

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 30, 2017

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

v.

ASH GROVE CEMENT COMPANY,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-614-M  
A.C. No. 03-00256-388809

Docket No. CENT 2016-249-M  
A.C. No. 03-00256-402913

Mine: Foreman Quarry & Plant

**DECISION AND ORDER**

Appearances: Daniel T. Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner

Ryan D. Seelke, Esq., Steelman, Gaunt & Horsefield, Rolla, Missouri, for the Respondent

Before: Judge Rae

**I. STATEMENT OF THE CASE**

These cases are before me upon two petitions for assessment of civil penalties 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 are two citations issued to mine operator Ash Grove Cement Company (“Ash Grove”) under section 104(a) of the Mine Act: Citation Number 8776098 in Docket Number CENT 2015-614-M<sup>1</sup> and Citation Number 8862764 in Docket Number CENT 2016-249-M.

A hearing was held in Texarkana, Texas, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. 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 of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I vacate both citations for the reasons set forth below.

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<sup>1</sup> Eight citations were initially at issue in Docket No. CENT 2015-614-M. Prior to hearing, the parties reached a settlement of seven of the citations, which was approved by Order dated July 15, 2016.

## II. FACTUAL BACKGROUND

The two citations at issue in this proceeding were written six months apart by two different MSHA inspectors at the Foreman Quarry & Plant, a limestone processing and cement manufacturing facility operated by Ash Grove in Arkansas. Tr. 19, 101, 114, 174. Both citations allege that Ash Grove violated the Secretary's Part 46 training regulations by failing to ensure that independent contractors working at its facility had received new miner training. The specific factual circumstances surrounding each of the alleged violations are set forth in the body of my decision below.

The parties have entered into the following stipulations:

### General Stipulations

1. Ash Grove, at all times relevant to these proceedings, engaged in mining activities and operations at Foreman Quarry & Plant in Foreman, Little River County, Arkansas.
2. Ash Grove's mining operations affect interstate commerce.
3. Ash Grove is subject to the jurisdiction of the Mine Act.
4. Ash Grove is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.
6. Leslie Moore and Dwight Shields were at the time the citations were issued authorized representatives of the United States of America's Secretary of Labor, assigned to MSHA, and were acting in their official capacity when issuing the citations at issue in these proceedings.
7. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the mine for 15 months prior to the date of the citation at issue and may be admitted into evidence without objection by Ash Grove.
8. Ash Grove demonstrated good faith in the abatement of the citations.
9. Payment of the penalties will not affect Ash Grove's ability to remain in business.

### Stipulations for Citation No. 8776098

10. Lloyd Wright, Carl Hunter, and Michael Johnson, the employees of Prewett Enterprises, Inc., are "employees of independent contractors" as that phrase is used in 30 C.F.R. § 46.2(g)(1)(i). It is not stipulated, however, that Lloyd Wright, Carl Hunter, and/or Michael Johnson engaged in mining operations or were miners under 30 C.F.R. § 46.2(g)(1).
11. Lloyd Wright is not a construction worker under 30 C.F.R. § 46.2(g)(1)(ii).
12. Carl Hunter is not a construction worker under 30 C.F.R. § 46.2(g)(1)(ii).
13. Michael Johnson is not a construction worker under 30 C.F.R. § 46.2(g)(1)(ii).
14. Lloyd Wright did not engage in mine development, drilling, blasting, extraction, screening, or sizing of minerals at the Foreman Quarry & Plant. No stipulation is reached as to "milling" or "crushing."
15. Lloyd Wright did not engage in the associated haulage of materials within the Foreman Quarry & Plant.

16. Carl Hunter did not engage in mine development, drilling, blasting, extraction, screening, or sizing of minerals at the Foreman Quarry & Plant. No stipulation is reached as to “milling” or “crushing.”
17. Carl Hunter did not engage in the associated haulage of materials within the Foreman Quarry & Plant.
18. Michael Johnson did not engage in mine development, drilling, blasting, extraction, screening, or sizing of minerals at the Foreman Quarry & Plant. No stipulation is reached as to “milling” or “crushing.”
19. Michael Johnson did not engage in the associated haulage of materials within the Foreman Quarry & Plant.
20. Lloyd Wright, Carl Hunter, and Michael Johnson received site specific hazard training from Ash Grove.

