

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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**MAY 18 2017**

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

v.

SUNBELT RENTALS, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-0291  
A.C. No. 44-00068-316647

Mine: Roanoke Cement Company

## ORDER DENYING SUMMARY DECISION

Before: Judge McCarthy

This remanded case is before me upon a Petition for Assessment of a Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Mine Act” or “the Act”). This matter is set for hearing on May 23-24, 2017 in Roanoke, Virginia. Currently pending before the Court are Respondent’s Amended Motion for Summary Decision, the Secretary’s Motion to Correct the Record in Partial Response to the Respondent’s Motion for Summary Decision, and the Secretary’s Response to [Respondent’s] Motion for Summary Decision Stating Contested Facts.

### **I. Statement of the Case**

This matter arises out of a non-fatal fall of materials accident that occurred in operator Roanoke Cement Company’s (“Roanoke Cement”) pre-heat tower on January 8, 2013. Roanoke Cement hired LVR, Inc. (“LVR”) to conduct annual maintenance on the tower. LVR hired Sunbelt Rentals, Inc. (“Sunbelt”) to erect scaffolding inside the tower so that LVR could perform the maintenance. On January 8, 2013, as Sunbelt was erecting scaffolding at the sixth level inside the tower, Sunbelt’s employee Brian Tyler was struck by unidentified material that fell from above and knocked him unconscious. MSHA inspector David Nichols subsequently issued citations to Roanoke Cement, LVR, and Sunbelt for violations of 30 C.F.R. § 56.18002(a).<sup>1</sup>

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<sup>1</sup>Section 56.18002(a) provides that

A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

Citation No. 8723677 was issued to Sunbelt and assigned to Docket No. VA 2013-0291. Citation No. 8723676 was issued to LVR and was assigned to Docket No. VA 2013-0275. Citation No. 8723675 was issued to Roanoke Cement and assigned to Docket No. VA 2013-0276. All three dockets were set for hearing on October 21, 2013. Prior to the hearing, the Secretary filed a Motion for Partial Summary Decision, and all three Respondents filed Cross-Motions for Summary Decision. The Secretary's motion requested findings that (1) the failure to perform a workplace examination "adequate" to discover latent defects is a violation of section 56.18002(a), and (2) the mine operator and its contractors have a duty to either perform an adequate workplace examination or ensure that one is performed. *Sunbelt Rentals, Inc., et al.*, 35 FMSHRC 3208, 3209 (Sept. 2013) (ALJ). I found that no genuine issues of material fact remained, and granted the Respondents' Cross-Motions for Summary Decision on the grounds that section 56.18002(a) contained no adequacy requirements and Sunbelt's shift examination of the pre-heat tower therefore satisfied the requirements of section 56.18002(a). *Id.* at 3216. I found in the alternative that "the Respondents did not have fair notice of the Secretary's interpretation that the cited regulation included an adequacy requirement." *Id.* at 3215.

The Secretary appealed, and the Commission granted the Secretary's Petition for Discretionary Review.<sup>2</sup> The Commission determined that section 56.18002(a) contains an adequacy requirement, vacated my summary decision, and remanded all three dockets to me for to determine whether "the workplace examination conducted by [Sunbelt] met the requirements of the standard." *Sunbelt Rentals, Inc., et al.*, 38 FMSHRC 1619 (July 2016).<sup>3</sup>

## II. Legal Principles and Analysis

Commission Rule 67 sets forth the guidelines for granting summary decision. 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. 29 C.F.R. § 2700.67(b). A motion shall be accompanied by a memorandum of points and authorities and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue, and supported by reference to accompanying affidavits or other verified documents. 29 C.F.R. § 2700.67(c). An opposition shall include a memorandum of points and authorities 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 supported by reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted unless controverted by the statement in opposition. If a party does not respond in

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<sup>2</sup> Despite my alternative basis for dismissal on the absence of fair notice grounds, I note that the Secretary advanced his current interpretation of section 56.18002(a)'s adequacy requirement for the first time in oral argument on appeal before the Commission. Tr. for Oral Argument at 34-36. In my view, this was inappropriate and the issue is preserved for judicial review.

<sup>3</sup> Docket No. VA 2013-0275 was disposed in my Decision Approving Settlement on November 30, 2016. Docket No. VA 2013-0276 was disposed in my Decision Approving Settlement on January 5, 2017.

opposition, summary decision, if appropriate, shall be entered for the moving party.  
29 C.F.R. § 2700.67(d).

Applying 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)).

Respondent's initial Motion for Summary Decision alleged that the Secretary failed to respond to Respondent's Third Set of Interrogatories, Second Set of Requests for Admission, and Second Set of Requests for Production, which Respondent served on the Secretary's solicitor on January 25, 2017. In response to Respondent's motion, the Secretary filed his Motion to Correct the Record and included copies of his timely responses to Respondent's discovery requests. Resp't's Mot. for Summ. Decision, at 2-3; Sec'y's Mot. to Correct, at 1. Respondent then filed an Amended Motion for Summary Decision, arguing that the Secretary's discovery responses show that no genuine issues of material fact remain. Resp't's Amended Mot. for Summ. Decision, at 1. The Secretary also filed a Response to [Respondent's] Amended Motion for Summary Decision, Stating Contested Facts on April 14, 2017. On April 14, the Respondent filed a final Response to [the] Secretary's Motion to Correct the Record in Partial Response to the Motion for Summary Decision.

As demonstrated by the parties' competing motions, and in light of the fact that the Commission had decided that despite my alternative basis for dismissal on fair notice grounds, it is permissible for the Secretary to advance his new interpretation of section 56.18002(a) for the first time during oral argument on his Petition for Discretionary Review, I find that genuine issues of material fact still remain regarding the adequacy of Sunbelt's January 8, 2013 workplace examination and whether the seventh level of the preheat tower constituted a “working place” within the meaning of section 56.18002(a).

### III. Order

WHEREFORE, Respondent's Amended Motion for Summary Decision is **DENIED**. I reserve judgment on the Secretary's Motion to Correct the Record until hearing, at which time the Secretary may proffer his discovery responses for entry into the record. This docket will proceed to hearing as scheduled on May 23-24, 2015 in Roanoke, Virginia.

*Thomas P. McCarthy*

Thomas P. McCarthy  
Administrative Law Judge

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