FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 14, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CERTIFIED CRANE AND RIGGING SERVICES, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0264 A.C. No. 41-02547-583536 Mine: Rye Plant 1144

DECISION

Appearances: Aletsey Hinojosa, Esq.; Mia Terrell, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Secretary of Labor;

Robert Pendleton, Esq., Houston, Texas, for Certified Crane and Rigging Services, LLC.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against Certified Crane and Rigging Services, LLC ("Certified Crane"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $155.00 for an alleged violation of one of her mandatory safety standards requiring that raised components of mobile equipment be secured to prevent accidental lowering when persons are working and exposed to the hazard.[1]

A remote hearing was conducted over Zoom on April 30, 2024, and the parties' Post-hearing Briefs are of record. The following issues are before me: (1) whether Certified Crane violated section 56.14211(c); (2) alternatively, whether Certified Crane violated section

[1] At hearing, the Secretary's motion to plead, in the alternative, a violation of 30 C.F.R. § 56.16009 was granted, without objection. Tr. 8-10. Amendments of pleadings are liberally granted when unopposed at hearings. See *Cyprus Empire Corp.*, 12 FMSHRC 911, 914-16 (May 1990) (judge did not abuse his discretion where operator did not object at hearing to modifying a citation's alleged violation).

56.16009; and, if so, (3) the gravity and negligence of the violation; and (4) the appropriate penalty.

For the reasons set forth below, I conclude that Certified Crane violated section 56.16009, **AFFIRM** the citation, as **MODIFIED**, and assess a civil penalty.

I. Factual Background

Certified Crane is an independent contractor, performing rigging services on the morning of July 11, 2023 at Rye Plant 1144, a sand and gravel operation owned and operated by Arcosa Aggregates Texas, LLC ("Arcosa"). Jt. Stips. 1, 2; Tr. 21, 24. The mine had been shut down for maintenance of its wash plant, including installation of a new shaker screen. Tr. 23. Certified Crane's three on-site riggers, operating a Grove GMK 6300L multi-ton crane, had hoisted the shaker screen for installation on the wash plant. Jt. Stip. 8; Tr. 26. Thereafter, when Arcosa workers advised the riggers that the wash plant was not yet ready to receive the shaker screen, the crane operator lowered one short end of its rectangular base to the ground, leaving the opposite end suspended in mid-air, and no physical block was placed under the load, nor was it barricaded. Jt. Stips. 9, 10, 11; Tr. 36-37, 143; Ex. P-6 at 1.

At 9:12 a.m. that morning, MSHA Inspector Chad Derouen arrived at the mine to conduct an E01 inspection, and was accompanied by Arcosa plant manager, John Worrell. Tr. 22, 24; Ex. P-3 at 2. On or around 11:00 a.m., according to Derouen, as they neared the crane and the suspended shaker screen, he observed two workers, one standing on either side of the load, who then walked away when they caught sight of them. Tr. 33, 43; Ex. P-3 at 7. On closer inspection, Derouen spotted footprints and water bottles directly underneath and in multiple locations next to the suspended load. Tr. 45-47; Ex. P-2A. Consequently, he issued an imminent danger order and 104(a) Citation No. 9679982, alleging a violation of section 56.14211(c).[2] Exs. P-1, P-2, P-3 at 7.

II. Joint Stipulations

The parties have stipulated as follows:

1. At all relevant times, Arcosa Aggregates Texas, LLC was an operator of Rye Plant 1144 Mine (Mine ID 41-02547), as defined in section 3(d) of the Mine Act.

2. During all times relevant to this matter, Respondent was operating as an independent contractor performing work at the mine identified above.

3. The products of Rye Plant 1144 Mine entered the stream of commerce and/or the operations or products thereof affected commerce, within the meaning and scope of section 4 of the Mine Act.

[2] 107(a) Order No. 9679984 was not contested by Certified Crane, and is not at issue in this proceeding.

4. The Administrative Law Judge has jurisdiction over this proceeding, pursuant to section 105 of the Mine Act.

5. The individual whose signature appears in Block 22 of the contested citation at issue in this proceeding is an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citation at issue in this proceeding.

6. The subject citation was served by a duly authorized representative of the Secretary on the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, but no stipulation is made as to its relevance or the truth of the matters asserted therein.

7. The assessed penalty, if affirmed, will not impair Respondent's ability to remain in business.

8. Respondent had a crane and crew on-site that consisted of an operator and two riggers to assist with installing shaker screens.

