

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**SEP 30 2014**

HECLA LIMITED,  
Contestant

v.

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

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

v.

CEMENTATION USA, INC.,  
Respondent

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

v.

HECLA, LIMITED,  
Respondent

CONTEST PROCEEDING

Docket No. WEST 2011-1390-RM  
Order No. 8565445; 08/16/2011

Mine: Lucky Friday  
Mine ID: 10-00088

CIVIL PENALTY PROCEEDING

Docket No. WEST 2012-0631-M  
A.C. No. 10-00088-281470 M445

Mine: Lucky Friday Mine

CIVIL PENALTY PROCEEDING

Docket No. WEST 2012-0760-M  
A.C. No. 10-00088-283636

Mine: Lucky Friday Mine

**DECISION AND ORDER**

Appearances: Matthew Vadnal, United States Department of Labor, Office of the Solicitor, Seattle, Washington for Petitioner;

Willa B. Perlmutter, Crowell & Moring, Washington, DC 20004, for Contestant and Respondents;

Mike Clary, Hecla Limited, Coeur d'Alene, Idaho, for Respondent Hecla, Limited.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves one section 104(d)(2) Order, 30 U.S.C. § 814(d)(2), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Hecla, Limited, and one section 104(d)(1) Citation, 30 U.S.C. § 814(d)(1), issued by MSHA to Cementation USA, Inc. (“Cementation”). The parties presented testimony and documentary evidence at the hearing held in Coeur d’Alene, Idaho, on January 14 and 15, 2014.

The original dockets before me consisted of two civil penalty proceedings – WEST 2012-0760M and WEST 2012-0631M – and three contest proceedings – WEST 2011-1390 RM, WEST 2011-1428RM, and WEST 2011-1429RM. On November 5, 2012, I signed an Order to Sever and Reconsolidate. I ordered that Citation Nos. 8559609 and 8559610 be severed from WEST 2012-0760M, be given a new docket number, and be consolidated with WEST 2011-1428RM and WEST 2011-1429RM. I also ordered that WEST 2012-0760M, WEST 2012-0631M, and WEST 2011-1390M be consolidated. Therefore, only Order No. 8565445 and Citation No. 8565446 are before me in this proceeding.

For the reasons stated below, I vacate both Order No. 8565445 and Citation No. 8565446.

## **I. Stipulations**

At the hearing, the Secretary read the Stipulations into the record: (Tr. 9:3 – 10:20)

1. Hecla admits that its Lucky Friday Mine is a mine within the definition of the Mine Safety and Health Act of 1977.
2. At all times relevant to these matters, the Lucy Friday Mine had products that entered interstate commerce or had operations or products which affected interstate commerce within the meaning and scope of Section 4 of the Act.
3. Hecla admits that it was a mine operator within the meaning of the Act and subject to the Act.
4. Cementation admits that it is a mine contractor within the meaning of the Act and subject to the Act.
5. Cementation and Hecla admit that this proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding administrative law judge has authority to hear this case, issue a decision, and assess the appropriateness of the evidence.
6. At all relevant times, Keith Palmer was an authorized representative of MSHA acting in an official capacity.
7. Hecla and Cementation were served copies of the citation or order with qualifications at issuance in this proceeding by an authorized representative of MSHA.

8. Exhibit A of the Secretary's Petition for Assessment of Civil Penalty, actively sets forth the number of inspection days at the site for Cementation and Hecla, their history of violations, and the number of persons affected.
9. Hecla timely contested the order contained in these dockets, and Hecla and Cementation served timely answers to the Secretary's Petitions for Assessment of Penalty.
10. The maximum proposed penalties for the alleged violations will not affect the ability of Hecla or Cementation to remain in business.
11. The exhibits the parties intended to offer into evidence and exchanged prior to the hearing are not subject to objection on that basis.

