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April 28, 2017

KLONDEX MIDAS OPERATIONS, INC., Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. WEST 2014-777-RM Order No. 8697481; 06/16/2014 Mine ID 26-02314 Midas Mine
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. KLONDEX MIDAS OPERATIONS, INC., Respondent v. KLONDEX GOLD AND SILVER MINING COMPANY, Respondent,	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2015-416-M A.C. No. 26-02314-372746 Docket No. WEST 2015-0607-M A.C. No. 26-02314-361821 Docket No. WEST 2015-742-M A.C. No. 26-02314-384346 Midas Mine Docket No. WEST 2016-039-M A.C. No. 26-02691-390994 Fire Creek Mine

ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Manning

These cases are before me on one notice of contest filed by Klondex Midas Operations, Inc. ("Klondex") and four petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). By notice dated January 4, 2017, these cases were set for hearing commencing on May 9, 2017.[1]

[1] The hearing in these cases was originally scheduled to commence on January 24, 2017. The hearing was continued until May 9, 2017 upon the request of Klondex.

On April 14, 2017, after the close of business, Klondex filed a motion for partial summary decision. Under Commission Procedural Rule 67(a), a motion for summary decision or partial summary decision may be filed "no later than 25 days before the date fixed for hearing on the merits[.]" 29 C.F.R. § 2700.67(a). Thus, Klondex filed its motion at the last possible moment.

The motion asks that I vacate the citations and orders discussed below. The following documents accompany the motion: (1) a 37 page "Memorandum of Points and Authorities" in support of the motion; (2) a 31 page "Statement of Undisputed Material Facts" in support of the motion that includes 203 numbered paragraphs; and (3) 20 exhibits, one of which contains numerous subparts. Many of these exhibits consist of portions of deposition transcripts. The paper copy of the motion with accompanying documents is about two inches thick.

These cases arise out of a fatal accident that occurred at the Midas Mine, an underground gold mine and a later inspection at Klondex's Fire Creek Mine. Exactly what happened at the time of the accident at the Midas Mine is not clear. According to the motion, an experienced miner was operating a jackleg drill on April 28, 2014.[2] Later during the shift, a co-worker found the miner sitting on the ground in an unusual location and position. He was unresponsive and facing the "wrong direction" over 15 feet from the working face with his jackleg drill in his lap and his coveralls wrapped around the smooth shaft of the drill steel.

The Secretary issued one citation and several orders (hereinafter "citations') following his investigation of the accident. In its motion, Klondex argues that MSHA has no evidence to support its enforcement actions and the citations have no merit as a matter of law. "Without knowing how the accident occurred, MSHA cannot support its speculative" post-accident conclusions that it used as the basis for the citations. (Klondex Memorandum 3). Klondex states that there is "no evidence to rule out the possibility that [the miner] 'suffered a medical event that could have caused him to lose his balance, his ability to handle the drill that he was using, or his consciousness, thereby resulting in his clothes becoming entangled.'" (Klondex Memorandum 14).

In a response filed after the close of business on April 26, 2017, the Secretary opposed Klondex's motion for partial summary decision. He argues that there are genuine issues of material fact with respect to each citation and that Klondex is not entitled to summary decision as a matter of law. He asks that the motion be denied.

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

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[2] Jackleg drills are frequently used in underground metal mines, especially in headings that are too tight for a jumbo drill. The drill is supported by a hydraulic leg that rests on the ground. Because the leg is generally angled so that the bottom of the leg is behind the drill, the leg can also be used by the miner to help provide pressure against the rock face that is being drilled.

(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).

The Commission has long recognized that "[s]ummary decision is an extraordinary procedure." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). Summary decision "is authorized only upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggregates New York, Inc.*, 29 FMSHRC at 9 (citations omitted). When the Commission reviews a judge's summary decision under Rule 67, it looks "'at the record on summary judgment in the light most favorable to ... the party opposing the motion,' and that 'the inferences to be 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.* (citations omitted).