9. When the contested citation in this proceeding was issued, the shaker screen was not fully lowered to the ground.

10. No physical block had been placed below the shaker screen when the contested citation in this proceeding was issued.

11. There were no barricades or flagging placed in the area next to the screen deck when the contested citation in this proceeding was issued.

Tr. 6-8.

III. Findings of Fact and Conclusions of Law

In order to establish a violation of the Mine Act, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Inspector Derouen issued 104(a) Citation No. 9679982, alleging a "significant and substantial" violation of 30 C.F.R. § 56.14211(c) that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was due to Certified Crane's "moderate" negligence. Ex. P-1. The "Condition or Practice" is described as follows:

> The Grove GMK 6300L-1 (300) Ton Crane was parked next to the Wash Plant, [and] a 3 deck, 40 ft by 10 ft Shaker screen was suspended from the crane and was not mechanically secured or blocked to prevent accidental lowering. Employees working in and around this equipment were exposed to the possibility of serious

injuries in the event that this load should fall. The crane operator was not in the cab of the crane in front of the controls. This crane was being used to install new plant components at the time of the inspection.

Ex. P-1. Subsequently, the crane operator lowered the shaker screen to the ground, terminating the citation. Exs. P-1, P-6 at 5-6.

The Secretary maintains that Certified Crane violated section 56.14211(c) because no physical block had been placed below the raised shaker screen to secure it from accidental lowering, and the crane was not equipped with a functional load-locking device. Sec'y Br. at 6-8. The Secretary further contends that the inspector's sighting of the two workers standing alongside the suspended shaker screen, together with his observation of footprints and water bottles scattered underneath and adjacent to the screen, establish that the workers were exposed to the hazard of the load accidentally falling or swinging. Sec'y Br. at 7. Alternatively, the Secretary asserts that Certified Crane violated section 56.16009 because the workers did not stay clear of the suspended load. Sec'y Br. at 15. Certified Crane takes the opposing position that no violation occurred under either standard, contending that the shaker screen was not a raised component of mobile equipment, that the crane had a functional load-locking device, and that the riggers did not place themselves in danger of the suspended load. Resp. Br. at 6-10, 16-17, 19.

A. Testimony

1. Chad Derouen

MSHA Inspector Chad Derouen, the Secretary's witness, testified that he conducted his July 11 E01 inspection of the mine accompanied by Arcosa plant manager, John Worrell. Tr. 22-24; Ex. P-3 at 3. He stated that Worrell had informed him that the mine was shut down for maintenance, and that independent contractor, Certified Crane, was in the process of installing a shaker screen on the wash plant. Tr. 25-26. According to Derouen, when he first observed the shaker screen, it was suspended from the hoist of a Grove GMK 6300L crane by a chain sling and rigged at a 30-degree angle, leaving one end raised approximately five feet above ground and the other resting on the ground. Tr. 35-36; Ex. P-6 at 1. He explained that the screen had been left suspended in that position while Arcosa miners prepared the wash plant for installation. Tr. 36-37. Although Derouen did not take any measurements of the shaker screen's dimensions, which he estimated to be 40 by 10 feet, he also estimated that it weighed several tons. Tr. 35. Derouen also testified that when he was walking toward the suspended shaker screen, there were two workers, one standing on either side of it, who he estimated to be a foot to a foot and a half away from the screen, who then walked toward the back of the crane and out of sight; he assumed that they worked for Certified Crane. Tr. 43-44, 74. Derouen stated that the crane operator was not in the cab, and that Worrell informed him, after talking to the crew, that the crane operator had gone to the bathroom. Tr. 33, 41; Exs. P-3 at 3, P-6 at 3. According to him, the area around the screen had not been barricaded or flagged-off with tape. Tr. 33-34. He attested to having observed multiple footprints and water bottles scattered underneath and around the shaker screen, which he annotated on a photograph that he had taken of the suspended load.

Tr. 45-49; Exs. P-2A, P-6 at 2.[3] He explained that the footprints and water bottle directly underneath the screen could not have been there before it had been hoisted because the weight of the flat-bottom screen would have wiped out the prints and mashed the bottles when it was transported to that location. Tr. 46-47. In his opinion, this evidence indicated that someone had walked underneath the suspended load. Tr. 72.

