

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**APR 11 2016**

HUNTER SAND & GRAVEL, LLC,  
Contestant,

v.

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

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

v.

HUNTER SAND & GRAVEL, LLC,  
Respondent.

CONTEST PROCEEDINGS:

Docket No. KENT 2014-391-RM  
Citation No. 8728537; 2/25/2014

Docket No. KENT 2014-392-RM  
Order No. 8728538; 2/25/2014

Docket No. KENT 2014-393-RM  
Order No. 8728539; 2/25/2014

Docket No. KENT 2014-394-RM  
Order No. 8728540; 2/25/2014

Docket No. KENT 2014-395-RM  
Citation No. 8728541; 2/25/2014

Mine: Dredge IV  
Mine ID: 15-17687

CIVIL PENALTY PROCEEDINGS:

Docket No. KENT 2014-566-M  
A.C. No. 15-17687-350333

Docket No. KENT 2015-75  
A.C. No. 15-17687-362767

Mine: Dredge IV

**ORDER DENYING SECRETARY'S MOTION TO ADMIT INVESTIGATION REPORT**

Before: Judge Barbour

The issues in these consolidated contest and civil penalty proceedings arise out of an accident and presumed fatality that occurred on December 10, 2013, when an employee of Hunter Sand and Gravel, LLC ("Hunter" or "the company") disappeared in the middle of the night from a dredge on the Ohio River. The employee was working on the dredge. He was last seen beginning a transfer from the dredge to a barge located immediately adjacent to the dredge. No one observed the employee fall into the river. However, the employee was wearing a cap

lamp and a light was seen moving downstream from the dredge. A “man overboard” call was given and the operator of a tug that had pulled up to the dredge backed away and headed downstream toward the light. As the tug neared the light, it disappeared beneath the water. Neither the employee nor his body were found, and he has been declared dead.

Following the disappearance, inspectors from the Secretary’s Mining Enforcement and Safety Administration (“MSHA”) conducted an investigation. The investigation resulted in the issuance of two citations and three orders to Hunter. One citation (No. 8728537), issued pursuant to section 104(d)(1) of the Federal Mine (the “Act”), 30 U.S.C. § 814(d)(1), states that the employee slipped and fell into the water while walking on the deck of the barge and charges the deck was covered with snow and ice and that Hunter did not sand, salt or clear the deck of the snow and ice in violation of 30 C.F.R. § 56.11016, a standard requiring regularly used walkways and travelways to be sanded, salted, and cleared of snow and ice as soon as practicable. Another citation (No. 8728540) issued pursuant to section 104(d)(1), charges that Hunter violated 30 C.F.R. § 46.7(b) in that the snow and ice on the barge deck affected the safety of the employee and changed the nature of the task the employee was assigned, but that the company did not provide new task training to the employee to account for the changed conditions. An order issued pursuant to section 104(d)(1) (No. 8728538) asserts that the employee was not wearing a life jacket and charges the company with violating 30 C.F.R. §56.15020, a standard requiring the wearing of life jackets where there is a danger of falling into water. Another order (No. 8725539) issued pursuant to section 104(d)(1) asserts the company violated 30 C.F.R. § 56.15005 in that it failed to provide safety belts and lines for employees working on the barge where there was a danger of falling into the water.<sup>1</sup> Finally, in a citation issued pursuant to section 104(a) of the Act (No. 8728541), Hunter is charged with violating 30 C.F.R. § 56.18002(a) in failing to have a competent person examine a working place (presumably the barge) for conditions affecting miners’ safety and to do so at least once each shift.

After the citations and orders were issued, the company contested the validity of each. MSHA then proposed aggregate civil penalties in the amount of \$152,820 for the violations alleged in the contested citations and orders.<sup>2</sup> Hunter contested each of the proposed penalties.

An extensive hearing followed on January 6 and 7, 2016, at which the issues before the court included the validity of the contested citations and orders, the existence of the alleged violations, the validity of the inspector’s findings relating to the alleged violations and the appropriateness of the proposed penalties. During the hearing the court listened to the testimony of four witnesses, two for each side. The court also admitted into evidence 22 documents and

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<sup>1</sup> The order was subsequently vacated by the Secretary. Tr. 290.

<sup>2</sup> A penalty of \$5,645 was proposed for the violation of section 56. 15005 alleged in Order No. 8725539. Vacation of the order means that the total of the proposed penalties is \$147,175.

copies of photographs offered by the Secretary, including the report of MSHA's investigation of the presumed accident and 16 documents offered by the company.

