

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

March 15, 2017

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

v.

CYPRESS POINTE INCORPORATED,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-480-M
A.C. No. 41-04793-379976

Mine: Milam Rock Pit

**ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION AND
DENYING SECRETARY’S CROSS-MOTION FOR SUMMARY DECISION**

Before: Judge Rae

The above-captioned proceeding is before me upon the Secretary of Labor’s petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At issue is one citation issued by the Secretary to mine operator Cypress Pointe Incorporated (“CPI”) under section 104(d)¹ of the Mine Act: Citation Number 8858079. The parties have filed cross motions for summary judgment.

Factual and Procedural Background

The disputed citation was issued by MSHA Inspector Ray G. Hurtado on March 23, 2015 for an alleged berming violation at the Milam Rock Pit, an aboveground mine near Milam, Texas that was operated by CPI at that time and has since shut down permanently. (Resp. Mot. 2; Sec’y Cross Mot. 5.) By CPI’s account, there were approximately 1500 feet of berms at the mine at the time the citation was issued. (Resp. Mot. 2.) On the entrance road to the pit, there was a berm along one side of an earthen bridge crossing a wet weather stream that filled with runoff during rainy periods. (*Id.*) In addition, berms surrounded a number of settling ponds at the site that had been installed by CPI to capture rock pit runoff in order to comply with EPA regulations. (*Id.*)

The Milam area received heavy rain in March 2015 and the mine was shut down for several weeks due to flooding. (Resp. Mot. 2; Sec’y Cross Mot. 12.) When Inspector Hurtado visited the mine on March 23, the only person present was mine superintendent Dale Warr, Jr.,

¹ The issuance of a citation under section 104(d)(1) denotes that the alleged violation was significant and substantial (S&S) and was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard. 30 U.S.C. § 814(d)(1).

who was operating a front-end loader in the pit area. (Resp. Mot. 3; Sec’y Cross Mot. 3.) Hurtado observed that approximately 100 feet of roadway did not have a berm in place. (Resp. Mot. 1; Sec’y Cross Mot. 3.) According to CPI, the berm along the entrance road had washed away in the flooding and the mine was closed to all customers and employees except Warr, who was using the loader to drain trapped water from the pit, fill washed out areas, and rebuild the berm. (Resp. Mot. 1-3.) According to the Secretary, Warr was using the loader to travel near the edge of a 5-foot drop-off as he removed the berm. (Sec’y Cross Mot. 3-4.)

Because 100 feet of berm were not in place, Inspector Hurtado issued Citation Number 8858079 alleging that CPI was in violation of 30 C.F.R. § 56.9300, which requires berms along roadways wherever a drop-off exists that could cause a vehicle to overturn. He marked the violation as significant and substantial (S&S), reasonably likely to cause a lost workdays or restricted duty type injury to one person, and involving high negligence. He terminated the citation less than an hour after issuing it, noting that a berm had been installed. (Sec’y Pet.)

The Secretary proposed a penalty of \$2,000.00 for the citation, which CPI paid. (Resp. Mot. 3; Sec’y Cross Mot. 2.) However, CPI subsequently sent a letter to MSHA contesting the citation and filed a motion to reopen the penalty assessment. The Commission reopened the penalty case in October 2016. The Secretary filed a penalty petition in November 2016 and the case was assigned to me. CPI has now filed a motion for summary judgment asking me to vacate the citation and order the Secretary to repay the penalty. The Secretary has filed a cross motion agreeing that summary judgment is appropriate but asking me to uphold the citation as written and approve the penalty.

Legal Framework for Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that “there is no genuine issue as to any material fact” and that “the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

Discussion and Conclusions of Law

The parties agree that there no genuine issues of material fact, but dispute whether the facts establish that the cited mandatory safety standard, 30 C.F.R. § 56.9300, was violated. The standard states in pertinent part: “Berms or guardrails shall be provided and maintained on the

banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” 30 C.F.R. § 56.9300(a).

The citation states:

Approximately 100 feet of roadway near the portable screen did not have a berm where a drop-off existed of sufficient grade to cause a vehicle to overturn. A drop-off of about 5 feet to the bottom existed. The berm was removed with a front-end loader, operated by the superintendent, for water drainage. The superintendent exposed himself to overturn injuries by traveling along the drop-off. The superintendent engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the berm requirements. This violation is an unwarrantable failure to comply with a mandatory standard.

The Secretary argues that a violation is established because a 100-foot section of berm was missing, superintendent Warr was using the loader close to the edge, and the 5-foot drop-off was sufficient to result in the loader overturning. (Sec’y Cross Mot. 7.) The Secretary has submitted an affidavit from Inspector Hurtado attesting to these facts, along with three photographs Inspector Hurtado took confirming there was an unbermed roadway in the pit area. (*Id.*, Attachments.)

