

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 8, 2016

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

v.

BUZZI UNICEM USA,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2015-306-M
A.C. No. 40-00039-380677

Mine: Bennett’s Lake Quarry

DECISION AND ORDER

Appearances: Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for the Petitioner

Timothy A. King, Buzzi Unicem USA, Chattanooga, Tennessee, for the
Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue is a single citation, Citation Number 8835889, issued to mine operator Buzzi Unicem USA (“Buzzi” or “the Respondent”) under section 104(a) of the Mine Act.

At the request of the parties a telephonic hearing was held on November 5, 2015, at which time testimony was taken and documentary evidence was submitted. The parties also filed written closing comments. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary. Based upon the entire record, I vacate Citation Number 8835889 for the reasons set forth below.

II. FACTUAL BACKGROUND

The parties have stipulated to the following facts:

1. Buzzi is an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

2. The Bennett's Lake Quarry Mine, Mine Identification Number 40-00039, is a "mine" as that term is defined by section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Buzzi's operations at the Mine are subject to the jurisdiction of the Mine Act.
4. The hearing of the above-referenced docket is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission ("the Commission") and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
5. Inspector Edward White was acting in his official capacity as an authorized representative of the Secretary when he issued the citation.
6. The total proposed penalty for this docket will not affect Buzzi's ability to remain in business.
7. The proposed assessment (Form 1000-179) accurately sets forth:
 - a. Buzzi's size, in hours worked;
 - b. The size, in hours worked, of the mine at which the citation was issued;
 - c. The total number of assessed violations for the 15 months preceding the month of the referenced citation; and
 - d. The total number of inspection days for the 15 months preceding the month of Citation Number 8835889.

Tr. 5.¹

Bennett's Lake Quarry is a small limestone pit located in Jasper, Tennessee. GX 5. The quarry operates for one shift each day beginning early in the morning. Tr. 29-30. The material extracted at the pit is processed onsite and the finished product is loaded onto barges on a lake to the south of the facility to be hauled away by tugboat. Tr. 31.

The citation at issue in this proceeding was written by MSHA Inspector Edward White² during a regular inspection of the quarry and charges the Respondent with failing to maintain sufficient illumination in the area where the barges are docked. GX 3. Inspector White arrived at the quarry to perform the inspection around 7:30 AM on March 16, 2015. Tr. 28. He observed the barges tied together in a tight bunch on the lake. Tr. 30, 40. A satellite image produced at hearing shows the barges' typical docking configuration: two barges are docked parallel to the shore with other barges tied to them broadsides to form a stack several barges

¹ In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered GX 1 to GX 9 and the Respondent's exhibits are numbered R-1 to R-8.

² White is a metal/non-metal mine inspector who works out of MSHA's satellite office in Tallahassee, Florida. He was hired by MSHA in June 2013 and trained at the Mine Academy in Beckley, West Virginia to become an inspector. Previously, he worked as a greaser, dredge operator, plant operator, and foreman at a sand and gravel mine for approximately sixteen years. Tr. 7, 12, 15-16, 20-21.

deep. Tr. 32-34. At some point during the inspection, a miner told White that it was impossible to see beyond the second barge before sunrise, yet employees are required to walk the barges to check the cables at approximately 6:30 AM each morning when it is still dark outside. Tr. 41-43; GX 2. Employees wear cap lights when working on the barges, and at the time of the inspection there was a tower light at the dock that provided illumination to the east and west, but there was no diffuse light source pointing south toward the lake and barges. Tr. 43-45, 62-64, 79. Based on the miner's statement that he could not see past the second barge and his own concerns about a trip and fall hazard due to insufficient illumination, White issued Citation Number 8835889. Tr. 42-43, 49. The citation was terminated later that day with notation that the company had rented a portable light system for the barge storage area until permanent lighting could be installed. GX 3.

White returned to the mine before sunrise the next day and observed the rented lights in operation. However, because he did not turn the lights off, he was unable to observe or measure the level of illumination without them. Tr. 64, 74.

The Secretary seeks a penalty of \$100.00 for the alleged violation. GX 6. The Respondent disputes that a violation occurred.

III. FINDINGS OF FACT AND ANALYSIS

The mandatory safety standard alleged to have been violated is 30 C.F.R. § 56.17001, which states: "Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." The Commission has stated that the issue of what constitutes "illumination sufficient to provide safe working conditions" requires the judge to make a factual determination based on the working conditions in the cited area and the nature of the illumination provided. *Capitol Aggregates, Inc.*, 3 FMSHRC 1388, 1388 (June 1981), *aff'd*, 671 F.2d 1377 (5th Cir. 1982) (unpublished table decision).

In this case, the working conditions in the cited area require employees to maneuver across the dock and the decks of floating barges to pull cables, reposition the barges, and check moorings, sometimes before sunrise. Tr. 32, 38-41, 72. The decks run around the edges of the barges. The interior of each vessel comprises a hold with 6-foot walls along its length and 3-foot walls on each end. Tr. 77; GX 4; RX 2. Employees are not required to load the barges by hand, as this is accomplished using a conveyor belt system. Tr. 31. Timothy King, the safety and health manager for the quarry, testified that employees working on the barges wear self-righting life vests that inflate automatically upon contact with the water. Tr. 68. He also stated that barge tenders always work in pairs, with a barge loader present inside the control room on the dock, and remain in radio contact with each other. Tr. 68-69, 77.