Joint Ex. 1; Tr. 5.<sup>2</sup>

### III. LEGAL PRINCIPLES

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### A. Citation No. 8776098 (Docket No. CENT 2015-614-M)

Citation Number 8776098 was issued by MSHA Inspector Leslie Moore<sup>3</sup> on June 16, 2015 after two hydraulic oil spills occurred at the Foreman Quarry & Plant. Ex. S-2. The initial spill occurred on or about June 10 when a two-inch steel line carrying hydraulic oil ruptured and spilled 40 to 50 gallons of oil onto the concrete pad surrounding the Finish Mill No. 1, which is a machine that grinds limestone into powder as part of the process of transforming it into cement. Tr. 27, 192-93. Ash Grove mechanics repaired the milling equipment immediately and the plant's environmental manager hired independent contractor Prewett Enterprises, Inc. (“Prewett”) to remove the spilled oil from the concrete. Tr. 77, 192, 200, 209, 212; Resp. Ex. C. Prewett is a hazmat specialist that provides environmental cleanup services. Tr. 192, 196; Resp. Ex. B. It took Prewett two days to contain and clean up the spill by erecting berms around the leaked oil, spreading Oil-Dri (a diatomaceous material that soaks up liquids) to absorb it, then

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<sup>2</sup> In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary's exhibits are numbered S-1 to S-6 and the Respondent's exhibits are designated A, B, C, E, F, G, J, K, L, and M. Tr. 5-6, 136.

<sup>3</sup> Moore has been an MSHA inspector for about four years and has conducted approximately 200 inspections. Before becoming an inspector, he worked in the mining industry for twenty years, starting his career in an underground coal mine and ultimately spending seventeen years in managerial positions at metal/nonmetal mines. Tr. 17-20.

shoveling the saturated material into buckets that were left onsite for disposal by Ash Grove. Tr. 64-66, 194, 200-02, 210, 215; Resp. Ex. C.

A smaller, subsequent spill occurred a day or so later when the line to the milling cylinder failed again. Tr. 194. Prewett returned to the mine on June 15 to clean this up in the same manner as the first spill. Tr. 194, 214; Resp. Ex. C. Once again, by the time Prewett arrived onsite, Ash Grove's employees had already repaired the milling equipment and the mill was fully operational. Tr. 63-64, 192-94, 202-03, 226. Prewett's sole task was to clean up the spilled hydraulic oil, which took no more than a day. Tr. 194, 203.

Inspector Moore was conducting a regular inspection of the plant, accompanied by Ash Grove Health and Safety Manager Bryan Snell, when he encountered Prewett employees Lloyd Wright, Carl Hunter, and Michael Johnson while they were cleaning the second spill. Tr. 26-28, 223-24. They had already laid out berms and applied Oil-Dri to the affected area and were in the process of shoveling the wet material into buckets. Tr. 64-66, 225. Inspector Moore asked the three workers if they were experienced miners. Tr. 32. They told him they were not. Tr. 32, 35. Moore then asked to review their training records. Tr. 28, 224. Prewett health and safety representative Tracy A. Steward could not provide documentation that any of the workers had received a full 24-hour course of new miner training, and conceded at hearing that he was not sure whether they had actually received such training. Tr. 38, 76, 89, 199-200, 205. However, he and Snell did produce documents showing that each of the three workers had received site-specific hazard awareness training and 9.25 hours of other training, including four hours of new miner training and several hours of First Aid training. Tr. 28-31, 68, 74-75, 205-06, 224-25; *see* Ex. S-6; Resp. Ex. A. Deeming this training to be inadequate, Inspector Moore issued an order compelling Prewett to withdraw the three employees from the mine and issued a duplicate citation, Citation Number 8776098, to Ash Grove on June 16. Tr. 26-27, 199; Ex. S-2 at 1, 3. The citation alleges that Wright, Hunter, and Johnson did not receive new miner training as required under § 46.5(a), which mandates that a mine operator must provide 24 hours of training to each new miner at its facility within 90 days of the date the miner begins working. Ex. S-2; 30 C.F.R. § 46.5(a). The workers were withdrawn from the mine and apparently never received the training. Tr. 39.