Derouen testified to the potential danger posed by the suspended load. He explained that rigging failures occur often, that hydraulic or electrical failures can cause equipment to drop and injure miners, and that he found five or six fatal accidents related to rigging failures since 2015 in MSHA's database. Tr. 37-39. Also, he opined that, if the rigging were to fail, the weight of the lifted machinery could cause it to fall and result in crushing injuries to anyone underneath it; if a lifting point were to fail, it could cause the screen to swing from side to side, potentially placing anyone standing nearby in danger. Tr. 64-65. Finally, he stated that when he issued the citation, he had not considered whether the crane was equipped with a functional load-locking device, or whether the load was mechanically secured. Tr. 101.

2. Joseph Lind

Testifying for Certified Crane, its general manager, Joseph Lind, stated that he had been in that position for eight years, and that he had a total of 43 years of experience in the crane and rigging industry. Tr. 122-23. Although he was not on-site during the July 11 inspection, he attested to being knowledgeable about the Grove GMK 6300L crane operations and the tasks that his crew had been performing. Tr. 123, 141-42. He explained that the crane is equipped with "function lockout switches" that correspond to the functions of the crane, including telescoping or elevating the boom, and raising or lowering the hoist. Tr. 134. When one of these switches is turned on, he explained, the corresponding crane function is locked, preventing it from being operated. Tr. 137. Lind stated that he considers these function lockout switches to be equivalent to a load-locking device because when they are turned on, the crane's operator cannot accidentally raise, lower, or otherwise move the load. Tr. 167-68, 180-84. While he also testified that the crane is equipped with dead-man switches on the joysticks and the operator's seat, providing a separate safety feature that an operator must engage before the crane will operate, he did not contend that the dead-man switches constitute a load-locking device. Tr. 140-41, 162. Upon further questioning on cross examination, Lind conceded that the function lockout switches would not prevent a load from descending in the event of a rigging or hydraulic failure, and that the Grove GMK 6300L Operating Manual ("Grove Operating Manual") does not identify the function lockout switches as constituting a load-locking device. Tr. 161-62, 166-69; Ex. P-5.

Lind also testified about precautions taken by Certified Crane to protect its workers from being struck by a falling or swinging load. He explained that there is no barricade requirement unless the load is being moved or lifted, and that the company follows OSHA standards, allowing for several methods of barricading. Tr. 141-42. Furthermore, he confirmed that the two workers observed by Derouen standing near the suspended shaker screen were Certified

[3] The photograph was mismarked and cited as exhibit P-2A, rather than P-6A.

Crane riggers, and stated that they were trained to avoid overhead risks, including travel underneath suspended loads. Tr. 146-47, 199-200.

Additionally, Lind explained that the shaker screen has a recessed bottom inside its perimeter that is designed for material to pass through it. Tr. 148. Therefore, he stated, when the unit is set down, only its perimeter contacts the ground, and it is possible that the footprints observed underneath the suspended load could have been made before the load had arrived. Tr. 148.

B. Fact of Violation under Section 56.14211(c)

The Secretary contends that Certified Crane violated section 56.14211(c) because the suspended shaker screen was a component of the crane, it was not secured from accidental lowering by either a physical block underneath it or a load-locking device on the crane, and the two Certified Crane riggers were standing near the suspended shaker screen, exposed to its accidental lowering.[4] Sec'y Br. at 6-8. Conversely, while Certified Crane's presentation of its case primarily focused on establishing that the crane was equipped with the equivalent of a functional load-locking device under section 56.14211(d), it contends, nonetheless, that section 56.14211(c) is inapplicable because the shaker screen was not a component of the crane, and workers were not exposed to the hazard.[5] Resp. Br. at 6-10, 16-19.

The Commission has recognized that section 56.14211(c) requires that "(1) a raised component of mobile equipment; (2) must be secured to prevent accidental lowering; (3) when persons are working on or around the equipment; and (4) are exposed to the accidental lowering of the component." *Hanson Aggr. New York, Inc.*, 29 FMSHRC 4, 8 (Jan. 2007).

A preliminary question of whether the standard applies to the present circumstances is whether the suspended shaker screen was a component of the crane. Generally, under section 56.14211(c), it is the component of the mobile equipment, in this case, the crane, that must be secured to prevent accidental lowering, rather than the object that it is hoisting, i.e., the load. Here, the Secretary contends that, for purposes of section 56.14211, the suspended shaker screen was both the load and the raised component of the crane. Sec'y Br. at 6, 16. The Secretary also asserts, relying on the Commission decision in *Dolese Brothers*, that anything hooked onto a crane becomes a component of it. Sec'y Br. at 6; see 16 FMSHRC 689, 691 (Apr. 1994).