ANALYSIS

A few preliminary matters must be noted. First, it is important to understand that the parties have not stipulated to any facts. In response to Klondex's Statement of Undisputed Material Facts the Secretary filed his Statement of Disputed Facts. He alleges that most of Klondex's undisputed facts are actually immaterial and he referenced evidence to support his position that the "undisputed" material facts presented by Klondex are actually in dispute.

Second, it is also important to understand that the issue in these cases is whether the Secretary established the violations set forth in the citations and related issues such as whether any of the violations were of a significant and substantial nature or were the result of the operator's unwarrantable failure to comply with the safety standard. This court is not charged with determining the exact sequence of events that led to the miner's death. Of course, the citations were issued as a result of the fatal accident, which is relevant, but exactly what happened in the moments prior to the accident is unlikely to be fully resolved in these cases and such resolution is not necessary to adjudicate the issues raised in the citations.

I find that there are genuine disputes as to the material facts with respect to each citation. Given that the hearing is scheduled for May 9 and it is incumbent on me to rule on the motion in a prompt manner, I have not discussed every dispute of fact or issue of law in this order. I have also not referenced every exhibit used by the parties to support their claims.

A. Citation No. 8697488, Section 57.18025, Working Alone.

The subject miner was assigned to operate a jackleg drill. Although other miners checked on him from time to time, he was working alone in the heading. Klondex argues that

the Secretary cannot establish a violation of the working alone standard because jackleg drilling is a routine mining operation and does not present a hazardous condition under the working alone standard. (Klondex Memorandum 18-27). It argues that undisputed facts demonstrate that the Secretary cannot establish a violation of the safety standard.

In his response, the Secretary presented facts to show that jackleg drilling can present a hazardous condition that invokes the requirements of the standard and that such hazardous conditions existed in the heading in which the miner was working. (Sec'y Opposition 12-14; Sec'y Statement of Disputed Facts 2-5). In addition, he argues that there is a dispute as to whether large rocks and other tripping hazards were present on the floor of the heading that contributed to the hazardous conditions. (Sec'y Opposition 15). Assuming that hazardous conditions were present, there is a genuine dispute over whether the deceased miner had sufficient contact with other miners during his shift commensurate with the hazards presented. *Id.* at 15-16.

I agree with the Secretary that there are genuine issues of material fact with respect to this citation and that, as a consequence, summary decision cannot be granted.

Klondex also raised issues concerning the Secretary's alleged new interpretation of the safety standard that makes jackleg drilling a *per se* hazardous activity no matter how experienced or skillful the jackleg operator is. That issue is discussed in sections D and F, below.

B. Order Nos. 8697489 and 8697490, Sections 57.7052(b) and 57.20003, Insecure Footing While Drilling and Housekeeping.

These orders allege that large and loose rocks, air and water hoses, drill steels, an axe, and an oil container were strewn about the ground in the miner's work area as he was drilling. As a result, the miner did not have secure footing as he was drilling and secure footing was not provided to keep the leg of the drill from moving or sliding while in operation. Klondex maintains that the undisputed facts demonstrate that, while such conditions may have existed after the first responders arrived and moved things around, the Secretary has no proof that these conditions existed while the miner was working. (Klondex Memorandum 27-31). It offered deposition evidence that the miner's work area was clean and unobstructed at the time he was drilling.

The Secretary disputes Klondex's contention that the miner's heading was clean and orderly before the accident. He points to other deposition testimony as well as other evidence that contradicts the evidence that Klondex provided with its motion. (Sec'y Opposition 19-21; Sec'y Statement of Disputed Facts 5-7).

I find that at least two photographs show that the cited conditions existed at the time of MSHA's investigation of the accident. (Sec'y Exs. 14 & 17). Whether some or all of these conditions existed at the time of the accident is in dispute. The Secretary presented sufficient evidence to deny the motion. At least one miner, who was in the heading before the accident, testified that rocks shown in a photograph may have been present earlier in the shift. (Sec'y Ex. 5). In addition, an MSHA inspector testified that during the investigation he saw large rocks

near the face where the miner was drilling that looked like they had been in that position for a while. (Sec'y Ex. 16). A genuine, triable issue of material fact exists as to the conditions in the heading at the time of the accident. As the trier of fact, I must analyze the evidence and determine how much weight and credibility I should give to the evidence presented by each party. As stated above, whether these alleged conditions contributed to the fatal accident is relevant but will not determine whether a violation was established.