## II. Background Facts

The Lucky Friday Mine ("the Mine") is an underground silver mine owned and operated by Hecla Limited ("Hecla") in Mullan, Idaho. (Tr. 25:2; 27:17-18) Hecla hired Cementation USA, Inc. ("Cementation") to construct a new vertical shaft at the Mine. (Tr. 25:15-16) The 4860 slot<sup>1</sup> of the Mine at the 51 ramp<sup>2</sup> is a three-sided slot that is about eighteen feet high, twenty-five feet wide, and eighty feet deep. (Tr. 36:19-20; 37:18; 37:23-24) The Mine uses slot 4860 for a gob pile, or waste debris pile. (Tr. 98:2-4) On April 7, 2011, a gob pile located at the 4860 slot was cleaned up to remove combustible materials<sup>3</sup> from the pile. (Tr. 48:14-19; 123:19-22; 242:7-19; 349:7-11) What remained behind among rock, cement, and metal debris in the 4860 slot were some pieces of timber, some fire-retardant vent bags, one HDPE pipe, and one wooden pallet. (Tr. 215: 22-25; 266:20-267:19; 352:15-18) After the April 7, 2011 clean up date, management at the Mine decided not to dump any more gob at the 4860 slot. (Tr. 297:5-6)

Justin Bartlett,<sup>4</sup> who was in charge of cleaning up the 4860 slot on April 7, 2011, testified that he did not think there was any waste debris left that was a fire hazard. (Tr. 352:19-24) Mr. Bartlett testified that there was old wire mesh, rock, shotcrete, and some timbers left, but nothing in the pile that he considered easily combustible. (Tr. 215:21-25) William Strickland<sup>5</sup> also

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<sup>1</sup> A slot is an "area that is cut out of rock that can be used to store materials... mine trash... permanent electrical boxes... powder magazines, [and] cap magazines...." (Tr. 28:2-8)

<sup>2</sup> The 51 ramp is a winding ramp "from the 4900 level going up along the vein and providing access to the lead, silver, zinc veins for the mining activities." (Tr. 213:12-14)

<sup>3</sup> "Combustible material" is defined as "a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion or release flammable vapors when subjected to fire or heat. Wood, paper, rubber, and plastics are examples of combustible materials." 30 C.F.R. §57.2.

<sup>4</sup> At the time of the hearing, Mr. Bartlett was employed by Cementation at the Lucky Friday Mine and had been for approximately two and a half years. (Tr. 244:20 – 245:12) He had worked as a construction miner for approximately three and a half years at the time of the hearing. (Tr. 245:13-16)

<sup>5</sup> At the time of the hearing Mr. Strickland was employed by the Franklyn Company and was working as a contract employee for Hecla. (Tr. 202:5-10) He was project engineer for all of

testified that he did not consider anything he saw in the gob pile to be a fire hazard. (Tr. 226:7; 242:16-19). James Duane Perryman<sup>6</sup> also saw nothing in the pile that he considered to be a fire hazard (Tr. 285:10-22; 293:5-8) and said that he “went back up there to make sure that we got everything, and I didn’t see anything else.” (Tr. 324:12-14)

The following month, however, excavations in the Mine created more waste which was moved to the 4860 slot on approximately May 29, 2011. (Tr. 295:3-6; 297:17-19; 300:14-16) The new gob items included metal split sets, metal mats, and approximately three pieces of old wood lagging (3” x 12” planks, each about six to eight feet long). (Tr. 296:4-7; 315:4-6; 317:6-7) After the additions to the gob pile at the 4860 slot, the slot area was barricaded, first with a snow fence (Tr. 299:10-13), which was later replaced by a chain-link fence. (Tr. 36:10-12, 234:12, 300:20) A sign was hung on the fence notifying miners that the area was not ventilated. (Tr. 300:11-12)<sup>7</sup> As of July 2011, the gob pile itself was approximately ten feet wide by twelve feet high. (Tr. 330:15)