The Secretary's position is unavailing, in that her reading of *Dolese Brothers* overlooks that, in addition to being attached to the crane's hook, the hoisted load, a manbasket, was being

[4] Section 56.14211(c) requires that, "A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component." 30 C.F.R. § 56.14211(c).

[5] Section 56.14211(d) provides a compliance alternative to subsection (c), providing that "a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent." 30 C.F.R. § 56.14211(d).

used to modify the crane to a mobile work platform. *Id.* at 690-91. Furthermore, the Commission reasoned that, "*as the crane was being used*, each part was in fact, a constituent element, or component, of the mobile equipment." *Id.* at 691 (emphasis added). Similarly, the Commission also determined that a hoisted spreader bar was both the load and a component of the crane, reasoning that a spreader bar is a "lifting device" that "assists crane operators in balancing heavy objects," and "distributes the load across more than one point, thereby increasing stability during lifting." *Sims Crane*, 40 FMSHRC 301, 301 n.2 (Apr. 2018). Therefore, an attached load becomes a component of a crane when it is used to modify the function of the crane, whereas an ordinary load is not a part of a crane merely because the crane is hoisting it. Consequently, I find that the shaker screen was not being used to modify the function of the crane and, as Certified Crane contends, as a component of the wash plant, it was the load.

Assuming arguendo, that the Secretary had established that the suspended shaker screen was also a component of the crane, the Commission has expressed, with clarity, that *work* must be occurring in order for section 56.14211(c) to apply. In *Sims Crane,* the Commission interpreted this prong of the analysis to require more than mere presence on a worksite to be considered work, explaining that the standard recognizes that mining tasks sometimes necessitate working near raised components and, therefore, provides specific safety standards for such circumstances. *Id*. at 304. The Commission also found that miners engaging in rigging are working under section 56.14211(c), but that walking underneath the raised component of the crane to talk to the inspector, not in furtherance of rigging, could not be construed as "work" under the standard. *Id.* at 304-05. Ultimately, although section 56.14211 was found inapplicable to the facts, the Commission found a violation under section 56.16009. *Id*. at 305.

The evidence establishes that the two Certified Crane riggers, observed near the raised shaker screen, were merely standing alongside it, and then walking away. At the time that Derouen observed them, the operator had left the cab, rigging had already been completed, and the shaker screen had been maintained at a 30-degree angle for several hours in anticipation of installation on the wash plant. Tr. 33, 143-44, 156; Ex. P-3 at 3. Consequently, I find that no work was being performed at the time of inspection.

Inasmuch as the Secretary has failed to establish, under section 56.14211(c), that the suspended shaker screen was a raised component of the crane, and that the riggers were working, it is unnecessary to resolve whether the crane was secured against accidental descent, and whether the riggers were exposed to the danger which, moving forward to the more general standard covering the load, is the crux of that inquiry under a different, simpler analysis. Consequently, I find that section 56.14211(c) is not applicable to the facts in this matter, and that Certified Crane did not violate the standard.

C. Fact of Violation under Section 56.16009

The Secretary contends, alternatively, that Certified Crane violated section 56.16009 when its riggers walked next to and underneath the suspended shaker screen.[6] Sec'y Br. at 15.

[6] Section 56.16009 provides that "persons shall stay clear of suspended loads." 30 C.F.R. § 56.16009.

Certified Crane asserts that its riggers were experienced and trained to stay clear of such hazards, and that they were never underneath the load. Resp. Br. at 16-17.