C. Citation No. 8697468, Section 103(a), Failure to Provide Documents.

This citation alleges that Klondex failed to provide "all documentation of dispatch logs" for a specified period of time after the MSHA investigators requested them. The Secretary subsequently issued Section 104(b) Order No. 8697481 for Klondex's continued failure to provide these documents. Klondex argues that it produced all the existing dispatch records and that the additional records that the Secretary is seeking do not exist. (Klondex Memorandum 32-36; Klondex Statement of Undisputed Facts 20-25). It states that it made a diligent, extensive, and timely search for the materials requested and produced all it could locate. Klondex maintains that there is no evidence to establish that it failed to comply section 103(a) of the Mine Act.

The Secretary responds that MSHA requested the records in large part to create a timeline of the events on the day of the accident and because MSHA believed that the mine required anyone working alone to call into the dispatcher every two hours. (Sec'y Opposition 22-23). The Secretary asserts that there is a genuine factual dispute over the existence of dispatch records for Crews A and C. He states that the miner who was acting as a dispatcher on April 28, 2014 "has given varying accounts as to whether he took notes on the day of the incident." (*Id.* at 23; Sec'y Statement of Disputed Facts 8-11). The Secretary relies upon this miner's deposition testimony. (Sec'y Statement of Disputed Facts 9-11; Sec'y Ex. 23).

As stated above, I must look at the record on summary decision in the light most favorable to the party opposing the motion. It may well be that Klondex produced all requested documents in its possession, but there is sufficient murkiness in the record to raise questions on this issue. The Commission has stated that in a motion for summary decision the moving party must establish "a right to judgment with such clarity as to leave no room for controversy" and must affirmatively prove "that the adverse party cannot prevail under any circumstances." *KenAmerican Resources, Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (citation omitted). The evidence provided by the moving party cannot simply allow the court to find in the movant's favor, "it must *require* the court to do so." *Id.* (citation omitted) (emphasis in original). In this instance, Klondex's evidence may be stronger than the Secretary's but I am unable to hold that the Secretary cannot prevail under any circumstances.

D. Citation Nos. 8876233 and 8876236, Section 57.18025, Working Alone at the Fire Creek Mine.

In July 2015, MSHA Inspector Pat Barney issued two citations at Klondex's Fire Creek Mine under section 57.18025 because in each instance a miner was working alone while operating a jackleg drill. In filing the motion for these citations, Klondex relies on Inspector

Barney's testimony that jackleg drilling is a hazardous condition, no matter what the circumstances. (Klondex Memorandum 21). He testified that it "is inherently hazardous." (*Id.*; Klondex Statement of Undisputed Facts ¶ 177). Klondex argues that the inspector's position is contrary to current law. (Klondex Memorandum 21; *Cotter Corporation*, 8 FMSHRC 1135 (Aug. 1986)). It argues that in *Cotter*, the Commission ruled that operating a jackleg drill is not *per se* hazardous. Because the citations were based on the Secretary's new, impermissible interpretation of section 57.18025, Klondex maintains that it is entitled to summary decision as a matter of law.

Klondex also argues that even if the safety standard is applicable as alleged in the citations, the Secretary failed to offer evidence that it was not in compliance. The inspector recognized that supervisors checked on the jackleg operators three or four times per shift. (Klondex Memorandum 24). Two Fire Creek miners told the inspector that, in addition to supervisors, other miners stop by on a regular basis. As stated by the Commission in *Cotter*, if a condition is determined to be hazardous, the safety standard requires a level of "communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation." 8 FMSHRC at 1139. Klondex contends that the evidence demonstrates that it met the requirements of this test.

