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January 9, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2017-0104
Petitioner,	:	A.C. No. 44-07355-430464
v.	:	
	:	
CARTER MACHINERY CO INC,	:	Mine: Surface Mine No. 1
Respondent.	:	

ORDER ON MOTIONS FOR SUMMARY DECISION

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. The Respondent filed a motion for summary decision ("Respondent's Motion") and Brief in Support thereof ("Respondent's Brief"). Thereafter, the Secretary of Labor, acting through a non-attorney, a conference litigation representative, or "CLR," filed a response to that motion and, in the same response, included a cross-motion for summary decision. ("CLR Response and Cross-Motion"). For the reasons which follow, the Court DENIES both motions. The Court further finds that the CLR, a non-attorney, is attempting *de facto* to practice law without a license, and therefore, as explained below, the CLR is DENIED permission by the Court to practice before it in such a manner.

Background

This docket involves a single section 104(a) citation alleging a violation of 30 C.F.R. §77.1104.[1] The cited standard titled "Accumulations of combustible materials," provides "Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

The Citation alleges that the Respondent allowed combustible material, namely motor oil, to accumulate in the engine compartment of a front-end loader. In particular, the Citation, which was issued on December 19, 2016, alleged that "[a]ccumulations of combustible material in the form of engine oil was [sic] located on the right side of the engine of the Kenworth maintenance truck c/n 1357, tag 149087. The oil was covering the engine block behind the turbo and

[1] Part 77 sets forth mandatory safety standards for surface coal mines and surface work areas of underground coal mines.

alternator. The accumulations were being caused by an oil leak at the filter housing. Oil had puddle[d] under the truck due to this oil leak. Oil leaks near the turbo and electrical components such as the alternator are reasonably likely to cause a fire resulting in serious injuries.[2]

SUMMARY DECISION

The Commission's procedural rules speak to Summary decision of the Judge at 29 C.F.R. § 2700.67 which, in pertinent part, provides

> (b)Grounds. 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.
>
> (c) Form of motion. A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and *a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.*
>
> (d)Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision 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 necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.
>
> (e)Affidavits. Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The judge shall permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, admissions, or further affidavits.

[2] The Citation also stated that "Standard 77.1104 was cited 8 times in two years at mine 4407[355] (0 to contractor BZ5)." It was marked as "Reasonably Likely," "lost workdays or Restricted Duty," "Significant and Substantial," of "Moderate" negligence, with 1 person affected.

29 C.F.R. § 2700.67 (emphasis added)

In *John Richards Construction*, 39 FMSHRC 959, May 2017, the Commission noted that it "has long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Fed R. Civ. P. 56. *See, e.g., Kenamerican Res., Inc.,* 38 FMSHRC 1943, 1946 (Aug. 2016); *Energy West Mining Co*., 16 FMSHRC 1414, 1419 (July 1994)." *Id.* at *960. When the record shows disputed material facts, summary decision is inappropriate. *Id.*

In *Sec. of Labor v Sunbelt Rentals*, 39 FMSHRC 1183 May 2017, ("*Sunbelt*") Judge McCarthy noted that in "[a]pplying 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)); *see 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))." *Sunbelt* at *1185

As noted in *Crown Resources v Sec. of Labor*, "Summary judgment should not be granted 'unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.' *Campbell v. Hewitt, Coleman & Assocs., Inc*., 21 F.3d 52, 55 (4th Cir. 1994) ... For summary judgment to be appropriate, the evidence must do more than allow the court to find in the movant's favor, it must '*require* that the court do so.' *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (emphasis in original). If, when viewing the evidence and drawing all permissible inferences in favor of the non-movant, the record could support either party, then resolution at the summary judgment stage is inappropriate. *Id.; Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-55 (1986). Disposition by summary decision is appropriate provided: (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. §2700.67(b). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Mo. Gravel Co*., 3 FMSHRC 2470, 2471 (Nov. 1981). If the moving party fails to meet its burden, then summary decision must be denied, regardless of the sufficiency of the opposition. Even the absence of an opposition does not entitle the movant to summary decision when the motion is inadequately supported. *See Adickes v. S.H. Kress & Co*., 398 U.S. 144, 159-61 (1970) (summary judgment must be denied where the evidence in support of the motion does not establish the absence of any genuine issue, even if no opposing evidence is presented). *See also In re Rogstad*, 126 F.3d 1224, 1227-28 (9th Cir. 1997); *Campbell*, 21 F.3d at 55-56. 39 FMSHRC 1536, *1537, *Crown Resources v. Sec of Labor*, July 2017 Judge Gill