The standard is intended to protect workers from being struck by hoisted loads, whether falling or swinging. See *id*. at 304. As such, the Commission has recognized that section 56.16009 prohibits miners from being in the fall zone directly underneath suspended loads, and requires that they also remain a sufficient distance away from them in order to protect themselves from injury. *Dawes Rigging & Crane Rental,* 36 FMSHRC 3075, 3078 (Dec. 2014). Whether a person has stayed clear of a suspended load is determined by considering the particular facts surrounding an alleged violation. *Id*. The position of the person in relation to the suspended load is the "pivotal factor" in determining whether the standard has been violated. *CCC Group, Inc*., 34 FMSHRC 1192, 1197 (May 2012) (ALJ) (citing *Anaconda Co.*, 3 FMSHRC 859, 861 (Apr. 1981) (ALJ)). The danger zone around a suspended load extends to the area in which the load could swing or fall. *Bragg Crane Service*, 42 FMSHRC 240, 245-47 (Mar. 2020) (ALJ) (violation found where a miner was approximately two feet away from a 40,000 pound hopper, because he was within the 10-foot radius that miners had been instructed not to enter); see also *Haines & Kibblehouse Inc.*, 30 FMSHRC 504, 518 (June 2008) (ALJ) (violation found where a swinging load struck a miner, and a reasonably prudent supervisor would have anticipated that the load would swing when lifted because of the obvious off-vertical deflection of the load line); see also *CCC Group*, 34 FMSHRC at 1198 (violation found where a miner was within arm's length of a suspended metal beam, and using his hands instead of a tagline to direct the beam).

The record establishes that Derouen observed Certified Crane riggers standing, at most, a foot and a half away from either side of the shaker screen that had not been blocked physically against motion, and that they both walked away from the load when they sighted the inspection team. Derouen's account of the riggers' location and activity was wholly credible, and no other witness on-site was called to put his assessments in controversy. Furthermore, the riggers' own behavior, walking away from the suspended shaker screen when they saw the inspector and plant manager approaching, leads to a reasonable likelihood that they may, themselves, have realized that they were engaging in prohibited behavior by standing dangerously close to the load. Indeed, the presentations of the parties' cases suggest that where the riggers were standing is not in dispute here, but whether their sighted locations were within the danger zone.

The Secretary contends that photographic evidence of footprints and water bottles underneath and nearby the raised shaker screen establishes that the riggers were either next to or underneath the suspended load. Sec'y Br at 15. In the photograph, taken and marked by Derouen, he identified two footprints within the imprint of where the shaker screen had rested before hoisting, and at least five additional footprints outside its perimeter in close proximity to it. Tr. 45-47; Ex. P-2A. It also depicts three water bottles strewn on the ground, one of which is directly underneath the suspended load, and the other two several feet away. Ex. P-2A. The probative value of this evidence of foot traffic within the shaker screen's perimeter is largely diminished by lack of any evidence as to when the apparent activities had occurred. Footprints made before the shaker screen had been positioned in its location would not have been erased, simply because only its perimeter contacted the ground, while its base interior surface was elevated. Furthermore, how and when the water bottles had come to rest nearby and underneath

the shaker screen is unknown and also of little probative value, as it is entirely plausible that they could have been tossed from a safe distance, without anyone being dangerously near the suspended load. On the other hand, at least two sets of footprints next to the shaker screen are consistent with where Derouen had observed the rigger closest to him on the near side of the load. Ex. P-2A. This evidence, together with Derouen's observations, leads to a finding that the riggers were standing, at best, a foot and a half away from the suspended load.

The ultimate question is whether the riggers were standing within the danger zone. Derouen's credible testimony establishes that rigging failures are fairly common, and that the suspended load could swing were one of the lifting points to fail. While the extent of the swing arc or any other movement has not been established by the evidence, the riggers' proximity to the load provided no safety buffer in the event of even the smallest unforeseen movement. Experienced, well-trained riggers would recognize the hazard of standing a mere eighteen inches away from a suspended multi-ton shaker screen, given the possibility of sudden load decent or horizontal movement, in conjunction with the ordinary movements of their extremities exacerbating the likelihood of contact. Consequently, I find that the riggers were standing within the danger zone, and conclude that Certified Crane violated section 56.16009.

D. Gravity and Negligence

1. Significant and Substantial

The Secretary contends that the violation was significant and substantial because it exposed Certified Crane riggers to permanently disabling injuries were the shaker screen's rigging to fail or the suspended load to otherwise move. Sec'y Br. at 11-13. Certified Crane does not advance any argument as to the gravity of the violation.

The Mine Act identifies a "significant and substantial" violation 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). The Secretary bears the burden of proving that a violation is significant and substantial by a preponderance of the credible evidence. *Consolidated Coal Co.*, 39 FMSHRC 1737, 1742 (Sep. 2017); *Keystone Coal*, 17 FMSHRC at 1838 (citing *Garden Creek*, 11 FMSHRC at 2152). The Commission's most recent refinement of the four *Mathies* criteria, that the Secretary must establish in order to prove that a violation is significant and substantial under *National Gypsum*, is in *Peabody Midwest*:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, LLC, 42 FMSHRC 379, 383 (June 2020); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-37 (Aug. 2016); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822 (Apr. 1981); see also *Buck Creek Coal, Inc.*

v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987).

