FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 30 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JOHN RICHARDS CONSTRUCTION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-101-M AC No. 24-020270-361812 Mine: Richards Pit

SUMMARY DECISION
ORDER DENYING MOTION FOR RECUSAL
ORDER DENYING MOTIONS FOR RECONSIDERATION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against John Richards Construction ("JRC"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). The Secretary seeks a total penalty of $200.00 for two alleged violations of his mandatory safety standards regarding yearly inspection of fire extinguishers and maintenance of a handrail on an elevated walkway.

The Secretary filed a Motion for Summary Decision ("Sec'y Mot.") with attached exhibits ("Exs. P-1 through P-8"), including the Declaration of MSHA Inspector David J. Small and his inspection notes for both citations. JRC responded with a Brief in Opposition to Secretary's Motion for Summary Decision ("Resp't Br."), with attached Affidavit of Mark C. Smith and Fire Extinguisher Records covering years 2013 and 2014 ("Exs. R-1 and R-2"), that also moves for my recusal, for reconsideration of the Order Granting Secretary's Motion for Simplified Proceedings, and the Order Denying Transcript Request.

I. Procedural Rulings

Commission Rule 81(b) permits a party to request that a Judge withdraw from a proceeding on grounds of personal bias or other disqualification by setting forth in detail the matters alleged to constitute personal bias or other disqualification in an affidavit. 29 C.F.R. § 2700.81(b). JRC alleges that I colluded with counsel for the Secretary to circumvent JRC's rights, as evidenced by my decision to continue the originally scheduled September 9, 2015 hearing. Resp't Br. at 2. This argument fails in that unfavorable "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" absent evidence of "deep-seated

favoritism or antagonism as would make fair judgment impossible." *Medusa Cement Co.*, 20 FMSHRC 144, 148-49 (Feb. 1998) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *Rock of Ages Corp.*, 20 FMSHRC 106, 125 (Feb. 1998) (citing *Liteky* for the proposition that judicial rulings are inadequate grounds for disqualification). As stated during conference calls with the parties and in an email from my law clerk, I rescheduled the hearing to allow the parties an opportunity to continue negotiation over the citations at issue, to permit additional time for issuance of my summary decision in the companion docket, WEST 2014-440-M, and to consider any motions filed by the parties in the instant matter, including a motion for summary decision by either or both parties. Since my decision to continue the hearing was grounded in the undisputed facts of this case, as stated by John Richards, himself, and agreed to by the Secretary's counsel, Lauren Polk, and was consistent with my fundamental duties to preside over this proceeding, JRC's motion for my recusal is, hereby, **DENIED**.

JRC's motions for reconsideration of the Order Granting Secretary's Motion for Simplified Proceedings, and the Order Denying Transcript Request have been considered. See Resp't Br. at 1-2. JRC does not, however, present any new information or sufficient basis to reverse either decision. Therefore, JRC's motion for reconsideration of the Order Granting Secretary's Motion for Simplified Proceedings is, hereby, **DENIED**; and JRC's motion for reconsideration of the Order Denying Transcript Request is, hereby, **DENIED**.

II. Summary Decision

Pursuant to Commission Rule 67(b), "[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) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). When considering a motion for summary decision, the court looks at the record "'in the light most favorable to . . . the party opposing the motion,' and . . . '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 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Based on the facts represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law on the issue of whether JRC violated both mandatory safety standards. Accordingly, I **AFFIRM** the citations, as issued, and assess penalties against JRC.

A. Factual Background

The Richards Pit is an intermittent sand and gravel mine in Seeley Lake, Montana, owned and operated by JRC, which employs two to three employees. Exs. P-1 at 1, P-7 at 1-2. John Richards is the owner of JRC. Answer to Pen. Pet. at 1. On July 29, 2014, MSHA Inspector

David Small conducted a regular inspection of the Richards Pit while the portable crushing plant was not operating, and subsequently issued two citations to JRC. Sec'y Br. at 2; Ex. P-1 at 1-2.

The Secretary contends that no material facts are at issue, and that he is entitled to summary decision as a matter of law. Sec'y Br. at 2. On the contrary, JRC argues that material facts are in dispute. Resp't Br. at 2. Looking at the record in the light most favorable to JRC, however, I conclude that there are no material facts in dispute.

B. Material Facts

1. Citation No. 8762878

It is uncontested that during Small's July 29, 2014 inspection of the fire extinguishers at the Richards Pit, Richards was unable to produce records that the cited fire extinguishers had received an annual inspection. Ex. P-1 at 2. According to Small, Richards stated that he was unaware that he needed to conduct yearly inspections of the fire extinguishers, and asked Small for additional time to conduct the inspections. Exs. P-1 at 2, P-4 at 1. In order to have the citation terminated, JRC produced an invoice indicating that Missoula Fire Equipment had performed the inspections of the cited fire extinguishers on August 6, 2014. Exs. P-3, P-5. The Secretary infers from these facts that annual inspections had not been performed. Sec'y Br. at 5.

