

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 7, 2018

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

v.

GCC RIO GRANDE, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-327-M
A.C. No. 05-04822-432228

Pueblo Plant & Quarry

ORDER ACCEPTING APPEARANCE
ORDER GRANTING SECRETARY’S MOTION FOR PARTIAL SUMMARY DECISION
ORDER DENYING RESPONDENT’S MOTION FOR PARTIAL SUMMARY DECISION
DECISION APPROVING PARTIAL SETTLEMENT

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against GCC Rio Grande, Inc., (“GCC”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties settled six of the seven citations included in the docket and filed simultaneous cross-motions for summary decision to address the single remaining citation, Citation No. 8838556. For the reasons set forth below, the Secretary’s Motion for Partial Summary Decision is **GRANTED**, Respondent’s Motion for Partial Summary Decision is **DENIED**, and the Motion to Approve Partial Settlement is **GRANTED**.

I. BACKGROUND FOR CITATION NO. 8838556

On January 5, 2017, MSHA Inspector Hanna Hurst issued Citation No. 8838556 to Respondent under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 56.11003 of the Secretary’s safety standards. 30 C.F.R. § 56.11003. The citation states as follows:

The ladder accessing the deck on the west side of the additives grizzly had been damaged. The ladder and part of the handrail connected to it had been hit with a loader, resulting in broken welds and incorrect positioning of the ladder. Ladders shall be maintained in good condition. A miner attempting to use this ladder to access the deck would be exposed to slip, trip, and fall hazards because the ladder is not straight. Various injuries could occur.

Inspector Hurst determined that it was unlikely an injury or illness would be sustained as a result of the violation, but that any injury could reasonably be expected to result in lost workdays or restricted duty. She determined that the violation was not of a significant and substantial nature, would affect only one person, and was a result of Respondent's low negligence. The Secretary proposed a penalty of \$116.00 for the alleged violation.

II. STIPULATED FACTS

The parties submitted joint stipulations along with their respective motions. The stipulations are as follows:

1. GCC Rio Grande, Inc., owns and operates the Pueblo Plant & Quarry (the "Mine"), in Pueblo County, Colorado.
2. The Pueblo Plant & Quarry is a "mine" as that term is defined by § 3(h) of the Federal Mine Safety and Health Act of 1977.
3. The operation and products of the Mine affect commerce and the Mine is subject to the Mine Act.
4. On January 5, 2017, Inspector Hanna Hurst performed a regular E01 Inspection of the Mine.
5. Inspector Hurst issued Citation No. 8838556 to GCC on January 5, 2017, alleging a violation of 30 C.F.R. § 56.11003. Exhibit B.
6. Citation No. 8838556 alleges that a loader damaged the ladder on the west side of the additives grizzly, breaking welds and forcing the ladder into an incorrect position.
7. The ladder at issue is the only access to the west side of the additives grizzly.
8. Miners access the west side of the additives grizzly infrequently, only to clean spillage.
9. The ladder is only used to access the west side of the additives grizzly.
10. The cited ladder existed in the condition pictured in Exhibit C when Inspector Hurst issued Citation No. 8838556.
11. Red danger tape was placed across the only access point to the ladder.
12. Both ends of the red danger tape were secure.
13. The red danger tape showed no signs of falling.
14. The red danger tape existed as pictured in Exhibit C when Inspector Hurst issued Citation No. 8838556.
15. GCC's Safety Handbook outlines its safety policy.
16. GCC trains and requires its miners to follow the requirements of its Safety Handbook.
17. GCC's Safety Handbook includes use of red danger tape under the section that describes methods of barricading.
18. The Handbook defines Barricading as a method to limit or prevent access to potentially hazardous areas and to increase employee awareness.
19. Specifically, the Handbook states that red barrier tape labeled "Danger Do Not Enter" is utilized to prohibit admittance or passage through an area, except by authorized personnel who are working on the project requiring the barrier.
20. The Handbook requires that Barricades that represent no admittance (Ex. Red "Danger Do Not Enter" tape) be provided to prevent entry into areas that may present hazards such as falling materials, falling hot materials due to overhead cutting/welding/grinding, being struck by equipment operating in the area, etc.

21. Before entering a taped-off area, the Handbook requires miners to contact the Control Room or the individual that taped the area off.
22. Use of the ladder would require a miner to intentionally disregard GCC's red danger tape policy.
23. No evidence exists that miners used the cited ladder or crossed the red danger tape in the cited area to access the barricaded area.
24. GCC did not assign any miner to perform any duties that required use of the ladder or access to the west side of the additives grizzly.
25. GCC did not have a work order in place to repair the ladder when Inspector Hurst issued Citation No. 8838556.
26. The Parties believe that there is no disputed issue as to any material fact and stipulate that this issue can be decided via motion based upon these stipulated facts.

