FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 10, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEST 2016-0001 A.C. No. 02-02663-3909322
v.	
SOUTHWEST ROCK PRODUCTS, LLC, Respondent.	Mine: Portable #1

DECISION AND ORDER

Appearances: Ms. Hannah Harris-Yager, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Mr. John Palmer, Environmental Health and Safety Director, Southwest Rock Products, San Tan Valley, Arizona for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). At issue is Citation No. 8828132 ("the citation"), which requires areas such as workplaces and passageways to be kept clean and orderly. Respondent challenges the Secretary's allegation that a violation occurred. For the reasons which follow, the Court finds that the cited standard was not violated, as the mine had not started its operations at the time the citation was issued.

The citation alleges a violation of 30 C.F.R. §56.20003(a), which states: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly" at all mining operations. 30 C.F.R § 56.20003(a).

The citation states,

> Housekeeping was not kept in order in the work platform of the JCI shaker screen, C/N 5000, on the northeast side under the rock return belt. Material was observed built up to the rubber springs. Continued normal mining operations expose miners to lost workdays/restricted duty slip, trip and fall hazards. The

work platform is accessed twice daily for pre-shift workplace examination making the chances of an accident occurring reasonably likely.

Ex. P-2.

A hearing was held on August 5, 2016 in Phoenix, Arizona, at which MSHA Inspector Joseph Summers Jr. and mine owner Chris Reinesch testified.

Factual Background

Respondent's Portable #1 is located in Pinal County, Arizona. It is a very small sand and gravel mine, which operates with 2 employees.[1] Tr. 93. The mine is a single bench, excavated by a front-end loader. Tr. 23. The cited area bordered a JCI shaker screen, which sizes sand and gravel. Tr. 23-24. Inspector Summers began inspecting the mine around 8:00 a.m. on July 7, 2015, accompanied by the lone employee present at that time, Mr. Preston Walters. Tr. 25. Importantly, the mine was not operational at the time of the inspection: Summers and Walters were the only people present at the time of the issuance of the citation. Tr. 40-41.

At 8:50 that morning, Summers wrote one citation concerning accumulated material on an elevated walkway bordering the three-level JCI shaker screen. The walkway is about 10 feet high; it is used to perform inspections and maintenance on the pulleys and belts that feed into the shaker screen, and to work on the shaker screen itself when necessary. Tr. 51-53. The parties do not dispute the inspector's finding that there was a pile of material built up on the elevated walkway, "almost to the top of the rubber screens that this shaker screen sits on." Tr. 25. Although the parties disputed when the cited accumulation began building up prior to the inspection, they agreed that the material had remained on the walkway throughout the 13 hours that had elapsed between the end of the evening shift when the mine closed for the day and the morning of the inspection the following day. Tr. 78-79.

Nor is it disputed that the operator had not yet conducted a preshift examination prior to Summers' inspection. The loader, an essential part of the two person operation, was down for repairs. It was only later in the day that the mine's Health and Safety Director, Mr. John Palmer, arrived along with the lead man and a Caterpillar representative. Tr. 35. The loader was still being serviced when Summers left the mine that afternoon. Tr. 60-61. Thus, from the time of the inspector's arrival to the time he left, the mine had never been operational. At the time of the inspection, the operator knew it was possible that the plant would be unable to run at all that day.[2]

[1] The inspector testified that at the time the citation was issued, the mine employed 5 people. Tr. 23-24. Although the inspector spoke of 5 employees, testimony established that the mine is even smaller — the respondent clarified that only 2 people run the plant per shift. Tr. 93.

[2] As Palmer asked, "[T]he loader was — was not functional, so there was a possibility that the plant wouldn't have ran the whole day?" Tr. 96-97. Reinesch replied, "Yeah. Until we knew the loader was going to be up, but he didn't know when it would run." *Id*.

Based on the evidence presented, upon applying the burden of proof the Secretary must meet, the Court concludes that no violation of the standard was established. The Court will first discuss the facts and case law highlighted by the Secretary at hearing and in his Post-Hearing Brief, and then turn to the Respondent's contentions.