The parties dispute whether Wright, Hunter, and Johnson were "miners" within the meaning of § 46.5 such that they were subject to the 24-hour new miner training requirement. For purposes of Part 46, "miner" is defined as follows:

- (1) *Miner* means:
  - (i) Any person, including any operator or supervisor, who works at a mine and who is engaged in mining operations. This definition includes independent contractors and employees of independent contractors who are engaged in mining operations; and
  - (ii) Any construction worker who is exposed to hazards of mining operations.
- (2) The definition of "miner" does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also does not include maintenance or

service workers who do not work at a mine site for frequent or extended periods.

30 C.F.R. § 46.2(g).

The parties have stipulated that Wright, Hunter, and Johnson do not qualify as construction workers under subsection (1)(ii) of the above definition. Joint Ex. 1. Therefore, they can be deemed “miners” only if they were “engaged in mining operations” within the meaning of subsection (1)(i) while working at Ash Grove’s mine.

“Mining operations” are defined as “mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine.” 30 C.F.R. § 46.2(h). Only three of the listed activities are at issue here: milling, which is the process of grinding material into powder form; crushing, which is the process of breaking large rocks into smaller pieces; and maintenance and repair of mining equipment. Tr. 44-47, 62; Joint Ex. 1.

The Secretary argues that because Wright, Hunter, and Johnson were working at the finish mill while at the mine, they were engaged in milling and crushing. Sec’y Br. 9. The Secretary also argues that because the three workers were called to the mine due to the mechanical failure of the hydraulic line, they were participants in the repair job, meaning that they engaged in “maintenance and repair of mining equipment.” Sec’y Br. 9.

Ash Grove disputes that the workers engaged in any milling, crushing, or maintenance or repair of mining equipment or any other type of mining operations. Resp. Br. 10-15. Ash Grove further argues that Wright, Hunter, and Johnson were service workers excluded from the definition of “miner” under § 46.2(g)(2) because they were not at the mine for frequent or extended periods of time. Resp. Br. 16.

I agree with both of Ash Grove’s arguments.

As conceded by Inspector Moore, the three Prewett employees did not directly engage in any milling or crushing of materials and their activities had no impact on the continuation of mining operations at the plant, as the leaking mill component had already been repaired and the mill restored to full service before they arrived onsite. Tr. 63-64, 77. Prewett was hired for the sole and limited purpose of removing hydraulic oil from the concrete. Tr. 192-94, 200, 209-10, 213-15; Resp. Ex. C. Prewett used its own specialized equipment, supplies, and personnel to accomplish this task. Tr. 201, 211, 215. Prewett’s employees did not operate, work on, repair, or maintain any of Ash Grove’s equipment. Tr. 66, 77, 192-94, 200-03, 210-11, 215, 225. In fact, they were forbidden from using Ash Grove’s equipment because they were not trained to operate it. Tr. 201. Steward, Prewett’s safety representative, could not even identify what piece of equipment had sprung the leak. Tr. 200. In short, the Prewett employees working at Ash Grove’s mine had no involvement with mining equipment, milling or crushing activities, or any other mining operations that may have been underway at the mine, and engaged solely in the assigned task of cleaning spilled oil from the ground.

Although Inspector Moore admitted that the only thing he actually saw the Prewett employees doing was shoveling saturated Oil-Dri into buckets, (Tr. 66, 83-84), he opined that anyone working near the active mill or at an active mine site would be a miner regardless of what task he was performing. Tr. 49, 86-87, 94. This view is clearly at odds with the regulatory definition of “miner,” which (except in the case of construction workers) is limited to individuals who work at a mine *and* are engaged in mining operations. 30 C.F.R. § 46.2(g). Inspector Moore admitted as much on cross-examination. Tr. 59-61. Wright, Hunter, and Johnson did not engage in mining operations and in fact had no contact whatsoever with the mill or any mining equipment while at the mine. It was at most incidental that they were working near the mill.

