordinary contemporary common meaning.” *Perrin v. United States*, 444 U.S. 37, 100 S. Ct. 311 (1979); see 2A Sutherland, *Statutory Construction* §§ 47.01, 47.28. If the meaning is unambiguous, the language is usually conclusive. See *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This is not to say the practical effects of the interpretation are ignored. When those effects conform to and further the purpose of the regulation, the results bolster the regulation’s plain meaning. When the practical effects do not further the purpose, judges must carefully consider whether the evidence compels a conclusion the words do not mean what they seem to say.

Section 56.16009 is straightforward. “Persons shall stay clear of suspended loads.” A “load” is defined as “a mass or weight supported by something.” *Webster’s Third New International Dictionary* (2002) at 1325. The noun “load” is modified by the adjective “suspended,” and when used as an adjective “suspended” is defined as being “held in suspension.” *Id.* at 2303. Thus, a “suspended load” is a mass or weight supported by something that is being held in suspension. To be held in suspension is to be in the “state of being hung.” *Id.* “Hung” is the past tense of “hang,” which is defined as “to fasten so as to allow free motion within given limits on a point of suspension.” *Id.* at 1029. Thus, I conclude a “suspended load” is a mass or weight fastened to allow free motion within the given limits of its point of suspension or support, and this is the same meaning I would reach if I interpreted the standard by applying “suspend” as a verb instead of “suspended” as an adjective.¹⁵

¹⁵ As the parties point out, the verb “suspend” is defined as “[t]o hang so as to be free on all sides except at the point of support.” Sec. Br. 14-15 (*citing to Webster’s* at 2303); H&K Br. 7 (*citing to Webster’s* at 2303).

This grammatical exegesis no doubt makes turgid reading, but behind it is a clear salutary purpose. Hanging loads having free motion can swing within a specific arc or radius. The standard's goal is to prevent persons from being hit by such loads through barring persons from locating within a hanging load's possible arc or radius. The logic is simple and irrefutable. When persons are outside the limits of a load's point of suspension, they will not be struck and injured or struck and killed when the load moves freely.

In my view, to find a violation of the standard, I need look no further than Stipulation 28, which states: "[a]t the time of the accident, as the pitman assembly was being lifted, it swung and struck . . . Davis. The pitman was a "load," the fact it was being lifted and swung means it was "suspended," and the fact it struck Davis means he was not "clear" of the load.

THE SECOND BASIS

Alternatively, if I look beyond the plain words of the standard, I find an implied obligation on the part of the operator that Davis, H&K's agent, did not meet, and I conclude his failure in this regard violated the standard.

Here, the testimony establishes the load – the pitman – was lifted approximately ten inches, but then jammed against the toggle seats. Velas and Yorden worked to free it with pry bars. Tr. 153-154. The pitman was lifted by Heenan in conjunction with their efforts, and the pitman came loose. However, Heenan stopped lifting before the pitman was free of the sides of the frame containing it. Tr. 154-155. At that point the pitman was suspended within the meaning of the standard. It was not touching the toggle seats or the sides of the frame. It was hanging free. But the extent of the pitman's possible swing was severely restrained by the frame. The men on the deck were outside the arc or radius of the possible swing. Thus, H&K was at that point in time in compliance with the standard. But when Heenan subsequently "boomed up" he raised the pitman above the sides of the frame, and Davis, Yorden, and Velas were no longer outside of the possible swing of the suspended pitman. They were not clear of the load, as the unsuccessful scramble to avoid the pitman showed.

I conclude section 56.16009, like many of the standards promulgated under the Mine Act, contains the *sub silentio* requirement the operator ascertain the specific prohibition of the standard and determine whether a hazard exists. Since it is clear the hazard against which the standard is directed is that of a person being struck by a hanging load, the question is whether a reasonably prudent person familiar with the industry and the protective purposes of the standard would have recognized that under the circumstances then existing on the platform, H&K was required to ensure Davis, Yorden and Velas stayed clear of the arc or radius of the pitman's possible swing. In short, as the pitman moved outside the confines of the frame, was H&K required to ensure the men stayed clear of the load? To put the question another way, would a reasonably prudent mine operator familiar with the operation of a crane and the conditions under which the pitman was lifted ensure the men were off the platform when the pitman cleared the frame? I conclude the answer is "yes."