The Parties' Contentions

The Secretary's Contentions

According to Summers' observations, the dimensions of the cited accumulation were roughly: 12 inches high, covering the width of the walkway, and extending roughly 30 inches along the walkway, with tapered sides and the highest point in the middle. [3] Tr. 73-74. He testified that, because the toe board on the walkway is only about four inches high, some of the accumulated material appears to have spilled over the edge of the walkway. Tr. 114. This adds to the difficulty in estimating when the accumulation began.

The hazard that Summers identified in the citation was that a miner might trip and fall on the built up material he observed on the metal walkway. Tr. 39-40. However, he acknowledged that, due to the presence of a hand rail, there was little risk of someone falling off the walkway to the ground below. Tr. 53.

Summers concluded that material had been accumulating on the walkway over the course of multiple shifts, based on his observations of the quantity of the material as well as its color and texture.[4] Tr. 31-33. He noted that no pre-shift inspection had taken place before he arrived, and that the operator had taken no steps to remedy the accumulation.[5] Tr. 50-51. It was noteworthy that Summers testified that if he conducts an inspection in the middle of an afternoon shift, he does not cite material that has built up because "that's normal spillage during the course of the operation." Tr. 55-56. This strikes the Court as inconsistent, as it is not the condition which prompts the issuance of a citation, but rather the timing of its discovery. Under the inspector's approach, the walkway accumulation could continue uncited for hours on end so long as the walkway had been cleaned up at the start of the shift.

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[3] Inspector Summers has over 10 years of experience as an MSHA inspector, and approximately 40 total years of experience in the mining industry. Tr. 22-23. The mine's owner, Mr. Reinesch, has worked in the construction aggregate industry for 43 years, and founded Southwest Rock Products 15 years ago. Tr. 91.

[4] As discussed, *infra* at 6, during the hearing Summers offered inconsistent (and increasing) estimations of how long the accumulation had existed.

[5] As Inspector Summers testified, "[Mr. Walters] was the only one there… The loader is down. The lead man was off the property. And he wasn't cleaning up. He wasn't doing anything. He wasn't making any effort to correct the conditions that had existed, and he had plenty of opportunity to." Tr. 50-51.

Based on this evidence, the Secretary argues that the citation must be upheld. Under his interpretation, the standard, "imposes a continuing obligation on the operator to ensure that workplaces, passageways, [and other areas] are clean and orderly" at all times. Sec'y's Post-Hearing Br. 10. He concludes, "Southwest Rock violated standard 56.20003(a) because it failed to keep the elevated walkway in a clean and orderly condition at all times." *Id*. However, the inspector himself did not espouse such a theory. The testimony establishes that such a construction would be impractical, causing the mine to repeatedly shut down its operation. Beyond that, during operation, the mine had access to the area blocked off by a chain.

The Secretary cites *Nally and Hamilton Enterprises* in support of this ongoing responsibility. *Nally and Hamilton Ent. Inc.*, 33 FMSHRC 1759 (2011). In *Nally*, an operator was cited for a violation involving a back-up alarm that had allegedly stopped functioning during a short interval after a pre-shift examination. *Id*. at 1760. The Commission overturned the ALJ's reasoning that there was only a violation after the operator had had a reasonable amount of time to discover and address a defective alarm, and held that the operator had an ongoing responsibility to ensure that warning devices on trucks are functional at all times. *Id.* at 1763. In other words, the respondent could not escape liability by arguing a lack of knowledge or negligence. As discussed below, there are salient differences between the facts of these two cases, but the Court's holding here does not in any way suggest that the standard cited contains a negligence or knowledge requirement.

A second precedent the Secretary cites is *Wake Stone Corporation*. *Wake Stone Corp.*, 36 FMSHRC 825 (2014). There, the operator prevented a MSHA inspector from operating a vehicle for the purposes of inspection, and insisted on first conducting a pre-operational examination. The Commission held that operators cannot avoid liability by insisting on a Section 56.14100 pre-operational examination when they learn of an impending MSHA inspection. *Id*. at 829. In the words of the Commission, the "strict liability nature of the Act does not allow for this sort of gamesmanship." *Id*. That case does not translate to the facts here, as the mine was not in operation, and in fact *could not* operate at the time the citation was issued.