Respondent's Motion for Summary Decision and Brief in Support[3]

The Respondent contends that the Secretary cannot establish any of the three elements for the cited standard: combustible material; which material was allowed to accumulate; in an area where the accumulation can create a fire hazard. Respondent asserts there is no genuine issue of material fact because the Secretary has no evidence as to the quality of the substance on the engine block, nor its quantity, nor the temperatures to which such substance would be exposed. Because the Secretary took no samples of the material, nor did he take measurements of its quantity or the temperatures involved, there is no evidence to support the alleged violation. Respondent's Motion at 2.

Pointing to the Secretary's responses to the Respondent's requests for admission, Respondent notes that the Secretary admits he did not take any temperature readings of the truck, Requests for Admission ("RFA") 5 and 9, nor take such readings while the truck was in operation after 15 minutes, nor after 30 minutes, 1 hour, 2 hours or 3 hours, *Id.* at 3, RFAs 10-14. Respondent asserts that Secretary cannot demonstrate that the material was motor oil, nor that it was allowed to accumulate, nor that such amounts created a fire hazard. *Id.* at 4. Respondent contends that the evidence does not show that the surface temperature of the equipment was high enough to cause an auto ignition of the accumulation, arguing that, if that were true, other engine parts would be subject to combustion.[4] *Id*. at 5. Respondent also argues that, even if the motor oil is assumed to have a flashpoint between 399 and 445 degrees, that does not establish the presence of a fire hazard because it has not been shown that the location of any such accumulations was sufficient to create a fire hazard. *Id.* at 6. In sum, the Respondent maintains that a violation of the cited standard cannot be established simply because of the alleged presence of motor oil on an engine when coupled with the fact that an engine produces heat.

The non-attorney conference litigation representative's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision[5]

Conference litigation representative David Steffey filed the Secretary of Labor's Response to Carter Machinery Co. Inc.'s Motion for Summary Decision and Cross-motion for Summary Decision. December 8, 2017 ("CLR Response and Cross-Motion"). Speaking to the

[3] Respondent's Motion for summary decision was submitted by an attorney. The same attorney also filed the Respondent's Reply in Opposition to the Secretary's cross-motion for summary decision.

[4] In making this argument, Respondent takes issue with an article about turbochargers, asserting that it does not advance the Secretary's case. The Court views this issue as one best resolved through testimony and, if such testimony is permitted, then followed by cross-examination.

[5] The CLR also opines about the Respondent's reference to the term "prevailing party" offering his thoughts about the Equal Access to Justice Act. CLR Response and Cross-Motion at 2. In this setting of litigation, such expressions constitute the practice of law.

standard cited, the CLR refers to "[c]ase law" that sets forth the elements of the standard at issue, 30 C.F.R. §77.1104. In doing so, the CLR cites *Maxxim Rebuild Co., LLC,* 35 FMSHRC 3261, 3268 (Oct. 2013) (ALJ) and *Northwestern Resources,* 21 FMSHRC 431, 438 (Apr. 1999) (ALJ) and other ALJ decisions. CLR Response and Cross-Motion at 2-3. The CLR then proceeds to present his views of case law interpretation of the terms "combustible material," "accumulations," and the meaning of "can" in the context of whether material *can* cause a fire hazard. From there, citing another ALJ decision, the CLR addresses the Secretary's burden where an accumulation of combustible material on an engine was involved. Each of the CLR's references to and legal interpretations of the cited cases, constitute, in the opinion of the Court, the unauthorized practice of law.