Through conference calls and subsequent submissions, Richards has represented that fire extinguisher inspections had been performed and were current at the time of Small's inspection. Resp't Br. at 2; Exs. R-1, R-2. This dispute is immaterial, however, because its resolution does not affect "the outcome of the suit under governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The issue before me is not whether the annual inspections had been performed, but whether, at the time of inspection, the operator was able to demonstrate to the inspector compliance with the standard by producing adequate documentation of timely inspections.

2. Citation No. 8762879

While inspecting the portable crusher plant at the Richards Pit, Small observed a missing 23-inch section of handrail associated with an elevated walkway that was nine feet above ground level. Exs. P-1 at 2, P-6. According to Small, Richards stated that one of his employees had removed the handrail a week prior to the inspection. Ex. P-1 at 2. It is undisputed that the cited section of handrail was missing at the time of inspection, that the missing section was readily observable, that the crusher plant had not operated in 2014, and that there was no barricade or signage warning of the alleged hazard. Exs. P-1 at 2, P-7 at 14. JRC argues, however, that the section was in the midst of repairs. Resp't Br. at 1. The Secretary disagrees, contesting that JRC was "actively performing maintenance" on the handrail section. Sec'y Br. at 6.

Resolution of whether the handrail on the portable crusher was in a maintenance mode is not material to the fact of violation, given that JRC had not reported to MSHA that the plant had been shut down, and even though the plant was not operating, the elevated walkway was openly accessible, without benefit of any safety precautions addressing the unprotected area.

C. Discussion and Analysis

In order to establish a violation of one of his mandatory standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

1. Citation No. 8762878

a. Fact of Violation

Small issued 104(a) Citation No. 8762878, alleging a violation of section 56.4201(a)(2) that was "unlikely" to cause an injury resulting in "lost workdays or restricted duty," affecting "one person," and was caused by JRC's "low" negligence.[1] The "Condition or Practice" is described as follows:

> The yearly inspection of the fire extinguishers were not conducted at the mine site. At least once every 12 months checks shall be conducted to determine the condition of the extinguishing agent, mechanical parts, hose, nozzle, and vessel to determine that the extinguisher will function properly. Based on continued mining operations a person could be injured if a fire were to occur and a fire extinguisher did not function properly.

Ex. P-2. The citation was terminated on August 13, 2014, based upon production of an invoice documenting that Missoula Fire Equipment had checked the fire extinguishers on August 6, 2014. Exs. P-3, P-5.

The Secretary contends that JRC's failure to provide Small with current annual inspection records of the fire extinguishers during the inspection violated section 56.4201(a)(2). Sec'y Br. at 5. Regarding this contention, Small asserts that he was presented with no documentation that the inspections had been performed, although the fire extinguishers appeared to be in good condition. Exs. P-1 at 2, P-4. On the other hand, JRC argues that the annual fire extinguisher inspections had, indeed, been performed by employee Mark Smith. Resp't Br. at 1; Exs. R-1, R-2; Ex. P-7 at 14.

Section 56.4201(a)(2) requires, at least, annual maintenance checks of fire extinguishers to ensure that they are operational. As noted earlier, this standard is only enforceable if the operator demonstrates to the inspector, through records or tags, that the fire extinguishers have

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[1] 30 C.F.R. § 56.4201(a)(2) provides that "[f]irefighting equipment shall be inspected according to the following schedules: [a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively."

been properly inspected. *Constr. Materials Corp.*, 23 FMSHRC 321, 323 (Mar. 2001) (ALJ); *see North Idaho Drilling, Inc.*, 35 FMSHRC 2472, 2489-90 (Aug. 2013) (ALJ) (outdated tags affixed to extinguisher established violation); *Carder, Inc.*, 27 FMSHRC 839, 853-54 (Nov. 2005) (ALJ) ("last proof" of an inspection established violation); *Hollow Contracting, Inc.*, 18 FMSHRC 2044, 2059 (Nov. 1996) (ALJ) (finding a section 56.4201(b) violation where the fire extinguishers lacked inspection documentation).