The Court does not view either Nally or Wake Stone to be instructive. The mines were operating in those instances. By contrast, here not only was SW Rock not operating, the 2 man operation, with only 1 person present and with an essential piece of equipment broken, was incapable of conducting mining.

Respondent's Contentions

The Respondent challenged the Secretary's contention that the accumulated material had been present more than one shift prior to the inspection. Through Reinesch's testimony, it contended that the accumulated material appeared dry and hardened only because it had remained on the walkway for approximately 13 hours between the end of the evening shift and the inspection the following day. Tr. 78-79. Reinesch pointed out, "in the middle of July… it's over 100 degrees out. It don't take long for this material to make it look like it's old" in the desert climate. Tr. 99. He added that the vibration of the screen helps to separate the moisture from the rock and sand, so it becomes solid faster. *Id*.

Reinesch testified that, although he was not present on the day of the inspection and had no personal knowledge of the particular accumulation that gave rise to the citation, he has seen similar accumulations of material build up around conveyor belts and other equipment at the mine. Tr. 98-99. He stated that similar-looking material accumulates every shift at his mine, because "it's very fine material. It wants to stick to the belt, and it will come around the head pulley and drop on the catwalk." Tr. 102. Some of this fine material being fed onto the shaker screen becomes stuck to the conveyor belt in part because the operator has to spray it with water to control dust. Tr. 98.

The essence of Respondent's defense was stated by Reinesch:

> We had not started up, and if – if the inspector would have shown up and the plant was running and that [the accumulation] was there and he had done a pre-trip and he could determine that it was from a prior shift, it would have been a violation… but this operator did not have an opportunity to clean it up because – just because there's that [accumulation] doesn't mean that's the first task of the – order of the day… That might be the very last thing that [the operator] conducts [sic] before he starts up. And that's – my position is – is that we weren't in violation because he never had an opportunity [to clean] before he started up."

Tr. 96.

Because some amount of accumulation near the feeder belt is inevitable, Reinesch testified that his company takes specific precautions to prevent a slip and fall injury: the area is restricted when the plant is in operation, and there is a chain and a sign across the entry to the elevated walkway. Tr. 103-04. He stated,

> If the plant is in operation, if the switch is on, this is a restricted area. Our policies and all our training[6] and everything dictates that you are not to enter this. The only time is when it's locked out.

Tr. 103.

These policies are in place specifically because there is "continual" accumulation from spilled material while the mine is in operation. Tr. 110. This spillage is due to the placement of the conveyor belt. Tr. 103. Reinesch testified that the company could not possibly remain competitive in the industry if they had to shut down operations for 30 minutes several times per shift to clean up small accumulations as soon as they occurred. Tr. 110-11. "I can't shut it down every 30 minutes and shovel it off. And this was – this – we were not given the opportunity to shovel this [walkway] off prior to starting." Tr. 103-04.

The Court adopts Reinesch's testimony that, while the condition was present when the previous shift ended the night before the inspection, such accumulations below the conveyor occur continually due to the configuration of the mine.[7]

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[6] Respondent also presented evidence that the management instructs its employees on how to conduct a workplace examination. Tr. 106, referencing Ex. R-1.

The Respondent opted to file a single brief in response to the Secretary's Post-Hearing Brief. Beyond highlighting some of the testimony from the hearing, Respondent also differentiated some of the non-precedential ALJ opinions that the Secretary cited for the proposition that similar accumulations have been found to violate Section 56.20003(a). Respondent's Post-Hearing Br. 2. Similar to the Court's analysis above, the Respondent also noted that the facts of *Wake Stone* are not analogous to the facts of this case:

> Southwest Rock Products' personnel never once asked to do a workplace exam *prior* to the inspector inspecting the plant. We are fully aware that, being able to conduct a workplace exam before an inspector inspects would jeopardize miner safety, as well as compromise MSHA's goal of protecting the miner… [Furthermore, it] is obvious that we are not dealing with safety defects on mobile equipment.

Id. at 3 (emphasis in original).