From that display of erudition, the CLR makes a host of contentions, including that "[t]he normal operating temperature may be relevant to whether a fire was reasonably likely to occur but it is not determinative of whether a fire 'can' occur," that the issuing inspector stated that oil leaks where located as alleged by the inspector are reasonably likely to cause a fire, that the Secretary need not prove his allegations beyond a reasonable doubt, and that the inspector, as a duly authorized representative of the Secretary, made observations about the combustibility and the quantity of the oil. CLR Response and Cross-Motion at 4, 5. As such, applying the framework and definitions provided by the Commission, and using logic and common sense, the CLR asserts that it has been established that there was oil, that the oil was combustible and in sufficient quantity to cause a fire. *Id.*

Given the above, that leaves, according to the CLR, only the issue of whether the accumulation was in a location where it could cause a fire. *Id.* at 5. The CLR points to turbo chargers as a significant ignition source, citing a 2004 fatality where hydraulic oil sprayed on a turbo charger and the flash point of hydraulic oil. *Id.* In this instance, the CLR contends, the normal operating temperature of the engine "goes to the likelihood of a fire and not whether a fire was possible." *Id.*

The CLR winds up his Response and Cross-Motion by asserting that the reasons he has presented support denial of the Respondent's Motion. *Id.* at 6.

The CLR then devotes only a single paragraph of his Response and Motion to his own cross-motion for summary judgment, wherein he contends

> Because a preponderance of the undisputed evidence demonstrates that combustible material was allowed to accumulate where it could create a fire hazard, summary decision should be granted in the Secretary's favor and the judge should find that §77.1104 was violated. The parties agreed during settlement negotiations that an injury causing event was unlikely and that the violation would be modified to Non S&S and the Respondent would accept the citation being modified to Non S&S and pay a penalty of $345.00. The Secretary does not intend to present evidence or argument that an injury was reasonably likely to occur or that the violation was S&S. As such, there are no further issues to be decided. The parties previously agreed that a penalty of $345.00 was appropriate given the factors set forth at Section 110(c) of the Act. The affidavit

> of Inspector Clevinger sets forth the basis for the negligence determination. The administrative law judge should find that the violation was not S&S and should assess a penalty of $345.00.

CLR Response and Cross-Motion at 6.

The CLR's cross-motion for summary judgment fails, completely, in form and substance to meet the requirements of Commission procedural rule 29 C.F.R. § 2700.67. Further, as Respondent notes in its Reply to the cross-motion, the CLR's invoking claims about the parties agreements in their settlement negotiations lays bare, starkly, the hazards of having non-attorneys practice law.

Respondent Carter Machinery's Reply in Opposition to the Secretary's cross-motion for summary decision.

Respondent Carter Machinery filed a Reply in further support of Respondent Carter Machinery Co. Inc's Motion for summary decision and memorandum in opposition to Petitioner's Cross-Motion for summary decision.[6] ("Carter Reply")

Carter contends that although the issuing inspector's affidavit asserts that "oil leaks near high heat sources such as the exhaust turbo and alternator can cause a fire," such an assertion is not the equivalent of a fact. Carter Reply at 3. The same is true, Carter asserts, with a host of other claims by the inspector.[7] On that basis, Carter asserts that the inspector's affidavit "is nothing more than the self-serving *ipse dixit* of an interested party." *Id.*

Similarly, Carter asserts that the Secretary's reference to an MSHA report involving a fatality from hydraulic oil spraying onto a turbocharger is not relevant because, among other distinctions, a different machine and a different combustible material were involved in that instance. *Id.* at 4.