In this case, even when viewing the evidence in the light most favorable to JRC, i.e, drawing an inference that JRC had timely inspected the fire extinguishers prior to Small's inspection, it is undisputed that JRC failed to provide Small with documentation that the inspections had been performed. Therefore, I find that the Secretary has established a violation of section 56.4201(a)(2).

b. Gravity and Negligence

The record establishes that the Richards Pit operated only intermittently, employing two to three miners, that the portable crusher had not been operated in 2014, and that the fire extinguishers appeared to be in good condition. Therefore, I find that the violation was unlikely to result in injuries causing lost work days or restricted duty and, viewing the evidence in the light most favorable to the operator - - that the inspections actually had been timely performed, but that the documentation was unavailable for whatever reason - - that JRC's negligence was low in committing the violation, as alleged by the Secretary.

2. Citation No. 8762879

a. Fact of Violation

Small issued 104(a) Citation No. 8762879, alleging a violation of section 56.11002 that was "unlikely" to cause an injury resulting in "lost workdays or restricted duty," affecting "one person," and was caused by JRC's "moderate" negligence.[2] The "Condition or Practice" is described as follows:

> A section of the top handrail was missing located on the elevated walkway on the impact crusher for the crusher plant for road rock material. The section missing is approximately 23 inches long, 42 inches above the walkway floor and nine feet above ground level. Based on continuing mining operations a person could be injured if they were to fall from that height.

Ex. P-6. The citation was terminated on July 29, 2014 when a handrail was welded in place.

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[2] 30 C.F.R. § 56.11002 provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

The Secretary contends that section 56.11002 requires JRC to maintain the elevated walkway in good condition, with handrails, since the walkway is accessible to miners. Sec'y Br. at 6. JRC argues that the handrail was removed because it was loose, that the section was in the midst of repairs, and that the crusher would not have been operated without a pre-shift inspection that would have noted, and required repair of, the missing section. Resp't Br. at 1.

It is uncontested that the portable crusher had not been operated in 2014 and that, viewing the evidence in the light most favorable to JRC, the handrail was being repaired. Considering the evidence that the walkway was elevated nine feet above ground level, and was missing a 23-inch section of handrail, without barricade or warning signage to prevent access, it is clear that any miner accessing the walkway would be exposed to a fall hazard, even from something as simple as a distraction, a misstep, or a momentary loss of balance.

I find JRC's arguments unpersuasive. Section 56.11002 does not condition a finding of violation upon any consideration of "pending repairs," or an operator's speculation that it would have cured a defect prior to operating machinery sometime in the future. *See Cactus Canyon Quarries of Texas, Inc.*, 23 FMSHRC 280, 290 (Mar. 2001) (ALJ) (finding an S&S violation of section 56.11002 where a fall of three to four feet was likely); *Alsea Quarries*, 33 FMSHRC 1840, 1843 n.3, 1845 (Aug. 2011) (ALJ) (finding a section 56.11002 violation in spite of evidence that the crusher was under repair); *Asphalt, Inc.*, 15 FMSHRC 2206, 2208 (Oct. 1993) (ALJ) (upholding a section 56.11002 violation even though the mine was in the midst of repairs during inspection). Therefore, I find that the Secretary has established a violation of section 56.11002.

b. Gravity and Negligence

It is uncontested that a miner would be exposed to injuries such as broken bones as a result of a nine-foot fall, and that the risk of injury was unlikely because only the handrail was being repaired, rather than the plant being operated. It is also clear from the record that the violation had existed for one week, and that Richards had knowledge of the condition because the missing railing was readily observable. Therefore, I find, as alleged by the Secretary, that JRC was moderately negligent in the violating the standard.

D. Penalty

The judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that JRC is a small, intermittent operator, with no prior violations of section 56.11002 or section 56.4201(a)(2) during the relevant time period, and an overall violation history that is not an aggravating factor in assessing appropriate penalties. I also find that JRC demonstrated good faith in achieving rapid compliance after notice of the violations. Since JRC has not put forth

any evidence that imposition of the proposed penalties would adversely affect its ability to remain in business, "it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)).

The remaining criteria involve consideration of the gravity of the violations and JRC's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

1. Citation No. 8762878

It has been established that this violation of section 56.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that JRC's negligence was low, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

2. Citation No. 8762879

It has been established that this violation of section 56.11002 was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that JRC's negligence was moderate, and that it was timely abated. Therefore, I find that a penalty of $100.00, as proposed by the Secretary, is appropriate.

ORDER

WHEREFORE, the Secretary's Motion for Summary Decision is **GRANTED**; Respondent's Motions for Recusal and Reconsideration of Order Granting Secretary's Motion for Simplified Proceedings and Order Denying Transcript Request are **DENIED**; and John Richards Construction is **ORDERED TO PAY** a total civil penalty of $200.00 within 30 days of this Decision.[3]

Jacqueline R. Bulluck
Administrative Law Judge
202-434-9987

[3] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

Distribution:

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