Inspector Moore also theorized that the three Prewett employees engaged in “maintenance and repair of mining equipment” because their cleanup work was part of the repair job for the hydraulic line. Tr. 47, 49. “[R]epairs are not complete until the housekeeping is done, the tools are cleaned up and put away. That is the complete repair process that I’ve always been aware of both in the Army and all of my management,” he explained. Tr. 62. This overly broad line of reasoning would convert a trash truck driver or a custodian emptying trash at the mine office into miners, which would be absurd. Also, as conceded by Moore, Ash Grove had already completed the repair job on its own and fully resumed normal mining operations before Prewett arrived onsite. Tr. 63-64. The scope of the Prewett employees’ duties were limited to hazmat cleanup, which is required by the Environmental Protection Agency whenever there is a spill of hazardous material. Contrary to the Secretary’s assertions, such activities do not bear a “close proximity to, and relationship with, the overall extraction process” (see Sec’y Br. 9), nor do they convert the hazmat crew into miners.

I conclude that Wright, Hunter, and Johnson did not engage in milling, crushing, maintenance or repair of mining equipment, or any other mining operations while at the Foreman Quarry & Plant and thus do not qualify as “miners” under § 46.2(g)(1)(i).

I further find that they are expressly excluded from the definition of “miner” under the exemption set forth in § 46.2(g)(2). This provision states that “service workers who do not work at a mine site for frequent or extended periods” are not miners. Wright, Hunter and Johnson are service workers because Prewett’s line of work, hazmat cleanup, is a service rendered to a mine operator or any entity when a potentially hazardous material is spilled. As to whether they worked at a mine site for frequent or extended periods, the Secretary’s Program Policy Manual defines “extended” to mean “more than five consecutive work days” and “frequent” to involve “a pattern ... occurring intermittently and repeatedly over time.” Resp. Ex. K; at 20 Tr. 147. Wright, Hunter, and Johnson’s presence at the mine does not meet these criteria. They spent just two days cleaning the first oil spill and even less time cleaning the second.<sup>4</sup> Tr. 194, 203. Prewett only rarely provides services at the Foreman Quarry & Plant, and this was the first time

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<sup>4</sup> Steward and plant manager David Dorris estimated that the cleanup took about eight to ten hours or approximately one day. Tr. 194, 203. An invoice confirms that Wright, Hunter, and Johnson were onsite for eight hours on June 15. Resp. Ex. C. Although there is no invoice for the following day, Moore’s inspection notes mention Wright, Hunter, and Johnson by name on both June 15 and 16 and the citation was issued on June 16, indicating the cleanup activities may have continued into a second day. Ex. S-2 at 16, 25. Even if this was the case, I accept Dorris and Steward’s testimony that the total time spent on the job was closer to one workday.

these particular Prewett employees had ever been to the site. Tr. 40, 66, 216. They told Inspector Moore they had not previously worked at other mine sites. Tr. 35. Thus, the evidence fails to establish they worked for “frequent or extended periods” at this or any other mine.

The Secretary argues that the appropriate inquiry under subsection (g)(2) is whether Prewett itself, not Prewett’s individual employees, worked at mines for frequent or extended periods. Sec’y Br. 9-10. MSHA data shows that Prewett employees as a whole worked a total of 9,108 hours at MSHA-regulated metal and nonmetal mines across the country in 2015. Tr. 40. Relying on this data, the Secretary takes the position that Wright, Hunter, and Johnson are miners simply by virtue of their status as employees of Prewett.

This argument is without legal basis. The language of subsection (g)(2) clearly references individuals, not operators. The “frequent and extended” exemption applies to Wright, Hunter, and Johnson as individual “service workers.” More broadly, there is nothing in the Part 46 training regulations that would indicate the definition of “miner” is operator-based, and this would make no sense, as it is the individual miners who must undergo the required training. See Tr. 149; *Cyprus Empire Corp.*, 15 FMSHRC 10, 13-14 (Jan. 1993) (noting that status as a miner is not determined by employment with an operator). As acknowledged by Inspector Moore, certain workers such as clerical or office staff may be employed by an operator but still not meet the Part 46 definition of a miner. Tr. 88. This undercuts any theory that miner status is employer-based.