The Respondent then noted that, in the absence of MSHA policy guidance and inspector assistance, it has developed internal policies and procedures "to mitigate hazards to our miners, vendors and contractors before and during operations to comply with this standard." *Id.*

Finally, Respondent argued that adopting the Secretary's interpretation of the standard would lead to an undue burden on the operator and which would produce absurd results. *Id*. at 2. An interpretation requiring the Respondent to continuously monitor and clean workplaces and passageways would necessitate that it "operat[e] for approximately 1 hour, spen[d] approximately 1 hour to shut down the plant, lock it out, clean off all workplaces and travel ways and start the plant back up. This would effectively cut production time in half, making Southwest Rock Products uncompetitive in the industry." *Id*. This elaborates upon Reinesch's testimony, recounted above. *See* Tr. 110-11. The Court would add that, as miners do not use the walkway when the conveyor is running, a continuous clean up requirement would serve no safety value.

Discussion

The Secretary correctly points out that the regulatory standard contains no limiting language but, as noted here, the parties do not contest whether Respondent knew or should have known of the accumulation. No one has suggested that the standard includes a knowledge or negligence requirement; it does not. Nor, as the Commission held in *Wake Stone*, would it be acceptable for a respondent to attempt to evade that citation through insisting on examining equipment and work-spaces ahead of an inspector. 36 FMSHRC at 829.

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[7] This view is supported by the inspector's testimony on cross examination. Respondent queried, "Would you say that 13 hours, wet material in July in Glendale, Arizona, would have enough time to dry and crusted over?" Tr. 78. Summers admitted, "During July, yes, it's possible for a surface crust, yes." Tr. 79. The Court notes that this undercuts the inspector's previous assessment on this point, although the central issue still remains that the mine was not operational at the time of inspection.

Whenever an operator contests a violation, the Secretary must prove, by a preponderance of the evidence, that a violation occurred. *RAG Cumberland Res. Corp*., 22 FMSHRC 1066, 1070 (2000). The Secretary did not satisfy this burden as to two allegations: (1) that the accumulation had been present for more than one shift and, (2) that but for the inspection Respondent would have begun production before cleaning up the accumulated material. As Inspector Summers himself testified, he would not have written a citation for an accumulation at an inactive mining site were it not for his assessment on these two factors. Tr. 55-56.

Nor does the Court subscribe to Summers' estimate that the accumulation had been present for multiple shifts. Initially, when asked how long it had been on the walkway, Summers estimated, "more than one shift [because] in my mining experience, to have that much material [accumulate] in a six-hour period is uncommon for the mining industry." Tr. 33. Summers later increased his estimate, concluding that the condition had existed for "at least two shifts." Tr. 37. Against these estimations, Summers was told, "the plant ha[d] not run since 8:00 the previous evening, and no workplace examination ha[d] been conducted; and [he] was told, had the plant been in operation, the work platform would have been cleaned pre-shift." Tr. 40-41. The inspector agreed that Walters made that latter remark on pre-shift cleaning, "at the time of the issuance of the citation at 08:50 [a.m.]" Tr. 41. Although Summers did not believe this assertion, the Court finds the claim to be more credible since Walters made it at the time the citation was issued, rather than long afterwards. Tr. 43. Regardless, these contentions are overridden by the fact that the plant was not operating, nor capable of being operated, at the time of the citation's issuance.

Summers found it damning that the condition had not been abated while the plant was idle, noting that Walters "wasn't cleaning up. He wasn't doing anything. He wasn't making any effort to correct the conditions that had existed, and he had plenty of opportunity to." Tr. 51. Yet Summers also agreed on direct examination that "the operator isn't required to do pre-operational workplace examinations." Tr. 48. The Court notes that this is accurate — and because the mine was not operating at the time the citation was written, it is irrelevant to discuss duties that arise *during* a shift. In response to a hypothetical posed by the Court, Summers stated his belief that if the operator "performed the housekeeping *sometime* during that shift [when the accumulation occurred,] there wouldn't be a violation." Tr. 55 (emphasis added). At hearing, the Court inquired whether the inspector may have "jumped the gun" in issuing the citation. Tr. 54. Given the undisputed facts, that descriptive phrase remains apt.

