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September 24, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. VA 2013-291-M A.C. No. 44-00068-316647 4IN
v.	Docket No. VA 2013-275-M A.C. No. 44-00068-316648 JOS
SUNBELT RENTALS, INC., LVR, INC., and ROANOKE CEMENT CO., LLC., Respondents	Docket No. VA 2013-276-M A.C. No. 44-00068-316646 Mine: Roanoke Cement Company

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION
ORDER TO DISMISS

Appearances: Willow Eden Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Petitioner

Dinah L. Choi, Esq., Ogletree, Deakins, Nash,, Smoak, & Stewart, P.C., Washington, D.C., for the Respondent, Roanoke Cement Company, LLC

Zachary J. Cohen, Esq., Lesavoy Butz & Seitz LLC, Allentown, Pennsylvania, for the Respondent, LVR, Inc.

Matthew R. Korn, Esq., Fisher & Phillips LLP, Columbia, South Carolina, for the Respondent, Sunbelt Rentals, Inc.

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). They involve a nonfatal fall of material accident on January 8, 2013, which resulted in citations against the production operator (Roanoke Cement), prime contractor (LVR), and subcontractor (Sunbelt)

under 30 C.F.R. § 56.18002(a).[1] That standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety and health."

Before hearing, the Secretary filed a Motion for Partial Summary Decision and Memorandum of Law in Support (Sec'y Mot.). That motion "seeks findings that (1) the failure to perform a workplace examination 'adequate' to discover latent defects is violative of 30 C.F.R. § 56.18002(a), and that (2) a mine operator and its contractors have a duty to either perform an adequate workplace examination or ensure that one is performed." Sec'y Mot. 2.

Respondents Roanoke Cement and LVR filed a Joint Opposition and Cross-Motion for Summary Decision and Supporting Memorandum of Law (Jt. Opp. and Cross-Mot.). They argue that a competent person designated by Respondent Sunbelt examined the working place and they had no duty to perform separate or additional examinations of the same working place or to ensure that an "adequate" examination was made. Jt. Opp. and Cross-Mot. 2.

Respondent Sunbelt also filed an Opposition and Cross-Motion for Summary Decision with Supporting Memorandum of Points and Authorities (R. Sunbelt's Opp and Cross-Mot). Respondent Sunbelt argues that § 56.18002(a) does not contain an "adequacy" requirement; that even assuming an adequacy requirement, Sunbelt performed an adequate examination; and that MSHA failed to provide Sunbelt with fair notice of its regulatory interpretation. R. Sunbelt's Opp and Cross-Mot. 2.

The Secretary filed a Response to Sunbelt's Cross-Motion and Reply to Sunbelt's Opposition (Sec'y Resp. 1). Sunbelt filed a Reply (R. Sunbelt's Reply).

The Secretary filed an *untimely* Response to Roanoke and LVR's Cross-Motion and Reply to their Opposition (Sec'y Resp. 2).[2] Even accepting the Secretary's late filing, it does not raise a genuine issue of material fact supported by reference to accompanying affidavits or other verified documents as contemplated by Commission Rule 67.

II. Issues

The issues as framed by the citations and cross-motions for summary decision are (1) whether Respondents LVR and Sunbelt violated § 56.18002(a) by failing to perform an "adequate" workplace examination to discover a "latent" hazard, and (2) whether Respondent Roanoke Cement violated § 56.18002(a) by failing to perform an independent workplace

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[1]The Secretary filed a Motion to Consolidate the three dockets. The motion was granted and a hearing was set for October 21, 2013 in Roanoke, Virginia.

[2] Pursuant to Commission Rule 10(d), the Secretary's response to Respondents' cross-motions was due on September 6, 2013, but was not filed until September 12, 2013.

examination on January 8, 2013. For the reasons that follow, the Secretary's motion for partial summary decision is **DENIED**, and Respondents' cross-motions for summary decision are **GRANTED**.

III. Findings of Fact[3]

1. Roanoke Cement operates a pre-heat tower comprised of six, vertically-connected conical vessels or cyclones, which process raw-mix limestone material heated to about 2000 degrees Fahrenheit. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 2, paras. 4-5.

2. The cyclones are lined with heat-resistant refractory, which insulates and protects the cyclones from wear and corrosion. *Id*. at 5.

3. LVR performs annual pre-heat tower maintenance, including refractory work, pursuant to contract with Roanoke. *Id*. at 6; Sec'y Mot. 2, Ex. A, p. 3.