Of more significance, in the Court's estimation, Carter notes that the Secretary's filing fails to comply with the provision in the Commission's rule addressing summary decision that such motions are to be accompanied by "a statement of material facts specifying each material

[6] In reviewing the submissions from both sides, this Order only addresses contentions that pertain to the issue of the appropriateness of summary decision. Thus, legal theories in support of such motions, asserting that one is entitled to summary decision as a matter of law, are not addressed until the prerequisites are present. Thus, it must first be determined that there is no genuine issue as to any material fact.

[7] Some of the assertions made by the inspector, for which Carter asserts there is a lack factual support, include his claims that oil leaks near high heat sources such as the exhaust turbo and alternator can cause a fire, that the flash point of engine oil is far less than the temperatures of the turbo or arc at the alternator, that the approximate flash point of the oil is approximately 420 degrees Fahrenheit and that the turbo and arc at alternator can exceed 1500 degrees Fahrenheit. Carter Reply at 3.

fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents." 29 C.F.R. § 2700.67(c), Carter Reply at 6.

DISCUSSION

Summary Decision is not appropriate

In order to prevail on a motion for summary decision, the initial hurdle requires showing that there is no genuine issue as to any material fact. One does not advance to the second step, establishing that the moving party is entitled to prevail as a matter of law, until the first hurdle, no genuine issue of material fact has been crossed. Upon review of the motions, the Court concludes that there are issues of material fact and therefore summary decision is inappropriate.

The material facts involve three elements, establishing: the presence of combustible material; an accumulation of such material; and an accumulation of a degree that it can create a fire hazard. Considering the submissions, the Court finds that genuine issues of material fact remain for each of these elements. Whether the Secretary will be able to establish each of the elements for the alleged violation of 30 C.F.R. §77.1104, absent an *appropriately substantiated* settlement, requires a hearing.[8]

[8] In the Court's October 6, 2017 Decision Denying Settlement, it was noted that the Secretary's original motion to approve settlement, dated July 7, 2017, presented no relevant information to support the proposed settlement. Rather, the motion simply made an autocratic pronouncement to the Court that "[t]he Secretary has determined that the S&S and gravity determinations in the citation at issue shall be modified as discussed above. Substantive modifications to citations and orders, including the S&S designation, are within the prosecutorial discretion of the Secretary. *Mechanicsville Concrete Inc*., 18 FMSHRC 877 (1996). The Commission's review of settlement proposals involving such substantive modifications is limited to whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification. Here, a $147.00 reduction in the penalty from $492.00 to $345.00 is appropriate and supported by the reduction in the gravity findings. The parties agree that the agreed-upon penalty amount is reasonable given the circumstances surrounding the violation." Motion at 2-3. The Court reminded the CLR that Commission Procedural Rule 31(b), titled, "Content of motion," and subsection (b)(1) subtitled "Factual support," require that all motions to approve settlement "include . . . facts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31(b)(1). The CLR's statement departs from Rule 31(b), and challenges the scope of the Commission's authority to approve settlements under section 110(k) of the Mine Act." The Court continued, informing that "[w]hen Commission judges approve settlements, they are required under Procedural Rule 31 to set forth the reasons for approval of settlements and those reasons shall be supported by the record. 29 C.F.R. § 2700.31(g) [and that it is] therefore improper for this Court to issue an order approving a settlement in the absence of any factual information in the record to support the proposed settlement." Decision Denying Settlement at 2.

The CLR's Motion violates Commission Procedural Rule 29 C.F.R 2700.3(b) in a number of particulars.

The Secretary's non-attorney representative, conference litigation representative David Steffey filed a notice of limited appearance. That notice asserts "The undersigned is authorized to represent the Secretary in all **pre-hearing** matters in this case. The undersigned may appear at a hearing on behalf of the Secretary ***if*** **an attorney from the Office of the Solicitor is also present**. In the event that the undersigned becomes authorized to appear at a hearing on behalf of the Secretary without an attorney from the Office of the Solicitor present, an Unlimited Notice of Appearance of Secretary's Representative will be filed prior to the hearing." March 14, 2017, Notice of Limited Appearance of Secretary's Representative at 1 (emphasis added).