On July 26, 2011, an arsonist intentionally set fire to the gob at the 4860 slot of the Mine at the 51 ramp at or around 6:30 pm. (Tr. 22:15; 27:24-25; 31:10-11; 170:22-23). The mine was safely evacuated, and there were no injuries as a result of the fire. (Tr. 70:19-25) The fire lasted about twelve to fourteen hours before it was put out. (Tr. 31:13) MSHA Inspector Keith Palmer<sup>8</sup> (“Inspector Palmer”) arrived on July 27, 2011, to investigate. (Tr. 26:11-20) Additionally, personnel from the local Shoshone County Sheriff’s office, the Idaho State Fire Marshal’s office, and the federal Bureau of Alcohol, Tobacco, Firearms and Explosives came to the Mine to investigate the fire. (Tr. 33:3-21)

### III. The Law

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d* 151 F.3d 1096 (D.C. Cir. 1998); *Jim*

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Hecla’s projects by overseeing all design work, engineering work, and supervises four construction coordinators. (Tr. 202:12-17)

<sup>6</sup> At the time of the hearing, Mr. Perryman was employed by the Franklyn Company and was working in a temporary-type position for Hecla. (Tr. 248:20-25) He was a construction coordinator and was in charge of helping Hecla oversee the shaft construction project. (Tr. 249:4-6)

<sup>7</sup> To the best of Inspector Palmer’s knowledge, there was no active work being performed in the 4860 slot. (Tr. 98:10-12)

<sup>8</sup> At the time of the hearing, Inspector Palmer had been employed by MSHA since January of 2001, (Tr. 17:13-16) as the field office supervisor for the Kent, Washington MSHA field office. (Tr. 20:19-20) At MSHA, Inspector Palmer worked as a mine inspector, he worked for the educational policy and development educational field services division, and was a field office supervisor at the time of the hearing. (Tr. 19:17-21) Before working at MSHA, Inspector Palmer worked approximately ten years at Asarco Incorporated in Arizona, which is an open-pit copper mine. (Tr. 17:21-24) Inspector Palmer also worked for the State of Arizona Game and Fish Department as a crew leader for about three or four years. (Tr. 19:9-11)

*Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”) The Citation and Order in this case allege a violation of Section 57.4104(a) of the Mine Act, which states that “[w]aste material, including liquids, shall not accumulate in quantities that could create a fire hazard.” 30 C.F.R. § 57.4104(a).

The Secretary must prove by a preponderance of evidence that waste material accumulated and that the accumulation “create[d] a fire hazard.” 30 C.F.R. § 57.4104(a). The regulation, however, is silent on the quantity of waste that is allowed to accumulate before a waste pile is considered to be a fire hazard. Therefore, the appropriate analysis is whether a “reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999); *Walker Stone Co. v. Secretary of Labor*, 170 F.3d 1080, 1083-1084 (10th Cir. 1998). This test is an “objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue.” *Canon Coal Co.*, 9 FMSHRC at 668.

In *Essroc Cement Corp.*, 33 RSMHRC 459 (Feb. 2011) (ALJ Manning), Administrative Law Judge Manning vacated a citation that alleged a violation of § 56.4104(a)<sup>9</sup> and found that:

[T]he Secretary did not meet the burden of establishing that the condition created a fire hazard. The flashpoint of hydraulic fluid is quite high and there were no ignition sources in the area. A spark or other similar event would be insufficient to ignite the fluid [...] Without a realistic possibility of a fire hazard, there is no violation.

33 FMSHRC at 465.<sup>10</sup>

The Secretary put great emphasis on the fact that the Mine Act is a strict liability statute. He also emphasized that mine owners are vicariously liable for employees’ deliberate violations

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<sup>9</sup> Section 56.4104(a) states that: “[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard.” 30 C.F.R. § 56.4104(a). This language is exactly the same as Section 57.4104(a), however, Part 56 of the Mine Act pertains to surface metal and nonmetal mines and Part 57 pertains to underground metal and nonmetal mines.

