

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue, NW, Suite 520N  
Washington, DC 20004

April 10, 2017

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

v.

CACTUS CANYON QUARRIES, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2016-410  
A.C. No. 41-00009-410862

Mine: Fairland Plant and QYS Mine

**DECISION APPROVING SETTLEMENT**  
**AND**  
**ORDER TO PAY**

Before: Judge Feldman

The captioned civil penalty proceeding is before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815(d). The single citation at issue, Citation No. 8864556, alleges that Cactus Canyon Quarries, Inc. (“Cactus Canyon”) violated 30 C.F.R. § 56.14207. Section 56.14207 provides:

Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.

30 C.F.R. § 56.14207. Specifically, Citation No. 8864556 alleges:

The Ford F-150 XL Sample truck was left unattended and parked on an incline. The wheels were not chocked and the provided park brake was not set. When the controls were set in neutral and the service brake released, the unit rolled downhill. No other mobile equipment and/or foot traffic was observed nearby.

The issuing Mine Safety and Health Administration (“MSHA”) inspector, Ramiro Jimenez, made the following determinations with respect to the gravity of the cited condition: “unlikely,” “lost workdays or restricted duty,” and one person affected. As a result of these findings, Inspector Jimenez designated this violation as non-significant and substantial (“S&S”). A violation is non-S&S if it is not reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). Inspector Jimenez attributed the cited condition to a “moderate”

degree of negligence. The Secretary proposed a \$100.00 civil penalty for Citation No. 8864556.

On February 16, 2017, 19 days before the scheduled March 7 hearing,<sup>1</sup> the Secretary filed a Motion for Summary Decision, asserting that the following facts regarding Citation No. 8864556 are not in dispute:

1. Cactus Canyon is the operator of the Fairland Plant and QYS Mine ID 41-0009 (“the mine”) located in Marble Falls, Texas.
2. On March 16, 2016, Inspector Ramiro Jimenez arrived at the mine to conduct a regular E01 inspection.
3. Inspector Jimenez met with the plant manager and together (along with five other miners accompanying for learning purposes) they started walking the mine.
4. About an hour into the inspection, Inspector Jimenez came upon a Ford F-150 XL truck parked on an incline outside of the bagger room.
5. The truck was parked and unattended.
6. On closer inspection, Inspector Jimenez found that the truck’s operator set the automatic transmission to park but failed to engage the emergency parking brake.
7. Inspector Jimenez also determined that the truck’s operator left the vehicle without chocking the tires or turning the tires into a bank.
8. Inspector Jimenez then set the truck’s transmission to neutral and the vehicle rolled downhill on the incline.
9. The operator used the truck at some point earlier in the morning on the day of the inspection.

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<sup>1</sup> The relevant Commission Rule provides:

At any time after commencement of a proceeding and *no later than 25 days before the date fixed for the hearing* on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.

29 C.F.R. 2700.67(a) (emphasis added).

*Mot. for Summ. Dec.*, at 2-3 (Feb. 16, 2017).<sup>2</sup> Asserting that there are no genuine issues of material fact, the Secretary moves for summary decision affirming Citation No. 8864556 as issued.

Via email, counsel for Cactus Canyon objected to the Secretary's February 16 Motion for Summary Decision as untimely under Commission Rule 67(a), and expressed a desire to proceed with the scheduled March 7 hearing. With respect to timeliness, on February 17, 2017, I issued an order reflecting that the 25 day window for filing summary decision motions in Rule 67 is not jurisdictional or otherwise unwaivable, and that resolution by summary decision, if appropriate, will promote judicial efficiency. 39 FMSHRC 417, 418 (Feb. 2017). Consequently, the scheduled March 7 hearing was continued without date and Cactus Canyon was required to file, on or before March 10, 2017, a response to the Secretary's Motion for Summary Decision, if it so desired. *Id.*

Thereafter, on March 9, 2017, Cactus Canyon filed a Response and Objection to the Secretary's Motion for Summary Decision and its own Cross-Motion for Summary Decision.<sup>3</sup> Significantly, Cactus Canyon does not dispute the fact of the violation and the non-S&S designation. Furthermore, with regard to the Secretary's civil penalty proposal, in its cross-motion, Cactus Canyon requests that the Secretary's proposed \$100.00 civil penalty be affirmed as issued. *Resp. Cross Mot. for Summ. Dec.*, at 3.