The CLR is apparently of the "limited" representative category. There are several problems with the Notice of Limited Appearance ("Notice"). First, as the title of "conference litigation representative" informs, he is a conference representative. It is true that in its October 6, 2017 Decision Denying Settlement, the Court accepted the CLR but that acceptance was only applicable to that limited appearance. When confined to that role, acting as an MSHA conference rep, the Court does not take issue with that limited capacity. Typically, in such circumstances, if a settlement motion is presented to the Court, the motion is focused on facts, not law, in support of penalty reductions.

However, in this instance the CLR went far beyond that legitimate role of presenting factual information. In the CLR's filing of his "Notice" he acknowledges that he is limited to pre-hearing matters and that if a hearing ensues an attorney from the Office of the Solicitor will be present. However, merely filing a "Notice," does not mean that one is accepted to practice before the Commission. Commission Procedural Rule 29 C.F.R 2700.3(b) does not leave that decision to a non-attorney filing such a Notice. That subsection provides under the subject "Other persons" that "A person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is: (1) A party; (2) A representative of miners; (3) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, other business entity, or a political subdivision; or (4) Any other person *with the permission of the presiding judge* or the Commission." 29 C.F.R 2700.3(b) (emphasis added).

Only subsection 4 of the procedural rule applies to the CLR and the Court has *not* given permission for the CLR to practice before the Commission in this matter.

In the Court's estimation the non-attorney CLR is attempting to practice law without possessing a law license.

In filing his Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision, the CLR's submission does not list any attorney for the Office of the Solicitor on the submission. Plainly, the CLR is not licensed to practice law, and he does not make any claim that he holds such a law license. By filing a motion, a legal document, and by making arguments as to the applicability of summary decision, the CLR has engaged in the

practice of law without a license. Besides the schooling and licensing requirements, prerequisites for the practice of law, though such absences are sufficient to establish a serious transgression, the Secretary's CLR has provided a practical example of the tendency of the non-licensed to, as it were, step in it. Carter correctly observes in its Reply that the non-attorney has referenced that the parties have engaged in settlement negotiations, noting that "settlement discussions are not considered by the Court, or by courts generally, when deciding the merits of a case for many reasons, not the least of which is that considering statements made in settlement negotiations would discourage the parties in any case from discussing settlement at all." Carter Reply at 5. In fact, the transgression by the CLR was egregious, as the CLR disclosed in his Response and Cross-Motion that "[t]he parties agreed during settlement negotiations that an injury causing event was unlikely and that the violation would be modified to Non S&S and the Respondent would accept the citation being modified to Non S&S and pay a penalty of $345.00." *Id.* at 6.

Licenses are required for many occupations including such diverse field as auctioneers, projection operators, security guards, makeup artists, massage therapists and manicurists, to name a few. Licensing is important to help ensure competence. *A fortiori*, this is especially true in complex professions such as law, medicine and accounting. The ability to practice the profession of law requires considerable schooling beyond the attainment of a college degree. To help ensure competence, all states have licensing requirements and nearly all require that a bar exam be passed before a license is issued.

Unlicensed to practice law and out of his depth, the non-attorney conference litigation representative's Response to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision motion should only have been filed by an attorney. The Court wishes to make it clear that it is sympathetic to the unnecessary position the Secretary has placed the unfortunate CLR.

The Secretary is on notice that henceforth the Court will only consider motions which contain legal arguments when signed by a licensed attorney.

Absent an appropriately supported amended motion to approve settlement, and the Court's approval of such motion, this matter, as previously noticed, remains set for hearing on February 20, 2018.

SO ORDERED.

William B. Moran
Administrative Law Judge

Distribution:

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