4. For several years, LVR has contracted with Sunbelt to erect scaffolding within the pre-heat tower so that LVR can perform its work. Sec'y Mot. 2, and Ex. A, p. 3 and Ex. B, Answer 1; Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 2, para. 6.

5. Sunbelt supervisor Kendrick Lavon Davis has personally supervised the annual scaffold erection projects at Roanoke over the past seven years. R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 2, para. 4.

6. About a week before Sunbelt began erecting scaffolding, Roanoke shut down the tower for cooling, inspection and cleaning, and used an air wand to clear loose or hanging material. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 2-3, para. 8; R. Sunbelt's Opp. and Cross-Mot. at 3, Davis Aff. at 3, para 8.

7. On January 2, 2013, Roanoke and LVR walked the exterior staircase of the pre-heat tower and inspected each level by looking through 2' by 2' doors to inspect for damaged refractory and buildup of loose material. None was observed. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 3, para. 10, and Ex. C, Synder Aff. at 2, para. 7; see also R. Sunbelt's Opp. and Cross-Mot. 3.

8. Roanoke provided site-specific hazard awareness training to LVR and Sunbelt employees before they arrived on site. Jt. Opp. and Cross-Mot., Ex. A, Oedel Aff. at 5, para. 10.

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[3] The following facts are uncontested as contemplated by Commission Rule 67 and raise no genuine issue of material fact.

9. On January 7, 2013, Sunbelt employees began scaffolding work inside the tower. *Id*. at 6, para. 13; Jt. Opp. and Cross-Mot., Ex. C, Synder Aff. at 2, para. 8.

10. On January 8, 2013, Sunbelt was erecting scaffolding at the sixth level within the pre-heat tower. Sec'y Mot., Ex. B, pp. 1-2.

11. At the start of the shift, Sunbelt supervisor Davis examined the area where the Sunbelt crew would be working and visually inspected the interior areas of the pre-heat tower above the sixth level. R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 3, para 8.

12. No physical objects or things were located between the sixth and seventh levels. Sec'y Mot., Ex. B at 2.

13. Davis did not climb the exterior staircase to the seventh level to peer through the small door because Sunbelt employees were not working on that level. R. Sunbelt's Opp. and Cross-Mot. 3-4, and Davis Aff. at 3, para 8.

14. Davis avers that the sixth level provided a better vantage point to examine interior areas above the sixth level because he could see the entire seventh floor, including the areas around the door. *Id*. at 3, para 9.

15. Davis further avers that the conditions that he observed on January 8, 2013 were the same as those observed in all the other pre-heat towers at Roanoke where Sunbelt had worked over the past seven years; that he had never seen more than dust or small particulates fall from the inside of the pre-heat tower; and that any material buildup on the walls was solid, and not loose or likely to fall. *Id*. at 3-4, paras. 10-11.

16. Davis and his crew had received all required MSHA training, including hazard recognition training associated with scaffold erection work. R. Sunbelt's Opp. and Cross-Mot. 3, and Davis Aff. at 2, para 5.

17. Davis was trained to observe potential hazards from falling objects during scaffold erection. *Id*.; *see also* R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 4, para. 12, and Pre-Shift Hazard Assessment Form at Attachment C.

18. Davis recorded his examination on a Pre-Shift Hazard Assessment form, which listed loose falling objects among potential hazards, and he reviewed potential hazards with his crew. R. Sunbelt's Opp. and Cross-Mot. 4, and Davis Aff. at 4, para. 12, and Pre-Shift Hazard Assessment Form at Attachment C.

19. During the January 8, 2013 shift, Sunbelt employee Brian Tyler was struck by unspecified falling material which fell from above him and knocked him unconscious. Sec'y Mot. 2, and Ex. A, pp. 1-2, and Ex. B, Answers 2, 3, 9, 17, and 21; see also R. Sunbelt's Opp.

and Cross-Mot. 3 and 5.

20. Tyler was wearing all required personal protective equipment, including fall protection. R. Sunbelt's Opp. and Cross-Mot., Attachment D, MSHA Inspector Nichols' January 8, 2013 post-accident field notes at 3.

21. Inspector Nichols' notes indicate that when he examined the seventh level from a two-foot door outside the tower, he observed build-up of material that could have fallen through a six-foot hole located between the sixth and seventh level above where Tyler was working. R. Sunbelt's Opp. and Cross-Mot., Attachment D, pp. 5-6.