The Secretary asked, "Inspector, is it your testimony that an operator has an obligation to clean up a spill *during* the shift in which the spill occurs?" Tr. 59 (emphasis added). Contradicting his own testimony, Summers responded, "Yes, they do." *Id.*[8] In the Court's view, an inspector attempting to declare when an accumulation in a restricted area of the mine must be cleaned, during an idle time between shifts, amounts to an attempt to assume the role of the

[8] Summer also stated, "Yes, sir" on cross examination in response to the question, "Before they shut off business that night, they should have cleaned it?" Tr. 59.

mine's manager.[9] Certainly, the standard does not instruct that if a spill occurs near the end of a shift, it must be cleaned up before the day ends rather than before operations resume the following morning. Nor is it an MSHA inspector's role to make these determinations on granular "policies and procedures to protect [mine] employees and function as a sand and gravel operation." Tr. 69. Upon further questioning, the inspector testified that he would not have issued a citation if a worker had been in the process of cleaning the accumulated material when he arrived. Tr. 60. In the Court's view, the inspector realized during this exchange that his statement demonstrated that he was attempting to dictate when the cleanup had to occur; he then reversed course and confirmed that the mine was *never* in operation while he was present that day. Tr. 60-61.

The Court asked the inspector how he would have replied to the mine's safety director had he contended during the inspection that there was no violation, "as long as they clean [the spill] up before they resume operations." Tr. 62. Summers replied, "If Congress had intended for this particular regulation to be enforced in that way, it would have been stated so in the regulation. The regulation says they shall maintain." *Id*. Setting aside the inaccuracies in that statement (e.g., that the regulatory standard is not promulgated directly by Congress and does not contain the word "maintain"), the Court disagrees with the view that the Act requires constant and continual cleaning. MSHA has never publicly interpreted the housekeeping standard to contain this requirement either.[10]

Unlike the sporadic mechanical malfunctions at issue in the cases cited by the Secretary, gradual accumulation of wet sand and fine rock is a constant and inevitable challenge for Respondent during production. If operators like Southwest Rock were in violation of standard 56.20003(a) for every instance that an accumulation were allowed to stand, they would be forced to either be subject to repetitive penalties or to constantly, yet unnecessarily, in terms of safety, pause and restart operations in order to clean up accumulations. Such untenable conclusions allow the Court to apply reasonable interpretations in the context of the particular facts. *Allan Lee Good*, 23 FMSHRC 995, 997 (2001).

Recognizing the Secretary's illogical claims, at the conclusion of the hearing, the Court observed that the inspector may have issued the citation prematurely, and therefore requested that the Secretary consider vacating it. Tr. 120. Subsequently, the Secretary advised that it decided not to vacate the citation.

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[9] *See* Tr. 56; when questioned further on this perspective Summers retreated from this stance and responded, "I can't direct the workforce." Tr. 65, *see also* Tr. 69.

[10] As of October 2016, MSHA has not published any policy guidance pertaining to the housekeeping standard. At hearing, Summers testified that he did not rely on any policy documents in determining whether a violation had occurred. Tr. 70.

Conclusion

If Respondent had begun operating the mine during or before the inspection at issue, without first remedying the accumulation at issue, arguably there might have been a violation and this citation could have been upheld. However, there was no violation in this case because, at the time of the inspection, the mine was not in operation and only one person besides the inspector himself was present. The mine could not begin operations until the loader was fixed. In fact, when the inspector departed the mine was still not operating. It is not for the inspector to dictate the order of the safety items that a mine must address, a proposition which the inspector conceded several times during his testimony. Therefore, under these facts, the citation must be vacated.

ORDER

For the reasons stated above, the Court finds the Secretary did not establish a violation of 30 C.F.R. § 56.20003(a). Accordingly, Citation No. 8828132 is **VACATED**[11] and this matter is hereby **DISMISSED**.

William B. Moran
William B. Moran
Administrative Law Judge

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[11] In the alternative, had the Secretary successfully established a violation of Section 56.2003(a), the Court would, in light of the significant mitigating factors presented by the Respondent at hearing as to negligence and gravity, impose a greatly reduced civil penalty.

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