Regarding the second *Mathies* criterion, the Commission has explained that the judge must determine "whether [the] hazard was reasonably likely to occur given the particular facts surrounding this violation." *Peabody*, 42 FMSHRC at 382 (quoting *Newtown*, 38 FMSHRC at 2041). "Reasonable likelihood" is not an exact standard, but must be evaluated with "a particular focus on the facts and circumstances presented." *ICG Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016); see *Newtown*, 38 FMSHRC at 2039. Applying the third *Mathies* criterion, the judge is to assume that the hazard identified in step two has been realized, and then consider whether the hazard would be reasonably likely to result in injury in the context of "continued normal mining operations." *Newtown*, 38 FMSHRC at 2045 (citing *Knox Creek Coal Corp.*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135). At step four, the judge determines whether any resultant injury would be "reasonably likely to be reasonably serious." *Newtown*, 38 FMSHRC at 2038.

I have found that Certified Crane violated section 56.16009. Applying the second *Mathies* criterion, the discreet safety hazard to which the violation contributed is the suspended load striking a miner by swinging or falling. The record establishes that the suspended shaker screen would swing or fall if there were a rigging, electrical, or hydraulic failure. With the riggers standing less than a couple of feet away from the shaker screen, any amount of load swing would have been likely to strike one of them, and sudden descent of the load would have been likely to strike either or both of them. Furthermore, according to MSHA's records, as many as six fatal rigging failure accidents occurred since 2015. Therefore, I find that there was a reasonable likelihood that the riggers, standing alongside the suspended load, would be struck as a result of sudden load failure or swing.

Under the third and fourth *Mathies* criteria, clearly, a large, multi-ton shaker screen unexpectedly swinging would be reasonably likely to strike a miner with a tremendous amount of force, resulting in permanently disabling to fatal injuries; if it were suddenly to fall, due to its weight and size, any extremity or body part contacted in its descent would likely be crushed, also resulting in permanently disabling to fatal injuries. Therefore, I find that the violation was significant and substantial.

2. Negligence

The Secretary has assessed the negligence of the violation as "moderate." Sec'y Br. at 14; Ex. P-1. Certified Crane does not take a position. The Secretary's Part 100 Penalty Table defines "moderate negligence" as "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). The record makes clear the seriousness of the riggers exposing themselves to the hazard by standing in the danger zone after the work had been paused. Indeed, there would not have been a danger zone had the crane operator lowered the load to the ground, or physically blocked it until the work resumed. Even the Grove Operating Manual cautions against leaving an unattended load in a

suspended position, expressly instructing crane operators to "always set the load down when there is a break in work, and never leave the truck crane whilst a load is raised." Ex. P-5 at 2. Furthermore, the hazard was obvious, and these experienced riggers should have known to distance themselves from the danger. However, because no Certified Crane management-level employee was on-site during the course of the shaker screen installation, I find that the contractor was unaware of the riggers' conduct, and that this is a mitigating factor. Therefore, I sustain the Secretary's moderate negligence designation.

IV. Penalty

While the Secretary has proposed a regularly assessed civil penalty of $155.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). See *Sellersburg Stone Co.,* 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the *Sellersburg* penalty criteria, I find that Certified Crane is a small operator with a clean violation history. Sec'y Pet. Ex. A; Ex. P-4. I also find that the proposed penalty will not affect Certified Crane's ability to continue in business, and that the operator demonstrated good faith in achieving rapid compliance after notice of the violation, by immediately lowering the suspended end of the shaker screen to the ground. Jt. Stip. 7; Ex. P-1. The remaining criteria involve consideration of the gravity and negligence of the violation. I have found that this was a very serious violation, and that Certified Crane was moderately negligent in committing it. Accordingly, I find that the regularly assessed penalty of $155.00, as proposed by the Secretary, is appropriate.

V. Order

WHEREFORE, it is **ORDERED** that Citation No. 9679982 is **AFFIRMED**, as **MODIFIED** to charge a violation of 30 C.F.R. § 56.16009. It is further **ORDERED** that Certified Crane and Rigging Services, LLC **PAY** a civil penalty of $155.00 within 30 days of the date of this Decision.[7]

Jacqueline R. Bulluck
Administrative Law Judge

[7] Payment should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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