

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 9, 2016

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

v.

RED RIVER COAL COMPANY, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2015-303  
A.C. No. 44-05971-389169

Mine: Stoker

## DECISION AND ORDER

Before: Judge Simonton

On October 31, 2016, the Secretary and Red River Coal Company, Inc. (“Red River”) filed motions for summary decision. At issue is a single citation, Citation No. 8201361, issued on June 22, 2015, to Red River. The citation originally cited a violation of 30 C.F.R. § 71.403(c) for Red River’s failure to have a valid bathhouse waiver. The Secretary has since modified the citation to a violation of 30 C.F.R. § 71.400 for Red River’s failure to provide a bathing facility, clothing change room, and sanitary flush toilet facilities. Neither party disputes that Red River did not have the required facilities or a bathhouse waiver at the time the citation was issued. Thus, the only issue presented for summary decision is whether Red River had adequate notice of the citation and the Secretary’s requirements for approving a bathhouse waiver application. Red River argues that District 5 of the Mine Safety and Health Administration (“MSHA” or “District 5”) has inconsistently applied the bathhouse waiver regulations over the past few years and did not provide adequate information to assist Red River in submitting a satisfactory renewal application. The Secretary argues that Red River had notice that it would receive a citation for its failure to have a current waiver and did not in fact have a waiver at the time the citation was issued. After careful consideration of the parties’ motions, the attached exhibits, the relevant case law, and the entire record in the case, I deny Respondent’s motion for summary decision and grant the Secretary’s motion.

### **I. FACTUAL BACKGROUND**

30 C.F.R. § 71.400 requires operators to provide bathing facilities, clothing change rooms, and sanitary flush toilet facilities. In cases where mines have arrangements with third parties to satisfy the bathhouse requirement or are unable to construct or support a surface bathhouse facility at the mine site, an operator may apply for a waiver under 30 C.F.R. § 71.403. Standard bathhouse waivers extend for a 1-year period, and must be renewed annually. 30 C.F.R. § 71.403(a). If necessary, operators may file for an extension of a waiver at the end of the one-year period. 30 C.F.R. § 71.403(d). The requirements for granting a waiver are quite general. Section 71.404(a) requires the application contain the name and address of the mine

operator, the name and location of the mine, and “a detailed statement of the grounds upon which the waiver is requested and the period of time for which it is requested.” Operators must have a current waiver or extension at all times.

The conditions at Red River’s Stoker Plant are unsuitable for facilities that require plumbing, and Red River therefore must apply for the bathhouse waiver each year. Prior to 2010, Red River’s waiver applications were approved without issue. Red River’s approved applications contained the same information: an application form with mine and operator information and employee signatures; a detailed statement written by the mine safety director describing the grounds for the request; and a letter from the Wise County/City of Norton Department of Health dated January 12, 2011, that denied Red River a sewage disposal construction permit (“Sewage Permit Denial”). Resp. Ex. C, D. Since 2011, however, the MSHA District 5 Manager has denied two of Red River’s bathhouse waiver applications.

Red River first began to experience changes in the waiver approval process after Greg Meikle assumed the District Manager position. On April 24, 2013, Meikle denied Red River’s February 8, 2013 waiver application. Resp. Ex. E. Red River’s application contained the same information as the previous two applications, which were approved. Meikle explained, however, that “based on the letter from Wise County/City of Norton Health Department, dated January 12, 2011, there may be alternative sewage disposal systems that might be applicable to [Red River’s] situation, but [Red River did] not pursue[ ] these alternatives.” *Id.* MSHA subsequently issued a citation to Red River for its failure to have bathing facilities, clothing change rooms, and sanitary facilities on the mine site. *See* Resp. Ex. H. On May 14, 2013, Meikle approved Red River’s interim application for a six-month extension while it looked into alternative sewage disposal systems. Resp. Ex. G.