<sup>10</sup> The Secretary attempts to analogize Section 77.1104 to Section 57.104(a). He cited case law that states that “the Secretary is not required to provide that an ignition or explosion was reasonably likely to occur. Rather, he is required to prove the presence of sufficient accumulations that can create a fire hazard or add to a fire hazard if an ignition source is introduced.” *Pittsburgh & Midway Coal Co.*, 16 FMSHRC 574, 576 (Mar. 1994) However, I find this argument unavailing because Part 77 pertains to surface coal mines and surface work areas of underground coal mines. Additionally, Section 77.1104 states that “[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.” 30 C.F.R. § 77.1104. (emphasis added) Part 56 and 57 of the Mine Act specifically refer to “waste materials,” whereas Part 77 specifically refers to “combustible materials.”

and that “the Mine Act clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the operator.” *Western Fuels-Utah, et al. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989) He further stated that the 9<sup>th</sup> Circuit Court of Appeals, in affirming a decision of the Commission, held that a mine owner was liable for a violation of the Mine Act committed by an unknown person who entered the mine property without the knowledge of the owner. *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983)

#### IV. The Violation

On August 16, 2011, MSHA Inspector Palmer issued Order No. 8565445 to Hecla and Citation No. 8565446 to Cementation alleging that both had unwarrantably failed to comply with 30 C.F.R. § 57.4104(a).<sup>11</sup> Section 57.4104(a) regulates a mandatory safety standard. The Citation and Order allege:

An excessive amount of combustibles were [*sic*] allowed to accumulate in the 4860 slot. The 4860 slot, off of the 51 ramp, was used as a gob area. Old timber, driscoll pipe, hydrolic [*sic*] hoses, pallets, and card board<sup>12</sup> had been thrown away in this area. Evidence indicated that this area contained the combustibles since at least 04/07/2011. Hecla and Cementation management was aware of this condition and had discussed this area on 04/07/2011. According to a miner, a barricade was erected to prevent access in this area sometime during the week of June 20, 2011 because of an ongoing MSHA inspection. There are several miners that work and travel on the 4900 level and the 51 ramp on a daily basis. There is no evidence that reasonable efforts were made by Hecla or Cementation to correct this condition. A fire occurred in this gob area on 7/26/2011 in which the excessive amounts of combustibles contributed to the intensity and duration of the fire. Management engaged in aggravated conduct constituting more than ordinary negligence because they were aware of the excessive amounts of combustibles and did not take reasonable efforts to remove them. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1, Ex. G-4.

The Citation and the Order also allege that the condition was reasonably likely to cause injury, that the injury was reasonably likely to be fatal, that the violation was significant and substantial (“S&S”), the negligence standard was high, and the number of persons affected was eighteen. Ex. G-1, Ex. G-4. The Secretary proposed a penalty of \$63,000.00 against Cementation and \$38,000.00 against Hecla for this violation.

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<sup>11</sup> The Citation and Order are identical in substance apart from the Order being a 104(d)(2) violation and the Citation being a 104(d)(1) violation.

<sup>12</sup> Inspector Palmer admitted at the hearing that there was no cardboard present in the gob pile. (Tr. 105:19 – 106:9)

Inspector Palmer admitted that in some cases some combustible waste is allowable underground and that the mine has the discretion to decide how much combustible waste is stored underground. (Tr. 92:4-8; 92:9-18) Inspector Palmer testified that he believed the waste materials that accumulated in the 4860 slot created a fire hazard (Tr. 69:22 –70:1) because the wood in the pile and the pallet could catch fire. (Tr. 70:3-14) He testified that there was at least one pallet that was considered waste on the gob pile. (Tr. 89:18-21) However, Inspector Palmer admitted that the slot held mostly rock and dirt. (Tr. 85:10-12; 108:5-6) The Secretary admitted into evidence some photos taken on April 8, 2011, but they depict some limited pieces of timber in the gob pile in slot 4860 that are not in close proximity to one another. Ex. G-9.

