

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2015

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

v.

CEMEX INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2014-453-M
A.C. No. 01-00016-357166

Mine: Demopolis Plant CEMEX Inc.

ORDER DENYING MOTION FOR RECONSIDERATION

The above-captioned case is before me upon the Secretary’s petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d).

Procedural Background

At issue in this proceeding is a single citation alleging that the Respondent failed to follow a systematic procedure of inspection, testing, and maintenance for three traction elevators at its Demopolis Plant, in contravention of 30 C.F.R. § 56.19120, which is one of the Secretary’s personnel hoisting regulations.

A hearing was previously scheduled for December 22, 2015. On November 20, the Respondent filed a motion for summary decision arguing that its elevators do not fall within the definition of “hoists” under 30 C.F.R. Part 56 and therefore are not subject to § 56.19120. The Secretary submitted a response and cross motion for partial summary decision asking me to find that traction elevators do constitute hoists within the meaning of the personnel hoisting regulations in Part 56. Attached to the response and cross motion was an affidavit from MSHA engineer Thomas Barkand attesting that traction elevators are equivalent to friction drum hoists.

On December 10, the Respondent submitted a response to the Secretary’s cross motion for summary decision arguing that the Secretary’s own evidence and regulations establish that elevators are not hoists. The Respondent did not allege that genuine issues of material fact remained to be adjudicated as to this issue.

On December 22, I issued an order finding that elevators do qualify as hoists within the meaning of § 56.19120. I denied the Respondent’s motion for summary decision and granted the Secretary’s cross motion for partial summary decision on that issue.

Discussion

The Respondent argues that granting partial summary decision was inappropriate because it did not have an opportunity to depose Barkand, whose unchallenged testimony forms the basis for the Secretary's cross motion for partial summary decision, or to designate any rebuttal witnesses.

Although my order granting partial summary decision mentioned Barkand's affidavit as an aside, I did not rely on his statements in finding that the traction elevators at the Demopolis Plant fall within the regulatory definition of a "hoist," which is a question of law. This finding was predicated upon my interpretation of the regulations and application of the broad protective purposes of the Mine Act. The crux of my analysis was that elevators, like hoists, are used for hoisting personnel; exempting them from safety examinations under Part 56 would defeat the Mine Act's safety-promoting purposes and would be inconsistent with the parallel personnel hoisting regulations found in Part 77, which mention elevators separately but still subject them to the same examination requirements as hoists. Barkand's opinions did not influence this analysis. The fact that the Respondent did not have a chance to depose him or designate a rebuttal witness is therefore irrelevant.

The Respondent contends that summary judgment is inappropriate because issues of material fact exist, but no genuine, material factual issues have been raised. The burden is on the party opposing a motion for summary decision to provide 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." 29 C.F.R. § 2700.67(d). In its opposition to the cross motion for partial summary decision, the Respondent did not allege that any material issues of fact remained to be decided, in fact it was the Respondent who filed the first motion for summary decision alleging that no material facts exist. Whether an elevator is a hoist under the cited standard is a question of interpretation of the standard and the regulatory purpose of the Act which is a question of law properly before me. Therefore, the motion is **DENIED**.



Priscilla M. Rae
Administrative Law Judge

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