The Secretary cites two ALJ decisions purportedly supporting his contrary position: *Anderson Equipment Company*, 14 FMSHRC 222 (Jan. 1992) (ALJ), and *Lehigh Southwest Cement*, 33 FMSHRC 3229 (Dec. 2011) (ALJ). Sec’y Br. 9-10. His reliance on these decisions is misplaced. *Anderson* applies the “frequent or extended” analysis to an individual worker rather than the employer, which is the opposite of what the Secretary is asking me to do. 14 FMSHRC at 226. *Lehigh* is also wholly inapposite because it pertains to construction workers, whose status as miners depends on whether they are “exposed to hazards of mining operations” under § 46.2(g)(1)(ii), not whether they are employed by a particular company, much less whether that company works at mines for frequent or extended periods. 33 FMSHRC at 3236. (As noted above, the Secretary stipulated that Wright, Hunter, and Johnson are not construction workers.)

Another line of cases referenced by the Secretary elsewhere in his brief does indeed require consideration of the frequency and extent of an independent contracting company’s presence at a mine, but only in the context of determining whether the independent contractor can be considered an “operator” of the mine within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 802(d), such that it is subject to the Act’s jurisdiction. Sec’y Br. 8 (citing *Otis Elevator Co.*, 11 FMSHRC 1918, 1922-23 (Oct. 1989)). Neither jurisdiction nor Prewett’s status as an operator are at issue in this case. Further, the case cited by the Secretary is based on an earlier decision in which the Fourth Circuit found that employees of a utility company that provided electricity to a mine were not subject to the Secretary’s regulations because they visited the mine property only infrequently and did not perform any services they would not have provided elsewhere (i.e., their services were not specific to mining). *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985). This flies in the face of the Secretary’s position that

Prewett's employees, who analogously did not visit this mine frequently or regularly (see Tr. 186, 204, 216) or provide any services specific to the mining industry, should be subjected to the Secretary's special training requirements for miners.

For the reasons discussed above, I find that Wright, Hunter, and Johnson did not work as miners at the Foreman Quarry & Plant within the meaning of Part 46. Accordingly, they were not required to receive new miner training under § 46.5(a). Because the regulation is inapplicable, the citation must be vacated.

B. Citation No. 8862764 (Docket No. CENT 2016-249-M)

Citation Number 8862764 was issued by MSHA Inspector Dwight Shields<sup>5</sup> on December 8, 2015 during a spot inspection focusing on contractors at the Foreman Quarry & Plant. Tr. 102-04; Ex. S-4. When Inspector Shields arrived at the mine that morning, he first obtained a list of the contractors working onsite and then, accompanied by Snell, set out to visit the areas where each contractor was working. Tr. 104, 227. At the MCC (motor control center), the room that houses the electrical switches and panels controlling the mining machinery, Shields observed three employees of independent contractor Hadaway Electric Company, Inc. ("Hadaway") installing conduit and electrical wiring to bring a new lime injection system online. Tr. 105-07, 230. Inspector Shields spoke to the workers and learned that one of them, Peyton Harvison, was a new employee at this mine. Tr. 105-06, 141, 238. Shields asked to see the workers' training records. Tr. 105. Ash Grove had provided all three with site-specific hazard awareness training, which included an overview of the cement manufacturing process and instruction on specific hazards at the plant and on responsibilities such as workplace examinations and injury reporting. Tr. 139-40, 182-83. Two of the workers had also completed new miner training. Tr. 106. The new employee, Harvison, had received eight hours of annual refresher training on November 30, 2015 covering topics including electrical hazards, First Aid, emergency medical protection, lockout/tagout requirements, fall protection, and site cleanup. Tr. 109-10, 127-28, 136-41, 227-28; Resp. Ex. M. He had also gone through journeyman training in electrical work. Tr. 240. However, there was no documentation that he had received 24 hours of MSHA new miner training or any training in the required topic area of miners' rights. Tr. 109-10, 127-28, 133. Inspector Shields believed Harvison's training was inadequate, so he issued a withdrawal order to Hadaway and a duplicate citation, Citation Number 8862764, to Ash Grove alleging a violation of § 46.5(a). Ex. S-4; Tr. 107-08. Harvison was withdrawn from the mine and subsequently completed the training. Tr. 159.