During the first day of the trial Mr. Ed Jewell, an MSHA inspector who testified on behalf of the Secretary, was asked by the court whether to his knowledge any other government agency investigated the purported accident and if so whether the agency issued a report. Mr. Jewell stated he did not know. Tr. 104-105. The following day, counsel for the Secretary advised the court that she spoke with representatives of the Coast Guard ("USCG") several times and that she understood a report of the incident authored by the USCG was "forthcoming" but that the report "ha[d] not yet been finalized." Tr. 292. The following exchange then took place:

Attorney for the Secretary: I would be happy to provide a copy of [the USCG report] to everyone when [it is finalized].

Attorney for Hunter: I know there is in . . . civil court proceedings a federal statute that provides that Coast Guard reports of investigations are not admissible. Whether there is some exception that would apply here . . . I really don't know.

The court: Well . . . I only expect that I would see it or get it if both of you agree.

Attorney for Hunter: Right. That's right.

The court: And we'll see how that develops down the road.

Tr. 293-294.

At the close of the hearing the court advised counsels that, "[T]he record is . . . complete with the possible exception of the [USCG] report, should that be an issue." Tr. 489. The eventuality of which the court spoke became a reality when the Secretary received a copy of the report, moved for its admission and inclusion in the record (Motion to Admit [USCG] Report of Investigation (March 8, 2016)), and Hunter lodged objections. (Response to the Secretary's Motion to Admit [USCG] Report of Investigation (March 29, 2016)).

The Secretary argues that the report is relevant and, as such, should be admitted. The Secretary notes that he contends the victim slipped on the snow, and possible ice, present on the walkways of the adjacent barge and fell to his death and that the conditions cited in the citations and orders "contributed to the fatality." Motion 3. According to the Secretary, the report "is a

publically available summary of the USCG's investigation findings and, as such contains the USCG's final conclusions as to the cause of the accident and what happened to [the victim]. As such, it makes the determination of a fact more probable than it would be without the evidence and is of consequence in a determination of the action." *Id.* The Secretary also notes that as an official government document, the report is self-authenticating. *Id.* 3-4. Further, the Secretary cites the liberal nature of admissibility in administrative law cases, and argues that, "another agency's perspective is relevant to the determination of the facts at issue in this matter." *Id.* 5. Finally, the Secretary advises the court that it may take judicial notice of the facts contained in the report as they are, according to the Secretary, "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.*

Hunter disagrees with the Secretary on every point. The company also asserts it is prejudiced by the delay in the issuance of the report which, although it is dated well before the hearing, was not available to Hunter until seven weeks after the hearing, thus preventing the company from making the report the object of discovery.<sup>3</sup> Response 2-3. Hunter points out that it has had "*no opportunity* to submit rebuttal evidence or conduct cross-examination of the Coast Guard personnel responsible for investigating and issuing [the] Report." *Id.* 3 (*emphasis in original*). Thus, Hunter has been unable to gauge the accuracy and reliability of the report, the details of the Coast Guard investigation, the credibility of the investigators and explore the differences between MSHA's and the Coast Guard's findings. Finally, Hunter raises other objections disputing the fact that the report is self-authenticating and challenging the assertion that the court may take judicial notice of the report's contents. Response 6-7.

### RULING

While the report may contain relevant information, this does not automatically render it admissible. Admission is not a right but rather is the result of a court's exercise of its discretion. Courts often deny admission to relevant evidence as they balance the interests of the parties, the public and the judicial system in the development of cogent, concise records and seek to render timely decisions.


Here, the court concludes the balance tips in favor of Hunter. Were the court to grant the motion, it is likely the company would be severely prejudiced unless the court also afforded the company the opportunity to apply the mechanics of discovery to the report, procedures that would inevitably delay a decision. Following such discovery, the court also might be required to reconvene the hearing to take additional testimony relating to the report, which would engender further delay. The parties had a full and fair opportunity to present their cases at the hearing. It is doubtful that at this juncture admission of the report would add information that is necessary to

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<sup>3</sup> The Secretary replies that despite the April 16, 2015, date on the report, the report was not available until January 7, 2016, the last day of the hearing, and the Secretary's counsel did not become aware the report had been issued until after the hearing. Secretary's Reply to Hunter Sand & Gravel, LLC's Response to the Secretary's Motion to Admit [USCG] Report of Investigation (March 31, 2016) at 2.

an accurate and legally correct resolution of the issues before the court, issues which center on the existence of alleged violations of mine safety standards, not violations of marine safety standards and procedures. Moreover, since no one saw the assumed accident or found the body of the assumed victim, admission of the report is likely only to augment already extensive speculation as to what may have happened.

The motion **IS DENIED**.

  
David F. Barbour  
Administrative Law Judge

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