The testimony establishes the boom up signal was given to Heenan by Velas. Tr. 256. The three men were on the platform when this was done. Heenan responded by raising the pitman, an action that resulted in Davis's death. Tr. 258-259; *see also* Tr. 356. The standard is meant to prevent just this kind of accident. H&K maintains "Heenan could clearly see the platform and the individuals on the platform . . . [Therefore, H&K's] employees could not reasonably be expected to anticipate that the crane operator would move the pitman while they were still standing on the platform." H&K Br. 11. However, the pitman was attached to the cable and although the goal was to move the cable away from the upper catwalk, moving the cable necessarily meant the pitman would also move.

Davis was in charge of the crew. He was acting on behalf of H&K. He had a duty to ensure the pitman's removal was carried out safely. As Yorden testified, hand signals were necessary for all of the picks (Tr. 335), and the record supports finding that during the course of the procedure to replace the pitman, signals were repeatedly given to Heenan, and he quickly responded. Tr.139, 154, 188, 192, 193, 236, 237, 251-252, 279. H&K's assertion Heenan "knew not to move the load while . . . [H&K's] employees were on the platform" is not supported by the record. It seems certain prior to the fatal pick, loads were moved many times in response to hand signals while employees were on the platform. Given these work practices, given the fact the pitman was sure to move when Heenan "boomed up," and given the fact the movement could possibly free the pitman from its restraints, in my opinion a reasonable supervisor would have anticipated: (1) that Heenan would have responded promptly when the signal was given, and; (2) that the pitman might thus be liberated.

I accept Velas's testimony the hoist cable was deflected by the overhead catwalk and that it was pointed out to Davis. Tr. 243. The deflection also was visibly obvious. Tr. 152. A reasonably prudent supervisor familiar with the lifting of loads would have anticipated the deflection might prevent a straight lift when Heenan boomed up and might cause the load to swing horizontally. This is especially true of a supervisor like Davis, whose recent refresher training included a reminder of the potential hazards of just such a situation. Tr. 313, 317, 323, Gov't Exh. 19 at 55, Gov't Exh. 25.

In sum, given all of the circumstances involving the lift, I find a reasonably prudent supervisor would have made sure everyone on the platform was off and out of the way of the possible swing of the load as it was lifted.¹⁶ I am aware the same logic might compel a conclusion the men should have been removed from the platform during some of the prior lifts as well. But, H&K was cited for a violation of section 56.16009 solely for the lift involving the accident, and I can only decide the case before me. In failing to ensure he and his men were out

¹⁶Practically, this means Davis probably should have removed himself and the others from the possible path of the load before the signal was given.

of the way, Davis and, thus, H&K violated the standard.¹⁷

S&S AND GRAVITY

_____ An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, 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 FMSHRC 1541, 1550 (September 1996).

The Secretary established the violation was S&S. She proved H&K violated section 56.16009. She also proved there was a measure of danger to safety, in that failing to ensure the men were outside the path of the suspended 7,100 pound pitman subjected them to the danger of being hit. Moreover, she established there was a reasonable likelihood the hazard contributed to (that of being hit) would result in the type of accident that occurred. Removal and replacement

¹⁷In reaching this conclusion, I specifically reject H&K’s “contradictory evidence” argument. H&K Br. 4-7. It is my responsibility to evaluate the totality of the evidence offered and determine if a preponderance of it supports finding the violation occurred. Here, I have found it does, that the Secretary has met her burden of proof and established H&K violated the standard.

of the pitman required numerous lifts. It was easy, as the accident showed, for Heenan either to misread the signals he was given or to lift the pitman too far out of its constraints. Failing to guard against these mistakes by moving the men outside the pitman's possible path made the resulting accident reasonably likely. Further, given the weight of the pitman, the Secretary established it was reasonably likely the nature of any resulting injury would be serious, if not fatal.