Ash Grove does not dispute that Harvison was a miner who was required to undergo new miner training under § 46.5. As noted above, § 46.5 requires a mine operator to provide 24 hours of training to each new miner at its facility. 30 C.F.R. § 46.5(a). Four of those hours must be provided before the miner begins working and must cover a specific set of topics listed in the regulation. *Id.* § 46.5(b). The balance of the training must be provided within 90 days after the miner begins work. *Id.* § 46.5(c)-(d). Until the full 24 hours have been completed, the new

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<sup>5</sup> Shields has been a mine inspector for MSHA for about eight years. Previously, he worked at an open-pit barite mine and a sand and gravel operation for about three years and then spent 22 years in the military. He specialized in equipment repair. Tr. 101-02.

miner must work where an experienced miner can observe him to ensure he is working in a safe and healthful manner. *Id.* § 46.5(a).

Inspector Shields alleged that Harvison had not received new miner training despite being at the mine for more than 90 days and not always working under the observation of an experienced miner. I find that some of these allegations are unsupported.

First, there is no clear evidence that Harvison had been working at the mine for 90 days. There is no documentation to verify his start date at the mine or show how long he was employed there before the citation was issued. According to Inspector Shields, Harvison said he had been working onsite for about three months, but Shields did not bother to check any records for confirmation. Tr. 105-06, 141. Snell testified that Harvison had not reached the 90-day point yet. Tr. 229. The Secretary did not call Harvison as a witness or produce any other evidence to resolve the conflicting accounts. The Secretary bears the burden of proof on this point, and I find he has not carried it by a preponderance of the evidence.

Similarly, there is no clear evidence Harvison worked unsupervised. Shields observed him working with two other Hadaway employees, Tyler Cole and supervisor Randy Johnson. Tr. 105, 152. Both were fully trained under Part 46. Tr. 106. Snell testified that both men were experienced miners and Harvison was working directly under them while at the mine as “more or less a helper, a gofer, and a runner.” Tr. 228-31. Former plant engineer Frank Plummer, an Ash Grove employee who was present the day the citation was issued and has since retired, also testified that Harvison was following Cole and Johnson, both of whom are electricians, to learn from them and was helping by bringing parts, conduit, and wires for the job. Tr. 238. By contrast, Shields did not know what job duties Harvison had been assigned. Tr. 129. His only testimony that Harvison worked without supervision was that he asked Johnson if Harvison ever “go[es] into these electrical boxes by himself” and Johnson said yes. Tr. 111, 142-43, 156-57, 169-70. Shields did not elaborate on what he meant by going “into the box” alone nor did he record this conversation in his notes. Tr. 129-30. The Secretary did not call Johnson as a witness to corroborate the hearsay statement, which gives me further pause to find Shields’ testimony credible. Again, I find the Secretary has not met his burden of proving this allegation by a preponderance of the credible evidence.

Because Harvison was working under the supervision of experienced miners and the evidence does not establish he had been at the mine a full 90 days, he still had time to complete new miner training without running afoul of the regulation’s 24-hour requirement. However, Inspector Shields also alleges that Harvison did not receive four hours of training on the topics listed under § 46.5(b) as mandated by the regulation before beginning work. Tr. 155-56, 166, 244-46. I find that Harvison did, in fact, receive training on many of these topics during the eight hours of refresher training he completed on November 30, 2015, as shown on the training form produced by Ash Grove. Resp. Ex. M. But because his start date at the mine is unknown and he had apparently been working there for several months as of December 8, which was just a week later, it is very unlikely the refresher training took place before he began working. This violates § 46.5(b). In addition, the training certificate does not show instruction in several of the required topic areas required under § 46.5(b), notably the area of miners’ statutory rights and

responsibilities, which was of particular concern to Inspector Shields. Tr. 110, 127, 133, 139, 156. I find that Harvison's training was lacking in this respect.<sup>6</sup>

