

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

March 19, 2024

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2023-0165-M
Petitioner,	:	A.C. No. 41-00025-574949
	:	
v.	:	
	:	
HEIDELBERG MATERIALS SOUTHWEST	:	Mine: Bridgeport Plant
AGGREGATES, LLC,	:	
Respondent.	:	

**ORDER DENYING RESPONDENT’S MOTION FOR PARTIAL SUMMARY DECISION
AND
DENYING THE SECRETARY’S CROSS-MOTION FOR SUMMARY DECISION**

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. The Secretary alleges in Citation No. 9644299 that Heidelberg Materials Southwest Aggregates, LLC (“Heidelberg” or “Respondent”) violated 30 C.F.R. § 56.14105 by not blocking the hot water and steam inside an 18-inch flex pipe that burned four miners trying to unclog the slurry line. On June 14, 2023, Chief Judge Glynn F. Voisin assigned me this case and attached a copy of my prehearing order, which required the parties either to settle the matter or position it for hearing by August 23, 2023. The parties sought extensions of the deadlines, which I granted. The parties timely filed their prehearing reports, and pursuant to my November 30, 2023, notice and order, I set this case for a hearing to be held on April 9–10, 2024, in Dallas, Texas.

On December 8, 2023, Heidelberg filed Respondent’s Motion for Partial Summary Decision. The motion argues that section 56.14105, 30 C.F.R. § 56.14105, does not apply to Citation No. 9644299, one of the two violations contained in this docket, and thus the citation should be vacated. In response, the Secretary on December 20, 2023, filed her Acting Secretary’s Response to Respondent’s Motion for Summary Decision and Cross-Motion for Summary Decision, which requests that I determine the cited standard is appropriate for the circumstances described in Citation No. 9644299.¹ Heidelberg filed Respondent’s Opposition to the Secretary’s Cross-Motion for Summary Decision on January 2, 2024.²

¹ I consider the Secretary’s cross-motion to be for partial summary decision to address the issue of whether the noted standard applies to the facts alleged. Respondent still contests the gravity and negligence determinations, thus requiring a hearing on those issues.

Commission Procedural Rule 67(b) provides that 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). The Commission has consistently held that summary decision is an “extraordinary procedure” and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Id.* at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and “inferences to be drawn from the underlying facts” are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

In reviewing these cross-motions for summary decision, I must determine whether there is no issue as to any material fact before determining which moving party is entitled to summary decision as a matter of law. Counsel for the parties stated in a conference call with my law clerk their belief that the facts surrounding the alleged violation were undisputed. The parties have submitted stipulations and attached affidavits, which I discuss at length below.

I. STIPULATIONS AND FACTUAL STATEMENTS

A. Stipulations

The following stipulations are taken from the parties’ filings as follows:

1. At all times relevant to these proceedings, Respondent was an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d). (Resp’t Prehr’g Statement at 2; Sec’y Prehr’g Statement at 1.)
2. With respect to these proceedings, Respondent is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801, et seq. (Resp’t Prehr’g Statement at 2; Sec’y Prehr’g Statement at 1.)
3. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act. (Resp’t Prehr’g Statement at 2; Sec’y Prehr’g Statement at 1.)
4. The individual whose signature or name appears in Block 22 of the Citation at issue in this proceeding is an authorized representative of the Secretary of Labor. The inspector was acting in an official capacity when he issued the Citation. (Resp’t Prehr’g Statement at 2–3; Sec’y Prehr’g Statement at 1.)

² In this decision I use the following abbreviations: Respondent’s Motion for Partial Summary Decision (“Mot.”); Acting Secretary’s Response to Respondent’s Motion for Summary Decision and Cross-Motion for Summary Decision (“Sec’y Cross-Mot.”); Respondent’s Opposition to Secretary’s Motion for Summary Decision (“Resp’t Opp’n”).

5. The Citation at issue in this proceeding was properly served upon Respondent, as required by the Mine Act. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
6. The Citation in this proceeding may be admitted into evidence for the purpose of establishing its issuance but not necessarily for the truthfulness or relevancy of any statements asserted therein. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
7. The proposed penalty will not affect Respondent's ability to remain in business. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
8. Respondent demonstrated good faith in abating the alleged violation. (Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)

B. Factual Statements

The relevant, uncontested, and material facts taken from Respondent's motion and the parties' filings are as follows:

1. On August 5, 2022, a slurry line at the Plant was clogged. (Mot., Ex. A at 1: Citation No. 9644299; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
2. The slurry line is between the 10SU001 Tank and the 70SU001 Tank. (Mot., Ex. B at ¶ 2: Affidavit of Robert Branch.)
3. A pump connected to the slurry line has a rotating impeller that creates suction to move the slurry down the line. (Mot., Ex. B at ¶ 3: Affidavit of Robert Branch.)
4. The impeller is the only mechanical moving part of the pump on the slurry line. (Mot., Ex. B at ¶ 4: Affidavit of Robert Branch.)
5. When the pump is off, the impeller does not move, and no material can pass through the pipe or past the pump. (Mot., Ex. B at ¶ 5: Affidavit of Robert Branch.)
6. The pump is near the suction flex hose, but the impeller sits deeper into the connecting pipe and away from anyone working to remove the suction flex hose. (Mot., Ex. B at ¶ 6: Affidavit of Robert Branch; Mot., Ex. C at 1: Photograph of Slurry Line with Suction Flex Hose Removed and Next to Pump Connector.)
7. Four miners—three Heidelberg employees and one contractor—attempted to clear the clog. (Mot., Ex. A at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
8. In a first attempt, the miners ran the pump connected to the slurry line, but this attempt was not successful. (Mot., Ex. A at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
9. In a second attempt, the miners proceeded to remove a suction flex hose to access the material and clean it out. (Mot., Ex. A at 1; Mot., Ex. C at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
10. The pump was off during this second attempt. (Mot., Ex. A at 1; Mot., Ex. B at ¶ 8: Affidavit of Robert Branch; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)
11. When the miners removed the suction flex hose, a sudden release of hot water and steam injured the miners. (Mot., Ex. A at 1; Resp't Prehr'g Statement at 3; Sec'y Prehr'g Statement at 2.)

12. On October 11, 2022, the Secretary issued Citation No. 9644299 alleging that Heidelberg violated the safety standard at 30 C.F.R. § 56.14105 “by not blocking the hot water or steam from the slurry line.” (Mot., Ex. A at 1.)

C. Citation No. 9644299 Allegations

MSHA Inspector James D. Redwine, who issued Citation No. 9644299 on October 11, 2022, designated the alleged violation as highly likely to result in fatal injury to four miners. (Mot. at Ex. A.) He made the following allegations in the “Condition or Practice” section of Citation No. 9644299:

A serious accident occurred at this mine involving 3 miners and 1 contractor, while attempting to unplug a slurry line the miners had ran the slurry pump for several minutes trying flush out the slurry line out. With no success in unplugging the line, they decided to break the line loose by the 18-inch flex pipe after removing the 30 bolts that holds the line together. They then connected a come-a-long to pull the flex pipe out, in this process maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. This condition exposed miners to serious injuries by not blocking the hot water or steam from the slurry line. Standard 56.14105 was cited 1 time in two years at mine 4100025 (1 to the operator, 0 to a contractor.)

(Mot., Ex. 1.)

D. Affidavit of Heidelberg’s Robert Branch

I, Robert Branch, based on my personal knowledge and belief, do hereby declare and state as follows:

1. My name is Robert Branch, and I am a leadman at the plant. I have been in the mining industry since 1986. I have worked with the type of slurry pump at the Bridgeport Plant for over two decades, and I am familiar with how the system operates.
2. There is a slurry line between the 10SU001 Tank to the 70SU001 Tank.
3. A pump connected to the slurry line has a rotating impeller that creates suction to move the slurry down the line.
4. The impeller is the only mechanical moving part on the slurry line.
5. When the pump is off, the impeller does not move, and no material can pass through the pipe or past the pump.
6. The pump is near the suction flex hose the crew removed on August 5, 2022, but the impeller sits deeper into the connecting pipe and away from anyone working to remove the suction flex hose.

7. On August 5, 2022, I was periodically with the four-man crew attempting to clear the clogged line.
8. I saw the four-man crew while they were in the processes of removing the suction flex hose. At that time, the pump was off.
9. I was not with the four-man crew when they removed the suction flex hose.

(Mot., Ex. B.)

E. Declaration of MSHA's James D. Redwine

I, James D. Redwine, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an employee of the Mine Safety and Health Administration (“MSHA”), United States Department of Labor, where I serve as a Mine Safety and Health Specialist. I am fully familiar with the facts and circumstances of the above-captioned case.
2. The information contained in this Declaration was obtained from my personal knowledge and from my inspection of the Bridgeport Plant on August 5, 2022.
3. I have been an inspector for 11 years.
4. Prior to working for MSHA, I worked at Texas Industries in Bridgeport, Texas for 28 years.
5. In total, I have 39 years of experience in the mining industry.
6. It is not uncommon for slurry lines, like the one in this incident, to become clogged and require maintenance or repair, including breaking the line loose to remove the clogged material.
7. I have performed this task at least 20 – 30 times during my career.
8. The pump is an essential and integral part of the slurry line. The slurry line cannot function without the pump.
9. The pipe, including the flex hose used in this instance, is also an essential and integral part of the slurry line. The pump serves no purpose without being connected to the pipeline.
10. When the pump was run repeatedly to clear the clogged material, the limited volume of water inside the part of the line had nowhere to go. As a result, the pump heated that water to boiling, and caused pressure and steam to build up in the pipe.
11. The pressure and steam was sealed inside the line, and it was all released suddenly when the come-along pulled the piece of flex hose off the line.

(Sec’y Cross-Mot., Ex. 1.)

II. ARGUMENTS AND ISSUES

In Respondent’s motion for partial summary decision and in its opposition to the Secretary’s cross-motion for partial summary decision, Heidelberg argues that there is no genuine issue as to any material fact and that it did not violate section 56.14105 as a matter of law. (Mot. at 7; Resp’t Opp’n at 1.) Heidelberg argues that the language of the standard is unambiguous, and therefore the Secretary’s interpretation should not be entitled to deference.