The Secretary maintains that Klondex is misreading *Cotter*. The Commission clearly limited its holding to the facts of that case. In addition, there is disputed evidence as to whether there were "regular and dependable" contacts with the miners operating the jackleg drills. (Sec'y Opposition 26). Inspector Barney testified that Klondex should have established a check-in policy to make sure that the contacts were dependable and that more frequent contacts were necessary to comply with the safety standard. *Id.*

I find that genuine issues of law and fact need to be resolved with respect to these citations. First, the coverage of the safety standard must be determined as applied to the particular facts of the case. The issue is not whether, in the abstract, the safety standard prohibits the operator of a jackleg drill from working alone, as alleged by Klondex, but rather whether the safety standard prohibited these particular miners from working alone given the totality of the circumstances. The record is simply not fully enough developed to resolve these issues on summary decision. In addition, Klondex relies heavily on the Commission's holding in *Cotter*, but I agree with the Secretary that the Commission was careful to limit its holding to the facts. That decision does not resolve the issues in these cases as a matter of law.

E. <u>Unwarrantable Failure and Negligence Issues</u>.

Klondex also maintains that there is no factual or legal basis for the Secretary's allegations that the accident citations were the result of Klondex's unwarrantable failure or aggravated conduct. (Klondex Memorandum 31-32). It points to the fact that the conduct of a rank-and-file miner is not imputable to the operator. It further states that without knowing how the accident occurred, the Secretary cannot establish that Klondex should have done something more to prevent it. All the evidence suggests that his accident was entirely unforeseeable and unexpected. *Id.*

The Secretary contends that multiple disputes of material fact preclude summary decision with respect to unwarrantable failure issues. (Sec'y Opposition 21-22). There is a dispute as to the degree of danger posed by the alleged violations. Without resolving these disputes, the court cannot decide whether the violations were unwarrantable. There are also disputes concerning whether Klondex had adequate policies in place to protect the subject miner. For example, there are disputes as to whether Klondex had policies in place concerning how clean jackleg drillers should "keep their headings." (Sec'y Opposition 22) (citations omitted). There was deposition testimony that the rocks on the floor of the subject miner's heading were typical at the mine. *Id.*

I agree with the Secretary that there are genuine issues of material fact that must be resolved before unwarrantable failure and negligence issues can be addressed. In addition, I note that the issue in these cases is whether the citations should be affirmed, modified, or vacated. These proceedings were not designed to determine what caused the accident.

F. Klondex Reply Brief.

After the close of business on April 27, Klondex filed a motion to file a reply brief in support of its motion for summary decision along with a copy of the reply brief. For good cause shown, the motion is **GRANTED**.

Klondex seems not to understand the purpose of summary decision in Commission jurisprudence. Klondex argues that because the evidence it presented to support its motion is stronger and more convincing than the evidence submitted in opposition, it is entitled to summary decision as a matter of law. When considering a motion for summary decision, a Commission judge is not permitted to evaluate the relative strength or credibility of the evidence presented by the parties and enter findings of fact and conclusions of law after weighing this evidence. I agree with Klondex that, at least with respect to some of the citations, the evidence it presented to support its motion appears to be stronger and more persuasive than the evidence presented by the Secretary in opposition. Nevertheless, I am unable to conclude that the evidence presented *requires* me to grant the motion for partial summary decision in any respect.

With respect to the working alone citations, the safety standard provides that no miner shall be allowed to perform work alone "in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen." 30 C.F.R. § 57.18025. Klondex maintains that the sole issue is whether the operation of a jackleg drill automatically invokes the requirements of the standard such that a jackleg drill operator can never work alone unless the operator can be seen or heard. That is, the only legal issue is whether the operation of a jackleg drill is *per se* hazardous. Based on Commission precedent and undisputed evidence, it argues that it is entitled to summary decision on this issue as a matter of law. (Klondex Reply Br. 2-6). Klondex seemingly disregards that it is possible for a judge to hold that the facts in a particular case warrant a finding that the use of a jackleg drill created a hazardous condition thereby establishing a violation of the safety standard without holding the operation of a jackleg drill is an inherently hazardous activity and can never be operated alone.[3]

[3] Klondex also argues that the evidence establishes that it did not violate the safety standard even if it is assumed that operating a jackleg drill alone is considered to be hazardous. (Klondex