Nonetheless, Ash Grove argues the citation should be vacated because new miner training was primarily Hadaway's responsibility; Hadaway received a violation; and Ash Grove, as the production-operator, should not have received a duplicate citation under the circumstances. Resp. Br. 16-19. Responsibility for ensuring that contract workers meet the Part 46 training requirements is divided between the independent contractor and the production-operator under § 46.12. This regulation provides that the independent contractor bears primary responsibility for providing new miner training to any of its employees who qualify as miners, while the production-operator bears primary responsibility for providing site-specific hazard awareness training. 30 C.F.R. § 46.12(a)(1), (b)(1). The Secretary's Program Policy Manual (PPM), a source of policy guidance for both MSHA inspectors and the mining industry, further states:

MSHA views § 46.12 as a regulatory indication of whom the agency will cite for training violations under ordinary circumstances. Both the production-operator and the independent contractor share the responsibility that all miners receive all required training, and in extraordinary circumstances, MSHA may determine that both the production-operator and the independent contractor should be held liable for training violations.

Resp. Ex. K at 31-32. Relying on this guidance, Ash Grove contends the Secretary has not made a showing of "extraordinary circumstances" to warrant the issuance of duplicative citations in this case. Resp. Br. 16-19.

I agree. The regulations and PPM make clear that Hadaway bore primary responsibility for ensuring Harvison received new miner training under § 46.5. As the production-operator, Ash Grove was responsible for site-specific training and for monitoring its contractors to help ensure compliance with the other training regulations. Ash Grove substantially fulfilled these obligations. All three of the Hadaway employees had been given site-specific training. Tr. 139-40, 182-83. Ash Grove had also taken multiple steps to ensure its contractor workforce was adequately trained. For example, the company had invited Hadaway to contractor training

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<sup>6</sup> Although technically the standard was violated, I note that the Secretary has failed meet his burden of proof on all other issues. He has completely failed to address the regulation at § 46.12 and related guidance in the Program Policy Manual, which, as discussed in detail in the body of my decision below, are highly relevant to this case because they control whether it was appropriate to cite the production-operator under the circumstances. The Secretary also utterly failed to adduce testimony establishing the violation was significant and substantial (S&S). Inspector Shields acknowledged that the Commission has established a four-part test for S&S in the *Mathies* decision, but repeatedly testified that the sole reason he marked the violation S&S was because "an untrained miner is a hazard to himself and others," which is not the appropriate legal standard. Tr. 133, 167, 243, 246-50; see *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Secretary has also failed to establish the negligence was high, as is discussed in greater detail later in this decision.

conducted by MSHA at the mine site, but Hadaway had chosen not to attend. Tr. 124, 233. According to Snell, Ash Grove had “tried very hard to start getting our contractors to start playing ball” by implementing a comprehensive contractor safety management program. Tr. 232-33. He noted that he had personally taken steps such as auditing contractors’ training materials before allowing them onsite, refusing to hire them if they lacked proper training documentation, and making them leave the site if they were caught without it. Tr. 233-34. George Stephen Minshall, corporate director of health and safety, appeared at the hearing and further described in detail Ash Grove’s procedures for selecting, hiring, and monitoring contractors. Tr. 175-85. The company follows a concrete six-step process that includes determining the scope of the work to be assigned and performing an initial risk evaluation and project expectations assessment which is then used as a roadmap to ensure the mine is hiring qualified workers and to monitor and assess the contracting company’s performance once its workers are onsite. Tr. 175-78.