III. SUMMARY OF PARTIES' ARGUMENTS

The Secretary argues that GCC violated section 56.11003 when it failed to maintain a ladder that provided the only access to an area of the mine. Sec'y Mot. 3. There is no dispute that the ladder was damaged and had separated from the concrete to which it had been attached. *Id.* Accessing the ladder would have endangered the health and safety of a miner. *Id.* Although GCC had strung red danger tape several feet away from the access to the ladder, miners could easily duck under the tape to access the damaged ladder, GCC policy still allowed access to the area, and there were no plans to repair or remove the ladder. *Id.* 3-4. Contrary to GCC's argument, the use of red danger tape does not defeat the violation, and its reliance on *Essroc Cement Corp.*, 33 FMSHRC 456 (Feb. 2011) (ALJ) is misplaced, as that case is easily distinguished. Sec'y Mot. 5. The Secretary asserts that the gravity and negligence are not at issue, and notes that, while the operator had failed to schedule the replacement or repair of the ladder, the low negligence designation is supported by the procedure the operator had in place to recognize and correct hazards by using the red danger tape until the hazard could be addressed. *Id.* 6-7. Finally, the Secretary argues that the proposed penalty of \$116.00 is appropriate and requests that the citation be affirmed as issued. *Id.* 8.

Respondent argues that Citation No. 8838556 should be vacated because the cited ladder had been barricaded to prevent its use. GCC Mot. 2. It avers that barricades which comply with section 56.20011 of the Secretary's regulations, like the Secretary's lockout/tagout procedures, remove areas from eligibility for MSHA inspection. *Id.* 5. Here, citing this court's decision in *Essroc Cement Corp.*, 33 FMSHRC 456 (Feb. 2011) (ALJ), it argues that the red tape was a barricade, noting that it was secure, physically obstructed the only possible access to the ladder, and informed miners that they should not enter the area. GCC Mot. 7-8. Moreover, GCC trained its miners so that they would never intentionally break or remove red tape and its internal handbook policies indicate that miners cannot access areas barricaded with red tape. *Id.* 8.

IV. DISCUSSION AND ANALYSIS

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has long recognized that “summary decision is an extraordinary procedure.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471(Nov.1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). When the Commission reviews a summary decision under Rule 67, it looks “‘at the record on summary judgment in the light most favorable to . . . the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The subject citation was issued under section 56.11003 which requires that “[l]adders shall be of substantial construction and maintained in good condition.” 30 C.F.R. § 56.11003. The parties have stipulated that “[t]he cited ladder existed in the condition pictured in [Sec’y Mot.] Exhibit C when Inspector Hurst issued Citation No. 8838556.” Jt. Stip. 10. Respondent does not dispute that the ladder presented a hazard and that the ladder had separated from the concrete to which it had been attached. I agree that the conditions depicted in Sec’y Mot. Ex. C clearly indicate that the ladder had not been maintained in good condition.

Respondent asserts that by stringing red caution tape across an area in front of the ladder it “barricaded” the ladder. In doing so, it argues that, just as MSHA’s lockout/tagout procedure removes equipment from service such that MSHA cannot cite it for hazardous conditions, “barricading” the ladder removed it from service with the result that MSHA should not have issued the subject citation. I find that the red danger tape used here was not a “barricade” as that term has been defined by the Secretary.

Section 56.20011, states in pertinent that “[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches.” 30 C.F.R. § 56.20011. The safety standard further states that warning signs must “display the nature of the hazard and any protective action required.” Respondent does not argue that the red danger tape was a “warning sign” under section 56.20011. Moreover, the red danger tape did not display the nature of the hazard, with the result that the tape did not meet the requirements of the standard.

“Barricaded” is defined as “obstructed to prevent passage of persons, vehicles, or flying materials.” 30 C.F.R. § 56.2. Although the red danger tape suggested that miners not enter the area, it was not capable of *preventing* passage of persons. The Secretary’s regulations do not define “prevent passage.” The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines “prevent,” as relevant to this analysis, as “to deprive of power or hope of acting or succeeding . . . [,] to keep from happening or existing . . . [,] to hold or keep back[.]” *Webster’s New Collegiate Dictionary* 905 (1979).

A reasonable interpretation of the cited standard requires that the barricade do far more than put miners on notice of the hazard, but also must also act to hold them back and keep them from being able to access the hazard without at least some effort. It must impede travel into the hazardous area. The red danger tape was not capable of doing this. The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thomson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Human behavior can be erratic and unpredictable. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions[.]” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). I have previously applied these principles to a violation of section 56.20011. *Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 345 (Feb. 2011) (ALJ). As noted by the Secretary, a miner could easily duck below the tape. Consequently, I find that this red danger tape was not a barricade. Decisions of other Commission judges are consistent with this analysis.¹

Finally, I agree with the Secretary that Respondent’s reliance on my decision in *Essroc Cement Corp.*, 33 FMSHRC 459, 474-75 (Feb. 2011) (ALJ) is misplaced. In that decision, I made clear that I was vacating the guarding citation at issue primarily because the cited area was more than seven feet from the walking or working surface, thereby satisfying an express exception in the Secretary’s standards. 30 C.F.R. § 56.14107. Issues involving the adequacy of the tape as a barricade were not sufficiently explored by the court in *Essroc*. Indeed, the operator’s argument in that case was based erroneously on the Secretary’s definition of the term “barrier.” 30 C.F.R. § 56.2. The Secretary’s definition of “barrier” specifically allows the use of “a warning sign or tape” to demarcate a hazardous area.² As a result, I find that *Essroc* is distinguishable from the matter at hand.