With respect to the housekeeping and secure footing citations, Klondex argues that the Secretary in his response "tries to create factual disputes where they do not exist." (Klondex Reply 7). It argues that the "Secretary's alleged factual issues depend on selective quotations" in the deposition testimony he presented. *Id.* It maintains that there is no credible evidence to support a conclusion that the conditions in the heading where the accident occurred were the same as shown the post-accident photos. It presented evidence that "everyone who saw the [heading] that morning, before the accident, thought it was in good condition." *Id.* at 7-8. I tend to agree with Klondex that the evidence presented by the Secretary on these citations does not appear to be particularly strong or convincing, but he presented sufficient evidence to raise a genuine issue of material fact as discussed in section B, above.

Klondex argues that this court "can rule that there was no violation of [section 103(a) of] the Mine Act relating to documents as a matter of law even based on the Secretary's version of events." (Klondex Reply 8-9). It states that the evidence clearly shows that any notes that were taken and not produced do not exist. The deposition testimony proves that the miner who was acting as the dispatcher at the relevant time discarded any notes taken at the end of each shift or left them on the dispatch office desk. *Id.* at 9. Klondex represents that it promptly and thoroughly searched for any of the records requested by the Secretary. As stated above in section C, there is sufficient murkiness in the record presented by the parties to raise questions of fact that must be resolved. I agree with Klondex, however, that based on the evidence presented by the Secretary in response to the motion, the Secretary's evidence appears to be weak on this issue.

Finally, Klondex argues that the Secretary's alleged disputes of fact regarding negligence are not supported by the sources he cites. (Klondex Reply 9-10). Klondex states that there can be no dispute that Klondex miners were properly and extensively trained and the deceased miner was a highly skilled jackleg drill operator. Klondex argues that there is simply no evidence upon which a judge could conclude that Klondex's negligence was high or that the citations were the result of its unwarrantable failure to comply with the safety standards. I find that there are some disputes of fact as discussed in section E above and, more importantly, there are legal issues that must be resolved when applying the facts to established precedent concerning negligence and unwarrantable failure. Evidence necessary to establish high negligence and unwarrantable failure is inexorably related to the evidence necessary to establish a violation and the gravity of any violation. Issues surrounding the negligence of an operator cannot be resolved in a vacuum.

OTHER CONSIDERATIONS

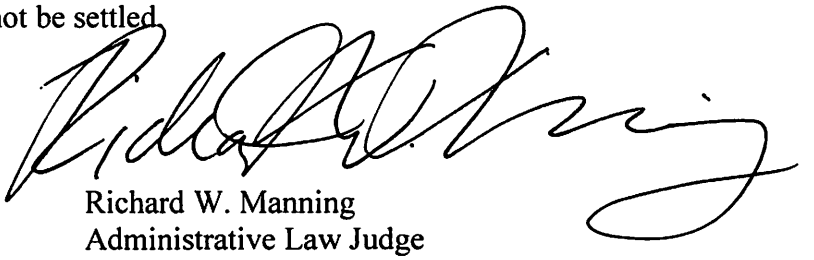
Given that I had to issue this order in a prompt manner, I have not addressed all of the issues raised by the parties. Although I reviewed the relevant exhibit evidence presented by the parties, I have not referenced each of them in this order. To the extent any issues raised by Klondex are not discussed herein, I hold that they do not meet the standard for granting summary decision.

Reply 6-7). I find that there are significant factual disputes concerning this issue as discussed above in sections A and D.

For the reasons set for above, I hold that there are genuine issues of material fact and that Klondex is not entitled to partial summary decision as a matter of law. Klondex did not establish that it has a right to partial summary judgment "with such clarity as to leave no room for controversy" and it did not establish that the Secretary "cannot prevail under any circumstances." *KenAmerican Resources* 38 FMSHRC at 1947.

ORDER

The motion for partial summary decision filed by Klondex is **DENIED**. The hearing will commence on May 9, 2017 as previously scheduled. I strongly urge the parties to attempt to negotiate a settlement of as many of the citations as possible and to enter into stipulations of fact on as many issues as possible that cannot be settled.



Richard W. Manning
Administrative Law Judge

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