However, Cactus Canyon disputes several of the Secretary's assertions with respect to gravity. Specifically, Cactus Canyon asserts that the citation should be designated with "no likelihood" of injury (rather than that injury is "unlikely"), "no lost workdays" (rather than "lost workdays or restricted duty"), and no persons affected (rather than one person affected). As a final matter, Cactus Canyon argues that the cited condition was not attributable to any negligence, rather than the "moderate" degree of negligence asserted by the Secretary.<sup>4</sup>

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<sup>2</sup> The Secretary submitted a sworn affidavit from Inspector Jimenez in support of these facts. *Mot. for Summ. Dec.*, Ex. 1.

<sup>3</sup> In its cross-motion, Cactus Canyon objects to Exhibits 2, 3, 4, and 5, attached to the Secretary's Motion as "not sworn or certified copies." *Resp. Cross Mot. for Summ. Dec.*, at 1 (Mar. 9, 2017). Exhibit 2 is a copy of the citation at issue, Exhibit 3 is a copy of Inspector Jimenez's inspection notes, Exhibit 4 are photographs taken by Inspector Jimenez of the cited vehicle, and Exhibit 5 is an MSHA "Fatalgram and Best Practices" notification regarding the failure to engage the parking brake or properly chock vehicle wheels. Cactus Canyon's objections are denied as the disputed exhibits were created within the scope of MSHA's performance of its enforcement duties.

<sup>4</sup> In objecting to the Secretary's designations, Cactus Canyon contends disputed facts concerning Cactus Canyon's training practices, the managerial responsibilities of the individual responsible for the cited vehicle, the speed and distance the truck would roll if the automatic transmission park gear failed, and the likelihood that individuals would be injured by such a circumstance. *Resp. Cross Mot. for Summ. Dec.*, at 2-3.

The threshold material issues in this civil penalty proceeding are whether Cactus Canyon committed the violation of the cited mandatory standard and whether the cited condition was S&S in nature. As previously noted, Cactus Canyon concedes the fact of the violation and the Secretary's non-S&S characterization.

With respect to the statutory penalty criteria in section 110(i),<sup>5</sup> Cactus Canyon's violation history and the appropriateness and effect of the \$100.00 civil penalty are not material. Questions concerning the likelihood of lost workdays or restricted duty and the number of persons affected are only germane to the question of the degree of gravity. However, the agreed upon \$100.00 civil penalty, as well as the non-S&S designation of the cited condition, alone, sufficiently demonstrate that the gravity of the violation was not serious. Finally, a \$100.00 civil penalty is appropriate regardless of whether the cited violation is based on strict liability or the Secretary's proposal of a "moderate" degree of negligence. Therefore, the parties' dispute with regard to negligence and the above components of gravity are moot.<sup>6</sup>

Consequently, as the parties have agreed to all of the material issues with respect to the fact of the violation, S&S, and the appropriate civil penalty in their cross-motions, I construe the parties' motions as a motion to approve settlement, which shall be approved as consistent with the penalty criteria in section 110(i) of the Mine Act.

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<sup>5</sup> Section 110(i) provides the statutory parameters for assessing civil penalties. Section 110(i) provides:

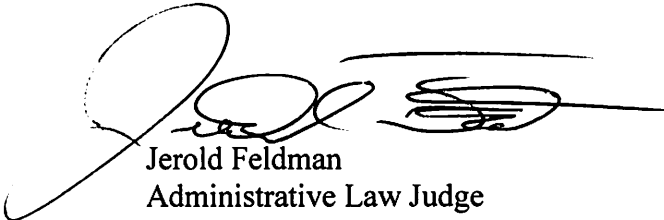
The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] *whether the operator was negligent*, [4] the effect on the operator's ability to continue in business, [5] *the gravity of the violation*, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i) (emphasis added).

<sup>6</sup> Factors concerning the likelihood of lost workdays or restricted duty, the number of persons affected, and the degree of negligence are not recorded in MSHA's public database and, as such, do not affect an operator's history of violations.

**ORDER**

In view of the above, **IT IS ORDERED** that Cactus Canyon Quarries, Inc. pay, within 40 days of the date of this Order, a **civil penalty of \$100.00** in satisfaction of Citation No. 8864556.<sup>7</sup> **IT IS FURTHER ORDERED** that upon timely receipt of the \$100.00 payment, the civil penalty proceeding in Docket No. CENT 2016-410 **IS DISMISSED**.

  
Jerold Feldman  
Administrative Law Judge

Distribution:

Timothy J. Turner, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Andy Carson, Esq., 7232 Co. Rd. 120, Marble Falls, TX 78654

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<sup>7</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.