As for the nature of the illumination in the cited area, employees wore cap lights at night, and diffuse lighting for the barge docking area was supplied by a tower light fixture at the control room with lights pointing to the east and west. Inspector Smith did not visit the area before sunrise until after additional lights had been added, so he was unable to measure or describe the scope or quantity of illumination provided by the tower light. Tr. 64-66, 73-74. He noted that the fixture was wired for a south-facing light that had never been installed. Tr. 63.

However, King testified that the company had in fact installed a south-facing light in the past, but the barge tenders at the time had removed it because it “caused a blinding effect when they were on the barges.” Tr. 67.

The Secretary argues that the illumination described above was insufficient to provide safe working conditions in that it would not have allowed the operator to locate miners and effectuate a swift rescue in the event of an emergency. Sec’y’s Post-Hr’g Br. 7. Inspector White’s primary concern was that a miner could trip and fall into the lake unnoticed in the dark. White took photographs showing equipment on the deck of the barge, which presented a tripping hazard, and testified that a prior trip-and-fall injury had occurred at the facility’s barge docking area in December 2014. GX 4; Tr. 46-47.

Although the evidence offered by White shows why insufficient lighting at the barge docking area could be hazardous, the Secretary has failed to present enough reliable, objective evidence to establish that the lighting was actually insufficient. The Secretary relies solely on the evidence from Inspector White, but White’s testimony bears indicia of unreliability which diminish the weight of his opinions regarding the nature and sufficiency of the lighting in the cited area.

To begin with, White was unfamiliar with the layout of the barge docking area and the work performed there. For example, he cited the tower light for lacking a north-facing light and did not realize until the hearing that the barges were actually located in the opposite direction and the empty light socket was pointing southward. Tr. 62-64. He did not recall that the south-facing light had previously been removed by barge tenders because it created glare, even though this had been brought to his attention during the inspection, according to King. Tr. 67-68. White misidentified which building was the control room on the satellite map shown at hearing, which is significant because the tower light was located at the control room. Tr. 35-36, 43-44, 57. He incorrectly guessed the height of the lips around the barge holds, which were so tall that King suggested they effectively block the view from the shore no matter what time of day it is or what lighting is provided. Tr. 53-54, 77. White also did not know what type of life jackets the barge tenders wore and was unaware that they maintained radio contact with the other employees and worked in teams of two so that a buddy system was in place in the event of an accident. Tr. 51, 68-69, 77.

In addition, some of the concerns that spurred White to issue the citation seem to have been unfounded. At hearing, he initially emphasized that he believed management should have taken action because employees had been complaining about the lighting for three weeks. Tr. 52, 54-56. But he later admitted that his notes showed “the three barge tenders had not spoken to management yet actually, but had been speaking amongst themselves.” Tr. 67. Also, although White indicated that his concerns about the lighting were motivated in part by a prior trip-and-fall injury in which an employee had stumbled over rigging on a barge deck, the company’s internal accident report shows that inadequate illumination played no role in that injury. The injured employee stumbled over unseen rigging because he was walking backwards and had failed to check his work area for tripping hazards beforehand. He was disciplined for his failure to examine his work space. RX 3; Tr. 69-72.

Most significantly, Inspector White did not actually observe the illumination in the cited area himself except during daylight hours. When he arrived at the quarry the morning the citation was issued, the sun had already risen. Tr. 28; RX 6. He had the opportunity to see what light was available when he returned to the quarry before sunrise the next morning. However, although he observed the temporary lights the Respondent had installed to abate the violation, he viewed the docking area only from a distance and did not turn the new lights off to determine how effective the original tower lights were. Tr. 64, 74, 76. At no time did he measure the illumination levels in the cited area or make any firsthand observations about visibility conditions in that area at night. Tr. 64-65, 73-75. He relied solely on the statement of one barge hand who said he could not see beyond the second barge. Judges have uniformly declined to find insufficient illumination in cases such as this one where the inspection occurred during daylight hours and the Secretary has presented no firsthand evidence regarding illumination levels or the nature of the illumination provided. See *Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 341-43 (Feb. 2011) (ALJ); *Jim Walter Res., Inc.*, 31 FMSHRC 1208, 1211-13 (Oct. 2009) (ALJ); *W.S. Frey Co.*, 16 FMSHRC 975, 1008-09 (Apr. 1994) (ALJ), *aff'd*, 57 F.3d 1068 (10th Cir.) (unpublished table opinion); *USX Corp., Minn. Ore Operations*, 15 FMSHRC 2333, 2341-44 (Nov. 1993) (ALJ).

In *W.S. Frey Company*, a case involving a fatal fall that occurred in a coal shed at night, the inspector alleged the lighting at the coal shed was insufficient in that miners working there was not visible to others. 16 FMSRHC at 1009. The judge vacated the citation, explaining that the pertinent inquiry under § 56.17001 was what a miner working in the location of the cited fall hazard at night would be able to see and that the evidence was deficient on this point. *Id.* Similarly, in the instant case, the focus is on what the miners working on the barges could see because they would be the employees exposed to the trip and fall hazard identified in the citation. Not only has the Secretary failed to produce sufficient evidence as to the effectiveness of the tower light, but it is also undisputed that miners working in the barge docking area wore bright cap lights, which would be sufficient to illuminate trip and fall hazards at their feet on the barge decks where they were working. Tr. 43-45, 75, 79.

For all the foregoing reasons, I find that the Secretary has failed to establish a violation of § 56.17001.

ORDER

Citation Number 8835889 is hereby **VACATED** and this proceeding is **DISMISSED**.



Priscilla M. Rae
Administrative Law Judge

Distribution:

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