On November 18, 2013, Red River submitted a bathhouse waiver application that addressed District Manager Meikle’s concerns. In addition to the waiver form and sewage permit denial, Red River provided more detail on the alternative sewage disposal systems. In its grounds for the request letter, Red River directly addressed the alternative sewage disposal systems, discussed the lack of potable water, distance from the closest public water line and public sewage line, Red River’s inability to obtain a building permit, and cost prohibitions as factors in favor of granting a waiver. Resp. Ex. J. Red River also provided a letter from the County of Wise Department of Building and Zoning. *Id.* The letter stated that no public water or sewer system was available at the mine site to support the construction of a bathing facility. *Id.* District Manager Meikle approved this application on January 16, 2014, to expire on January 16, 2015. Resp. Ex. I.

On November 10, 2014, MSHA CLR Hagel Campbell and William J. Sturgill, attorney for Red River, had a conference call with Administrative Law Judge Moran on the 2013 citation. Following the call, MSHA vacated the citation. Resp. Ex. Q.

Red River would again encounter problems upon District Manger Meikle’s departure and replacement the following year. On December 11, 2014, Red River submitted its application for renewal to the District Manager. *See* Resp. Ex. L. The application contained the same information approved by Meikle the prior year: the application; the detailed explanation of the

grounds for Red River's request; the sewage permit denial; and the letter from the County of Wise department of building and zoning. *Id.* However, District Manager Clayton E. Sparks denied Red River's waiver application on February 4, 2015. Resp. Ex. K. Sparks explained that "with the life of this mine being 7 to 10 years, all avenues need to be researched before a waiver could be granted." *Id.* District Manager Sparks specifically referred to the pump and haul system. *Id.* Oddly, Red River's Safety Director did discuss the infeasibility of the pump and haul system and identified the lifespan of the mine to be 5 to 7 years in his detailed letter describing Red River's grounds for approval. *See* Resp. Ex. J, L.

Red River did not request an extension or submit an amended bathhouse waiver application immediately after receiving District Manager Sparks' denial. Instead, it waited almost five months to receive a citation so that it could challenge the District Manager's enforcement of the waiver regulations. Resp. Mot. at 6. On June 22, 2015, MSHA Inspector Joe Black issued the citation to Red River for not having a bathhouse waiver. Sec'y Ex. 1. The citation alleged a violation of 30 C.F.R § 71.403(c). Section 71.403(c) provides "Upon receipt of any waiver, the operator shall post a copy of the waiver for at least 30 days on the mine bulletin board required by section 107(a) of the Act." On September, 29, 2016, the Secretary moved to amend the pleadings to change the section violated to section 71.400, which provides:

Each operator of a surface coal mine shall provide bathing facilities, clothing change rooms and sanitary flush toilet facilities, as hereinafter prescribed, for the use of miners employed in the surface installations and at the surface worksites of such mine.

The citation was marked non-S&S, unlikely to result in lost workdays, and the result of moderate negligence. Red River did not file an objection to the Secretary's motion to amend the citation, and this court granted the motion on October 6, 2016.

On July 7, 2015, Red River submitted an amended application for a bathhouse waiver. The application contained all of the same information as the previous application, save for an amended letter written by Red River's Safety Director and an updated letter from the Wise County Department of Building and Zoning. Resp. Ex. N. Red River's new letter included the same information as the previously approved application, including a discussion of alternative sewage disposal systems in bullet-point format, and discussed the cost of pumping associated with the alternatives. *Id.* It also discussed the infeasibility of an onsite septic system or alternative package plant system, and explained that pump and haul permits are only temporary measures. *Id.* The updated letter from the County of Wise Department of Building and Zoning stated that drilling a well was likely cost prohibitive, that pump and haul permits are only temporary measures, and that site compaction would require a plat. *Id.* It also included a copy of the Virginia state laws for the construction of wells. *Id.* On July 29, 2015, District Manager Sparks approved Red River's amended application. Resp. Ex. M.

Red River currently has an up-to-date waiver. On June 27, 2016, Red River submitted its bathhouse waiver renewal with the same information and was approved on July 22, 2016. Resp. Ex. O, P.

## II. SUMMARY JUDGMENT STANDARD

The Court may grant summary decision where the “entire record...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); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black’s Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences 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.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

## III. DISCUSSION

The Secretary argues, and the Respondent does not dispute, that Red River did not have a current bathhouse waiver at the time the citation was issued, and thus the citation should be upheld. Red River argues that the citation is invalid because the Secretary did not provide adequate notice of what information it must provide to receive a bathhouse waiver. Red River asserts that the Stoker Plant’s conditions have not changed over the past five years. Red River claims that the Secretary has denied its bathhouse waiver applications two times in that span despite the fact that Red River has submitted the same application that was approved the year before. We therefore look to whether Red River had fair notice of the regulations and whether the citation should be upheld.