One of the tools Ash Grove uses to help accomplish these tasks is a contractor prequalification computer system called BROWZ that permits the company to track and view contractors’ training records, health and safety statistics, and insurance certificates, among other things. Tr. 176-77, 181, 183-85, 190-91. The contractor receives a green light in BROWZ if all of its qualifications check out and a red light if not. Tr. 119. In this case, Hadaway had received a green light in BROWZ prior to being hired. Tr. 119-20. Because BROWZ had conferred a green light even though a new miner training certificate for Harvison had not been uploaded to the system, Inspector Shields believed that “BROWZ had a hole in it” and that Ash Grove needed to do more to verify contractors’ compliance with the training regulations. Tr. 121-22. But Minshall explained that BROWZ is not intended to serve as a repository for all contractor training records. Tr. 181. The contractor is required to upload its Part 46 training plan with at least one other training record to confirm that its training is current and compliant. Tr. 181. Ash Grove employs other measures to help verify compliance with training requirements, including independently checking contractors’ records and asking them to bring copies of their training plans and records to the site so they can be reviewed on request. Tr. 179-82, 232-34.

Inspector Moore had cited contractors for training violations on three other occasions over the past two years at the Foreman Quarry & Plant, which was one reason Shields believed BROWZ was not functioning effectively. Tr. 121-22. But Moore himself agreed this is a large mine with 135 employees as of the time he inspected it and multiple contracting companies onsite daily. Tr. 71-72. Ash Grove’s witnesses estimated the mine employs one to seven different contracting companies each day, and anywhere from a dozen to a hundred individual contract employees may be onsite on a daily basis depending on the mine’s operating status. Tr. 174-75, 222. Given the mine’s size and the number of contractors Ash Grove employs, I do not find a history of three violations over two years to be excessive. As Shields conceded, he checked every single contract employee’s records while at the mine on December 8 and Harvison was the only person who was not fully trained. Tr. 151. It appears that this miner simply slipped through the cracks. Tr. 151.

The Secretary has not pointed to any other extraordinary circumstances that would justify charging Ash Grove with a duplicate violation. I find that none existed.

Harvison's presence at the mine did not create hazards that would justify Inspector Shields' decision to write a citation. Shields conceded that any hazards present would be lessened if Harvison had electrical training, which he did. Tr. 131, 137-38, 146. In fact, Plummer testified Harvison probably had more electrical training than most people onsite given that he had completed electrician journeyman training. Tr. 240. Harvison was working under the supervision of two experienced miners. Tr. 230, 238. The electrical equipment his crew was working on had not yet been energized. Tr. 132, 229-30, 238-39. In short, this was not a situation where a high degree of danger warranted extraordinary enforcement action.

Ash Grove's conduct also does not justify extraordinary enforcement action in this case. The Secretary asserts that Ash Grove displayed high negligence in the two years preceding the issuance of the citation by failing to implement any changes to its system to verify whether contractors have properly trained their employees. Sec'y Br. 19-20. I note that Inspector Shields initially assessed Ash Grove's negligence as "moderate" but it was later modified to "low" after his field supervisor, Mike VanDorn, had a lengthy discussion with Snell about BROWZ and the measures the company had taken to ensure contractors' compliance with the training standards and agreed there were substantial mitigating circumstances even considering the prior violations. Tr. 153-54, 232-34. It was only during the course of this litigation that counsel alleged high negligence, which I find to be high-handed and completely unjustified. I have already found that Ash Grove substantially fulfilled its obligations under Part 46. The Secretary has not identified any additional measures Ash Grove should or could have taken to comply with the regulations. Hadaway, not Ash Grove, was primarily responsible for complying with § 46.5. The corrective actions taken after the violation reflect Hadaway's accountability for it: Hadaway withdrew its employee from the mine until proper training had been provided and the company owner told Shields that he would begin maintaining training records at a trailer he kept onsite so they would be more readily accessible. Tr. 116. By contrast, Ash Grove did nothing to abate the duplicate citation, which was terminated four minutes after its issuance due to Harvison's withdrawal from the mine, and apparently changed none of its policies or practices afterward. Ex. S-4. It is not clear what action the Secretary hoped to spur Ash Grove into taking by issuing a duplicate citation. The inspector did not have a good reason to write it and ignored MSHA policy in doing so.

For the foregoing reasons, I vacate the citation.

### **ORDER**

It is hereby **ORDERED** that Citations 8776098 and 8862764 are **VACATED**. Because no issues remain for adjudication, these proceedings are **DISMISSED**.



Priscilla M. Rae  
Administrative Law Judge

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