CPI admits that the 100-foot section of berm was missing but argues that the berm had sustained flood damage necessitating repairs and that Warr was in the process of draining standing water and rebuilding the eroded earthen berm to return it to compliance with § 56.9300. (Resp. Mot. 3.) CPI points out that § 56.9300(a) requires berms to be “maintained” and a separate regulation, § 56.20003, requires the workplace to be kept in dry condition so far as possible. (*Id.* at 4.) CPI argues that if Warr’s actions in trying to achieve compliance with these regulations constituted a violation, operators would be placed in an untenable “Catch 22” situation, because whenever a berm washes away during flooding the operator would be out of compliance and unable to get back into compliance by rebuilding the berm. (*Id.* at 3-4.)

CPI’s argument is, in essence, that it was impossible to comply with § 56.9300 under the circumstances. CPI has raised this argument at every level of this proceeding, including in its initial letter to MSHA contesting the citation in June 2015, which stated “Surely [the regulation] wasn’t mean[t] to apply literally as berms are being built or maintained,” and in its answer to the penalty petition, in which CPI pointed out that the action prescribed by the inspector to abate the violation was for superintendent Warr to continue rebuilding the berm – the very activity for which CPI was cited. (*See* Resp. Mot. to Reopen; Resp. Answer.) Yet the Secretary wholly ignores this argument, instead asserting that a violation is established simply by the fact that the berm was missing and Warr was working near the edge of the 5-foot drop-off.

The Secretary cites three ALJ decisions in support of his position. (Sec’y Cross Mot. 6.) But even if these decisions held binding precedential value, which they do not, two of them are irrelevant because they deal with issues that are not disputed in this case, such as whether the cited area was a roadway and whether the drop-off was of sufficient grade or depth to create a

vehicle overturn hazard. *Stone Plus, Inc.*, 38 FMSHRC 661 (Apr. 2016) (ALJ); *Pappy's Sand & Gravel*, 20 FMSHRC 647 (June 1998) (ALJ). The remaining decision, *Andersen Sand & Gravel Co.*, concerns a situation where an operator received a citation after intentionally removing a berm. 13 FMSHRC 1269 (Aug. 1991). This is factually similar to the instant case, as Warr intentionally removed part of CPI's berm for drainage purposes. However, in this case, CPI's berm was already unavoidably damaged by flooding.² Also, unlike in the instant case, the operator in *Andersen* was found to have resumed normal mining operations for several months without rebuilding its berm. By contrast, this mine site was closed to all customers and employees except Warr after the flooding occurred. As acknowledged by the Secretary, Warr was the only person at the worksite, and there is no allegation he was doing anything other than trying to drain residual floodwater and repair the damaged berm in order to satisfy the operator's obligation to provide and maintain berms under § 56.9300.

The Secretary never addresses the troublesome fact that CPI was cited for not having a berm while Warr was in the process of rebuilding the berm. The Secretary asserts that Warr "should have recognized the violative condition instead of risking injury or, worse, his life." (Sec'y Cross Mot. 6.) But the Secretary does not say what he believes Warr should have done instead to bring the berm back into compliance with the regulations. The Secretary fails to explain how this berm, or any other berm damaged by forces of nature, could ever be rebuilt if its damaged state prohibited the operator from getting close enough to make the necessary repairs. For that matter, if § 56.9300 flatly prohibits anyone from approaching a drop-off where a berm is needed but has yet to be constructed, it is unclear how berms could ever be built in the first place without running afoul of the regulation. This would be absurd, and I decline to interpret § 56.9300 in this manner. The regulation must give operators leeway to perform berm construction and maintenance work when a berm is not yet in place. Otherwise, compliance would be impossible.

I find that CPI did not violate § 56.9300(a) by working near a drop-off without a berm when the only work taking place was necessary construction work on said berm.

² If the Secretary contended that the entire 100-foot section of berm had been removed intentionally, this might raise a material factual dispute. The impossible situation described by CPI would be avoidable if the missing berms resulted entirely from a decision of its own making. But the Secretary does not dispute that flooding washed out some portion of the missing berm. In fact, he agrees that berms often washed away at this mine during severe rain and also argues that the berms must have been missing throughout March 2015 because the mine had been closed for several weeks due to flooding, which means he is assuming that the floods caused the damage. (Sec'y Cross Mot. 5-6, 12.) The long and short of it is, this proceeding was a waste of time and resources and should never have proceeded to this point in litigation.

Accordingly, CPI's motion for summary judgment is **GRANTED** and the Secretary's cross motion for summary judgment is **DENIED**. Citation Number 8858079 is hereby **VACATED** and this proceeding is **DISMISSED**.

A handwritten signature in black ink, appearing to read "Priscilla M. Rae". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Priscilla M. Rae
Administrative Law Judge

Distribution:

Felix Marquez, Esq., U.S. Department of Labor, Office of the Solicitor, 525 South Griffin Street, Suite 501, Dallas, TX 75202

James S. Carter, President, Cypress Pointe Inc., 1490 Burl Ivy Way, Hemphill, TX 75948