Considerations of due process prevent adoption of the agency’s interpretation “from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010). To comport with due process, laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Hecla Limited*, 38 FMSHRC 2117, 2125 (Aug. 2016) (citations omitted).

The notice requirement is satisfied when a party receives actual notice of MSHA’s interpretation of a regulation prior to enforcement of that standard against the party. *See LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). In the absence of actual notice,

the Commission applies an objective standard, commonly known as the “reasonably prudent person test.” See *Wolf Run*, 32 FMSHRC at 1682 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). The standard assesses “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC at 2416. In deciding whether a party had fair notice, the Court may look to whether (1) the plain language of the cited standard is clear and unambiguous, (2) the Secretary has issued guidance regarding its interpretation, (3) the company was given pre-enforcement warning, (4) previous citations were issued to the mine, or (5) a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the standard’s specific prohibition or requirement. *Ash Grove Cement Co.*, 38 FMSHRC 2151, 2159 (Aug. 2016) (ALJ) (citing *Wolf Run Mining Co.*, 32 FMSHRC at 1682).

Red River argues that the citation at issue should be vacated because the Secretary has inconsistently assessed Red River’s bathhouse waiver applications and failed to provide notice of what is required to merit approval. The Secretary’s denial of Red River’s waiver application, however, did not constitute the violation at issue. The Secretary issued a violation to Red River for failing to have a current waiver or providing the required facilities, not for failing to submit an adequate application. We must therefore first look to whether Red River had fair notice that the citation would be issued.

It is undisputed that Red River did not have a bathhouse waiver at the time that the citation was written. The plain language of sections 71.400 and 71.403 clearly indicate that if the mine site does not have bath facilities, changing rooms, or flush toilets, it must have a current waiver. Red River had received a similar citation in 2013 for failing to have an unexpired bathhouse waiver and admitted that it purposefully delayed reapplying for a waiver in order to receive the citation and challenge the Secretary’s inconsistent enforcement of the waiver application process. See Resp. Mot. at 6. Thus Red River had actual knowledge that it would be issued a citation if it failed to comply with the standard.

Having found that Red River had actual knowledge that it would receive a citation if it did not have a valid waiver, I do not find that MSHA’s prior inconsistent enforcement was sufficient to unfairly deprive Red River of notice. The Commission has long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard it concludes is correct. *Austin Powder Co.*, 29 FMSHRC 909, 919-20 (Nov. 2007) (citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057). Prior inconsistent enforcement is only one of several factors that the Commission considers in evaluating whether an operator has received fair notice. *Alan Lee Good*, 23 FMSHRC 998, 1006 (Sept. 2011) (Commissioners Jordan & Beatty).

Here, District 5’s bathhouse waiver approval procedure was inconsistent. In each instance where Red River’s application was denied, the denied application had been approved by District 5 the year before. District Manager Sparks’ denial letter requested more detailed information regarding all potential sewage disposal alternatives, but did not give Red River any guidance beyond requiring it to discuss all possible avenues, some of which Red River had already addressed in the previous application. See Resp. Ex. K.

However, MSHA's inconsistent prior enforcement does not mean that Red River did not have fair notice, especially in relation to the citation at issue. The factual context surrounding the citation demonstrates that Red River was aware of the waiver approval process and had the opportunity to avoid the citation.

First, Red River had been previously placed on notice as to the application process and an operator's options following a denial. As discussed above, District 5 issued a similar citation to Red River for failing to have a current bathhouse waiver in 2013. In that instance, Red River's initial waiver application was denied for failure to discuss alternative sewage disposal systems. After receiving a citation, Red River quickly submitted an application for an extension, followed by an amended application responding to the District Manager's explanation. Director Meikle approved Red River's extension and subsequent application, and MSHA vacated the citation. While the fact that the previous citation was vacated does not bear on the validity of the current citation, it demonstrates that Red River was previously placed on notice regarding the importance of discussing alternatives in its application. It also demonstrates that District 5 was willing to assist and accommodate operators in obtaining a bathhouse waiver.