22. Nichols asked Davis whether he traveled to the door on the seventh level during his workplace examination on January 8, 2013. Davis told Nichols that he did not travel to the seventh level. Nichols never asked Davis whether Davis examined the seventh level from inside the pre-heat tower on the sixth level. R. Sunbelt's Opp. and Cross-Mot. at 4, Davis Aff. at 4, para. 15. The Secretary failed to provide any affidavit or other verified document from Nichols that he did so.

23. Nichols issued a citation to Roanoke based on his determination that Roanoke last performed a workplace examination on December 30, 2012 and did not check the area above the accident site before turning the area over to the contractor. Sec'y Mot., Ex. C, p. 1.

24. Nichols issued a citation against LVR because . . . Sunbelt Rentals did not do an adequate work place exam as they never inspected the area above where the employees were working where there was hanging material." Sec'y Mot., Ex. C, p. 3.

25. Nichols issued a citation against Sunbelt because Sunbelt ". . . did not do an adequate work place exam in the area they were working as there [was material] hanging overhead that had not been noted on the workplace exam . . . ." Sec'y Mot., Ex. A, p. 4.

IV. Legal Principles and Analysis

Commission Rule 67 sets forth the guidelines for granting summary decision. 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).

A motion shall be accompanied by a memorandum of points and authorities and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue, and supported by reference to accompanying affidavits or other verified documents. 29 C.F.R. § 2700.67(c).

An opposition shall include a memorandum of points and authorities and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact supported by reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered for the moving party. 29 C.F.R. § 2700.67(d).

Applying these rules, the Commission has long recognized that summary decision is an extraordinary procedure analogous to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); s*ee also Lakeview Rock Prods., Inc*., 33 FMSHRC 2985, 2987-88 (Dec. 2011) (reiterating the Commission's summary decision rules). In reviewing a record on summary decision, a judge must evaluate the evidence in the light most favorable to the party opposing the motion. *Hanson Aggregates New York, Inc*., 29 FMSHRC 4, 9 (Jan. 2007); see also *Poller v. Columbia Broadcasting Sys., Inc*., 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962)).

In this case, the undisputed material facts set forth above establish that Respondents are entitled to summary decision as a matter of law.

Commission law holds that the requirements of 30 C.F.R. § 57.18002 are three-fold: (1) daily workplace examinations are required to identify workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record must be kept by the operator. *FMC Wyoming Corp*., 11 FMSHRC 1622, 1628 (Sept. 1989); *Cemex, Inc*., 32 FMSHRC 1897, 1903 (Dec. 2010) (ALJ); *TXI Port Costa Plant*, 22 FMSHRC 1301 (Nov. 2000)(ALJ); *Lopke Quarries, Inc*., 22 FMSHRC 899, 911-12 (July 2000) (ALJ); *Dumbarton Quarry Assocs.*, 21 FMSHRC 1132, 1136 (Oct. 1999) (ALJ). Each of these three requirements were met here. On January 8, 2013, a working place[4] examination was done by a competent person, Davis,[5] and a record was kept by Sunbelt.

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[4] "Working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. §§ 56.2, 57.2. "As used in the standard, the phrase applies to those locations at a mine site where persons work during a shift in the mining or milling process." 61 Fed. Reg. 42788 (Aug. 19, 1996); MSHA Program Policy Manual at § 56.18002; *see also* Procedure Instruction Letter (PIL) No. P11-IV-01, entitled "Reissue of P10-IV-3: Examination of working places (30 C.F.R. §§ 56/57.18002)," effective February 17, 2011 through Match 31, 2013.

[5] A competent person is defined as "a person having abilities and experience that fully qualify him to perform the duties to which he was assigned." 30 C.F.R. §§ 56.2, 57.2.

In his response to Sunbelt's cross-motion for summary decision, the Secretary argues that Sunbelt did not perform an "adequate" examination of the 7th level, but does not contend or establish by opposition that the 7th level was a "working place." Sec'y Resp. I at 2. In his untimely response to Roanoke's and LVR's cross-motions for summary decision, the Secretary argues that whether Sunbelt performed a workplace examination sufficient to satisfy the requirements of the standard is a material fact in dispute. Both arguments presume that the standard contains an "adequate" workplace examination requirement. It does not.

The plain language of Section 56.18002(a) does not include an adequacy requirement. No adequacy requirement is contained in MSHA's program policy guidance regarding the requirements of Section 56.18002.[6] As noted, no adequacy requirement is present in Commission case law interpreting the three requirements of section 56.18002(a).