Mr. Strickland testified that most of the combustible materials were removed, put in dumpsters, and sent to the surface of the mine to be discarded. (Tr. 241:25 – 242:1) Most importantly, Mr. Strickland testified that “[a]nything of kindling size, that concerns me more. Paper waste, of course, rags, of course, any material like that gets sent out in bins to the surface.” (Tr. 232:18-21) Further, Inspector Palmer admitted that the fire marshal was unable to determine how much combustible material was present before the fire. (Tr. 105: 2-5) Inspector Palmer also testified that there was no evidence that an abundance of combustibles had been present before the fire due to the small amount of ash after the fire was extinguished. (Tr. 105:9-13) In Mark Aamondt’s, the Fire Chief of Shoshone County Fire District No. 2, report he noted that “[i]t could not be confirmed how much debris was removed or how much remained after the cleanup.” Ex. R-6, pg. 4.

Mr. Strickland testified that the amount of combustibles in slot 4860 was at most ten percent, maybe less (Tr. 218:2-6) He also testified that he was not worried that the wood timbers were a fire hazard because it is very difficult to light 4x4s, 2x12s, 6x8s, or 6x10 timbers. (Tr. 222:22 – 223:7) Mr. Strickland was also not worried that the pallet was a fire hazard because it is very difficult to light a pallet. (Tr. 223:17-23) He was not concerned that the HDPE pipe was a fire hazard because its melting point is above 400 degrees. (Tr. 225:11-14) Inspector Palmer admitted that it would be difficult to hold a match to a timber and light it on fire. (Tr. 112:8-10)

Inspector Palmer testified that there was no ignition source identified at the 4860 slot other than the arsonist. (Tr. 96:10-12) Further, to the best of Inspector Palmer’s knowledge, there is no methane in the mine. (Tr. 101:6-7) Fire Chief Aamondt testified that he found nothing in the 4860 slot that was an ignition source, (Tr. 189:6-8) and that there were no electrical problems in the slot. (Tr. 189:9-19) After the fire was investigated, it was concluded that the fire was intentionally set with an open flame by a person. (Tr. 170:22-23) Inspector Palmer did mention other potential ignition sources – cigarettes and/or a pressurized paint can that was lit on fire. (Tr. 215:10-14; 228:9-10) However, the Secretary presented no evidence at the hearing that these sources were anywhere near slot 4860.

As stated above, the Secretary put great emphasis on the Mine Act being a strict liability statute and the fact that there is vicarious liability even for unknown persons who enter a mine and violate the Mine Act. However, the Secretary did not prove by a preponderance of evidence that a trespasser accumulated waste material in quantities sufficient to create a fire hazard in violation of Section 57.4104(a). The Secretary cannot use vicarious liability or the Mine Act’s

strict liability to infer that a criminal intervener who intentionally set a fire to the gob pile in slot 4860 somehow violated Section 57.4104(a). The Secretary also did not prove by a preponderance of evidence that a mine employee or agent accumulated waste material in quantities sufficient to create a fire hazard in violation of Section 57.4104(a). Indeed, the only thing that the Secretary proved by a preponderance of the evidence is that a fire was set by an arsonist in slot 4860, which is not a violation of Section 57.4104(a).

While the Secretary did show that there were some waste materials in slot 4860 that were combustible, the Secretary failed to meet his burden by a preponderance of evidence that a reasonably prudent miner familiar with the purposes of Section 57.4104(a) could find that the accumulation of waste materials in slot 4860 could create a fire hazard. The Secretary also failed to present sufficient evidence that there would have been an ignition source to create a fire hazard if the arsonist had not intervened. Therefore, I find that Hecla and Cementation did not violate Section 57.4104(a). Because I find that no violation existed, I need not discuss the gravity, negligence, significant and substantial, and unwarrantable failure standards.

**WHEREFORE**, it is **ORDERED** that both Order No. 8565445 and Citation No. 8565446 be **VACATED**;

It is further **ORDERED** that Docket Nos. WEST 2011-1390-RM, WEST 2012-0631-M, and WEST 2012-0760-M be **DISMISSED**.



L. Zane Gill  
Administrative Law Judge

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