¹ In *J.S. Redpath Corp.*, Judge Priscilla Rae determined that a strand of rope running from rib to rib, along with PVC pipe and orange plastic snow fencing was not an adequate barricade because, among other things, it was poorly constructed, had gaps, and was attached to the ribs in a “non-permanent unsecure manner” such that it would not have prevented entry of “persons, vehicles or flying materials.” 35 FMSHRC 2629, 2642 (Aug, 2013) (ALJ). In *Newmont USA Limited*, 34 FMSHRC 146, 161 (Jan. 2012) (ALJ) Judge John Lewis held that that a rope strung from rib to rib was incapable of preventing the passage of persons, vehicles or flying materials.

² “Barrier” is defined in section 56.2 as “a material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or tape.” 30 C.F.R. § 56.2.

I find that there are no genuine issues as to a material fact and that the Secretary is entitled to summary decision as a matter of law. Respondent violated section 56.11003, as alleged in the citation. Accordingly, I **AFFIRM** Citation No. 8838556 as issued.³

I must assess a civil penalty for the violation based on the six penalty criteria set forth in the Mine Act. 30 U.S.C. § 820(i). GCC did not dispute the Secretary’s evidence of record regarding the application of the penalty criteria to the citation. Consequently, I accept the Secretary’s determinations. *See* 29 C.F.R. § 2700.67(d). The Secretary’s low gravity and negligence designations are affirmed. Exhibit A to the Petition for Penalty demonstrates that GCC abated the violation in good faith and that GCC is a medium sized operator with approximately 155,000 operator hours worked, while its controlling entity worked approximately 800,000 hours. In addition, data from MSHA’s Mine Data Retrieval System at its website shows that the Pueblo Plant & Quarry had a history of 89 violations in the 15 months preceding the issuance of the subject citation, 16 of which were significant and substantial. Based on the above, I find that the originally proposed penalty of \$116.00 is appropriate for this violation.

V. SETTLED CITATIONS

The parties offered the following settlement proposal for the remaining citations in this docket:

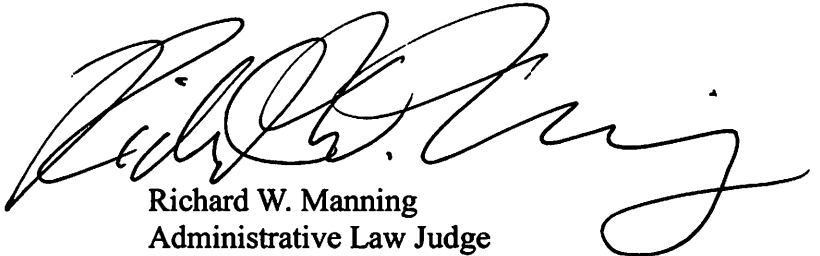
Citation/Order No.	Modification	Proposed Penalty	Amended Penalty
9304013	Accept as Issued	\$116.00	\$116.00
8838557	Accept as Issued	\$129.00	\$129.00
8838564	Modify to “Low” Negligence	\$116.00	\$116.00
8838565	Modify to “Unlikely” & “Non S&S”	\$305.00	\$116.00
8838561	Modify to “Low” Negligence	\$116.00	\$116.00
9304016	Accept as Issued	\$116.00	\$116.00
Totals		\$898.00	\$709.00

³ The Secretary’s motion for partial summary decision and motion to approve settlement were filed by Dennis J. Bellfi, a conference and litigation representative with MSHA. An attorney with the Department of Labor’s Office of the Solicitor has not entered an appearance in this case. Mr. Bellfi has been authorized by the Secretary to “represent the Secretary in all pre-hearing matters in this case, including representing the Secretary at a hearing without an attorney from the Office of the Solicitor present.” (Notice of Unlimited Appearance). This authorization is not binding on the Commission and such representation is not a matter of right. *See e.g. Carter Machinery Co. Inc.*, 40 FMSHRC ___, slip op. at 8-9, No. VA 2017-104 (Jan. 9, 2018) (ALJ); *Cyprus Emerald Resources Corp.*, 16 FMSHRC 2359 (Nov. 1994) (ALJ). Mr. Bellfi has appeared in other cases before me and, based on his experience, I hereby determine he is a competent representative. Consequently, I hereby permit him to represent the Secretary in this case under Commission Procedural Rule 3(b)(4). 29 C.F.R. § 2700.3(b)(4).

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

VI. ORDER

For the reasons set forth above, GCC Rio Grande Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of **\$825.00** within 30 days of the date of this decision.⁴



Richard W. Manning
Administrative Law Judge

Distribution:

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⁴ This decision and order resolves all issues in this docket. 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