(Mot. at 7; Resp't Opp'n at 1.) Heidelberg also argues that the Secretary, in her cross-motion, omitted analysis of whether her interpretation is reasonable and instead skipped to whether the notice provided by the regulations satisfies due process. (Resp't Opp'n at 5–7.)

The Secretary filed a combined Response to Heidelberg's Motion for Summary Decision and Cross-Motion for Summary Decision. The Secretary argues that (1) Heidelberg was performing maintenance and repair on the slurry line; (2) the cited standard does not require that the machinery or equipment be powered; (3) even if the standard required the machinery or equipment to be powered, the standard applies because the pump is powered machinery, and it is connected and integral to the function of the slurry line; (4) the release of hot water and/or steam is hazardous motion; and (5) the term "blocking" means to prevent or obstruct movement or progress. (Sec'y Cross-Mot. at 8–15.)

The issues the parties have put before me are: (1) whether section 56.14105 applies to the facts presented by the parties in Citation No. 9644299; (2) whether the language of the standard, on its face, is ambiguous; and (3) whether either party is entitled to a ruling on the application of section 56.14105 as a matter of law.

For the reasons discussed below, I **DENY** both parties' requests for summary decision.

III. DISCUSSION AND ANALYSIS

Heidelberg attacks the Secretary's reading of the standard on multiple fronts. First, Heidelberg argues that the equipment or machinery cited in Citation No. 9644299 is not covered by section 56.14105 because this standard applies only to "powered" equipment or machinery. (Mot. at 7–13; Resp't Opp'n at 6–7.) In that vein, Heidelberg asks me to view the slurry line (i.e., the 18-inch pipe connecting two silos that use a pump to manage the flow of slurry) as an individual piece of equipment, which Heidelberg argues is not powered in any way. (Mot. at 14.) Second, Heidelberg argues that "hazardous motion," as that term is used in the standard, can only be concerned with the actual movement of the equipment or machinery – not with the movement of any substance or material within the equipment or machinery. (Mot. at 12; Resp't Opp'n at 7.) Lastly, Heidelberg takes issue with the terms "maintenance" and "repair" as they are used in the standard, arguing that its miners were not involved in such activities as envisioned under the standard. (Resp't Opp'n at 4; Mot. at 13–14.)

In response to Heidelberg's arguments on powered machinery or equipment, the Secretary argues that Heidelberg's motion "asks this court to dissect the specific pieces of equipment and the process in such a way that the standard does not apply[, and that s]uch a disjointed view undermines the purpose of the standard, which is to protect miners from the release of hazardous energy or motion during maintenance or repairs." (Sec'y Cross-Mot. at 15.) Thus, whether the pipe in Citation No. 9644299 is covered under this standard may hinge on whether the pipe is part of an integrated, powered pumping system.

However, after a review of the record before me, I determine that neither party is entitled to summary decision because the parties disagree on a material factual determination—that is, whether the slurry pipe is an integral part of an overall slurry line system containing the pump.

That factual determination is material to determining whether Heidelberg's plain reading of section 56.14105 entitles it to summary decision. Likewise, that same factual determination affects the analysis of the interpretation of the other language contained in section 56.14105.

Here, the parties submit a competing affidavit and declaration in support of arguments which are at odds factually. Heidelberg argues the pipe is an individual piece of equipment that is not powered and points to the affidavit of Robert Branch to make its claim. (Mot., Ex. B.) On the other hand, the Secretary argues the pipe is part of an integrated slurry line system that includes the pump, essentially negating Heidelberg's reading of the standard, and points to the declaration of MSHA Inspector James Redwine to make its claim. (Sec'y Cross-Mot., Ex. 1.)

The parties want me to cast the die for one side based on a declaration or affidavit that inherently conflicts on a material fact, which comes without the benefit of witness testimony that is subject to cross-examination. I decline their invitation when a fact material to the outcome is in dispute.

Furthermore, the parties argue over the terms "hazardous motion," as well as the definitions of "maintenance" and "repair." (Resp't Opp'n at 4; Mot. at 8, 12-14; Sec'y Cross-Mot. at 10-13.) Similarly, resolving the material fact of whether the pipe is part of a system may affect the analysis of these legal questions.

Consequently, despite the parties stating that no facts were in dispute, I determine that the parties do not agree on a material fact in this case, as they submitted competing affidavits on the factual determination of whether the pipe in question may be considered part of an integrated system of machinery or equipment. I am bound by Commission Rule 69 to grant summary decision only when "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." 29 C.F.R § 2700.69. I conclude that there is an issue of material fact and thus neither party can prevail as a matter of law.

IV. ORDER

Respondent Heidelberg Materials Southwest Aggregates' Motion for Partial Summary Decision is hereby **DENIED**, and the Acting Secretary of Labor's Cross-Motion for Summary Decision is **DENIED**. The issues involving Citation No. 9644299, as well as the other citation contained in this docket, will be addressed in a decision issued after the scheduled hearing on April 9-10, 2024, in Dallas, Texas.



Alan G. Paez
Administrative Law Judge

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