In assessing the gravity of the violation, I note its effect – Davis's death – and find it was very serious.

NEGLIGENCE

Inspector Logan found the violation was the result of H&K's high negligence. Gov't Exh. 5; Tr. 77. As the inspector explained, Davis "allowed workers to be in harm's way when they started to actually hoist the pitman . . . to remove it from the platform" and he "failed to ensure . . . all the employees were clear of the area before the signal was . . . given to remove the pitman." Tr. 77. The Secretary argues, by failing to ensure he and the others were not out of the pitman's possible path when it was lifted, Davis failed to exercise reasonable care. Sec. Br. 2. I agree. Davis was the supervisor. He was in charge of the removal and replacement operation. Reasonable care required him to contemplate what would happen if the lift Heenan was signaled to undertake carried the pitman fully out of its constraints. Reasonable care required him to remove himself and his men from the path the pitman might take under those circumstances.

However, I also recognize the lack of care was not restricted to Davis. As H&K points out, Heenan could clearly see the platform and the people on it. He knew, or he should have known, not to lift the pitman while the men were in its possible path. Thus, both men failed to exercise the care required by the circumstances, and their joint failures cost Davis his life.

CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

_____ With regard to the history of previous violations, the parties stipulated in the 24 months before the issuance of the citation there were 21 citations issued in 13 inspection days. Stip.17; Gov't Exh. 11; Tr. 367. I view this as a medium history of previous violations.

SIZE

With regard to the size of the mine, the parties stipulated in the last full year before the citation was issued (2005), there were 13,176 hours worked at the mine. Stip. 8; Tr. 368. Counsel for the Secretary described this as a "relatively small mine." Tr. 368. (Counsel for H&K described it as "very small." Tr. 371.) With regard to the controlling entity, H&K, the parties agreed it had 473,375 hours worked. See Stip. 8, Tr. 372, 373-374, 369. Counsel for the

Secretary described H&K as of a “medium size.” Tr. 369. Given the stipulations and explanations, I find that H&K’s business is of a medium size.

ABILITY TO CONTINUE IN BUSINESS

With regard to the effect of the penalty on H&K’s ability to continue in business, the parties stipulated imposition of the proposed penalty will have no effect. Stip. 7.

GOOD FAITH IN ACHIEVING COMPLIANCE

Following issuance of the citation, H&K provided all mine employees with crane safety training. In addition, it reviewed the requirements of section 56.16009 with them. It did these things in a timely manner. Gov’t Exh. 7. I find the company demonstrated good faith in achieving rapid compliance.

CIVIL PENALTY ASSESSMENT

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
6029599	03/01/2006	56.16009	\$42,000

I have found the violation was very serious. I also have found it was the result of Davis’s and, thus, the company’s, lack of care. These findings, and the findings regarding the other civil penalty criteria, would warrant assessment of the penalty proposed by the Secretary, but for another factor that must be considered – Heenan’s negligence. As I have found, the fatal consequences of the violation were not solely due to Davis’s and H&K’s lack of care, Heenan was jointly responsible, and his inexplicable co-negligence, in my view, calls for a lesser penalty than that proposed. Given these findings and considerations, I conclude a civil penalty of \$30,000 is appropriate.

ORDER

The secretary has proven the violation of section 56.16009 alleged in Citation No. 6029599. H&K’s notice of contest of the citation **IS DENIED** and Docket No. PENN 2006-143-R **IS DISMISSED**. H&K **SHALL PAY** a civil penalty of \$30,000 for the violation within 40 days of the date of this decision. Upon payment of the penalty, Docket No. PENN 2006-288-M also **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

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