Second, the five-month gap between the denial and the citation gave Red River ample time to reply to the denial, seek additional guidance from District 5, and reapply for the waiver before receiving a citation. District Manager Sparks denied Red River's waiver application on February 4, 2015, and MSHA Inspector Black did not issue the citation to Red River for lack of a waiver until June 22, 2015. Thus, the denial was not an enforcement measure, but more akin to a pre-enforcement warning that gave Red River notice of the potential violation. *See General Elec. Co., v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that the agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated parties). Red River had knowledge that it was required to have a bathhouse waiver, and that if it did not, MSHA would issue a citation. Red River thus had months to reply to the denial or file an extension and seek clarification regarding the waiver requirements, and successfully reapply. Red River opted not to take that opportunity. Thus, the denial letter served as a pre-enforcement warning and notice of the citation at issue.

Even assuming that Red River did not have actual notice of the citation or regulations, a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the need to work with MSHA to obtain a bathhouse waiver as soon as their previous waiver expired. The provisions at issue are designed to ensure that miners have an area to sanitize before and after working in the mines, and a reasonably prudent miner familiar with this purpose would recognize that failing to provide such facilities, or failing to obtain a waiver, is in direct contravention of the act. 30 C.F.R. §§ 71.400-71.402. While MSHA could have been more explicit and consistent in explaining their requirements for approval of the bathhouse waiver, it is the responsibility of the operator once put on notice not to let a violation continue. *See Consul Buchanan Mining Co. v. Sec'y of Labor*, No. 15-1321, 2016 WL 6648676 (4th Cir. Nov. 10, 2016). District Manager Sparks provided enough explanation in his denial letter to begin a dialogue regarding the application before the risk of a penalty became imminent. Vacating this citation would, therefore, contradict Congress's mandate that mines and operators

are primarily responsible for ensuring that their mines are safe and complying with the health and safety standards. 30 U.S.C. 801(e); *see id.*

Red River argues that “a constantly changing standard year in and year out when the regulations have remained the same can certainly have significant and possibly drastic consequences on the operations of Red River and its ability to remain in operations.” Resp. Mot. at 6-7. There is no doubt that MSHA could have and should have been more specific in what it expected from Red River. MSHA would do well to fully explain the reasons behind its denials of applications, especially in instances such as this one where it is unclear what exactly the operator’s application lacked. However, MSHA did wait nearly five months to issue a citation and thus opened the door for dialogue and discussion regarding the specifics of the denial. Red River cannot be said to have lacked notice when it refused to engage in discussions that could advance understanding of the health and safety standards and avoid enforcement measures altogether.

Accordingly, I find that Red River had fair notice of the standard and uphold the violation.

#### **IV. PENALTY ASSESSMENT**

Section 110(i) of the Mine Act grants Commission Administrative Law Judges (“ALJs”) the authority to assess penalties under the Mine Act *de novo*, in accordance with six criteria. ALJs must consider:

(1) The operator’s history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator’s ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

30 U.S.C. § 820(i). The Secretary proposed a penalty of \$100.00 for the violation. Since I have granted the Secretary’s motion for summary decision, I have reviewed the six criteria to ensure that the penalty is proper. I find that the Stoker Plant is a small mine, and as discussed above has been cited once previously for this violation; a citation that was later vacated. The parties stipulated that the penalty will not affect Red River’s ability to continue in business. Stip. #4. The violation was not serious and was the result of moderate negligence. I find that Red River abated the violation in good faith when it resubmitted and was approved for a new bathhouse waiver. Accordingly, I find that a penalty of \$100.00 is appropriate.

#### **V. ORDER**

Based on my review of the record and the applicable law, I find that there is no dispute of material fact and the Secretary is entitled to summary decision as a matter of law. The

Secretary's motion for summary decision is **GRANTED** and Respondent's motion for summary decision is **DENIED**.

The Respondent, Red River Coal Company, Inc. is **ORDERED** to pay the Secretary of Labor the sum of **\$100.00** within 30 days of this order.<sup>1</sup>



David P. Simonton  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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<sup>1</sup> 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