In his untimely opposition to Roanoke's and LVR's cross-motions for summary decision, the Secretary also argues that Roanoke and LVR did not designate Davis to perform the workplace examination, but the Secretary errs when citing Synder's affidavit as the purported source for said designation. Sec'y Resp. II at 3. Roanoke and LVR rely on Attachment C to Sunbelt's Response, which is the "Pre-Shift Hazard Assessment" form by which Roanoke project manager Odell designated Sunbelt supervisor Davis to perform the workplace examination consistent with past practice. By that designation, Davis acted as examination agent for Roanoke, LVR, and Sunbelt on January 8, 2013. I reject any contrary argument that Section 56.18002 imposes a duty on multiple operators to perform multiple examinations of the same working place when the examination has already been done by a competent person.

Although the Secretary does not concede that Davis met the necessary requirements to be designated as a competent person, he offers no material facts, supported by affidavit or verified documents to show otherwise, apart from the fact that Davis missed the "latent" hazard during his examination. That is not enough under Commission precedent. *Cf.*, *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1629 (Sept. 1989) (examiner Hastings lacked ability and experience fully qualifying him to examine the work place around the turbine for adverse safety and health conditions because he had not seen company memorandum regarding the presence of asbestos in turbine insulation, he was unaware of the presence of asbestos-containing material in the turbine, and he had no training in asbestos recognition).

By contrast, Respondents have established by affidavit and other documents that Roanoke project manager Odell designated supervisor Davis as a competent person to examine the work place around the pre-heat tower prior to erection of the scaffolding. The record establishes that Davis received all required MSHA training, including hazard recognition training associated with

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[6] *See* MSHA's Program Policy Manual, Vol. IV, Subpart Q, Safety Programs, 56/57.18002, Examination of Working Places (Feb. 2003); MSHA's "Final Policy on Examination of Working Places," 61 Fed. Reg. No. 161, 42787-88 (Aug. 19, 1996); MSHA's Program Policy Letter No. P11-IV-01 (Feb. 17, 2011).

scaffold erection work. Sunbelt Mot. 3, and Davis Aff. at 2, para 5. More specifically, Davis was trained to observe potential hazards from falling objects during scaffold erection. *Id*.; *see also* Sunbelt Mot. 4, and Davis Aff. at 4, para. 12, and Sunbelt Attach. C. Davis recorded his examination on a Pre-Shift Hazard Assessment form, which listed loose falling objects among potential hazards, and Davis reviewed potential hazards with his crew. Sunbelt Mot. 4, and Davis Aff. at 4, para. 12, and Sunbelt Attach. C. In these circumstances, I find that Davis was a competent person having abilities and experience that fully qualified him to perform the workplace examination duties to which he was assigned.

It is unfortunate that Davis, although legally competent, *may have* performed his examination duties in a negligent fashion by failing to peer through the small door on the 7th level to check for a falling material hazard. Nevertheless, absent any legal authority to imply an adequacy requirement in the standard, there was no violation here for failure to find what the Secretary concedes to be a "latent" hazard. Sec'y Mot. 2.[7]

Finally, I conclude in the alternative, that the Respondents did not have fair notice of the Secretary's interpretation that the cited regulation included an adequacy requirement. As noted, the plain language of the regulation does not include an adequacy requirement, no adequacy requirement is contained in MSHA's program policy guidance, and no adequacy requirement is present in Commission case law interpreting section 56.18002(a). In these circumstances, a reasonably prudent miner would read the standard, as written, to require that a competent person, designated by the operator, examine each working place at least once per shift for conditions which may adversely affect safety and health. That was done here.

Concededly, an adequacy requirement is consistent with the overarching purpose of the Mine Act to protect the safety and health of miners. If the Secretary, on behalf of MSHA, now feels that an adequacy requirement should be imposed under section 56.18002(a), the Secretary may revise the standard consistent with the extensive use of the word "adequate" throughout Title 30, Parts 1-100, to give the regulated industry notice. *See* Sunbelt Mot. 15, and Sunbelt App. A; *cf., Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 711 (8th Cir. 2013)(emphasizing MSHA's failure to revise its regulation or update its policy guidance to reflect adverse interpretation).

[7] This does not mean that an examiner can turn a blind eye toward numerous, obvious or egregious hazards, which may equate to failure to perform the requisite examination.

V. Order

The Secretary's motion for partial summary decision is **DENIED**. Respondents' cross-motions for summary decision are **GRANTED**. This matter is **DISMISSED.**

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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