FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 18, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2013-332-M A.C. No. 23-00141-315058
v.	
MARTIN MARIETTA MATERIALS, INC., Respondent	Mine: Greenwood Quarry

ORDER DENYING SECRETARY'S MOTION FOR SUMMARY DECISION

Before: Judge Rae

This docket is before me on a petition for assessment of penalty filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 et seq. (2000) (the "Act"). On January 8, 2014, I granted the Secretary's motion to plead in the alternative alleging a violation of 30 C.F.R. §56.14100(b) as originally cited by the Mine Safety and Health Administration ("MSHA") inspector as well as a violation of 30 C.F.R. §56.14100(c) in the alternative. This single citation docket arises from an inspection conducted by Rickie Knupp on October 23, 2012 at the Greenwood surface limestone quarry operated by Martin Marietta Materials, Inc. ("Martin Marietta") in Greenwood, Missouri. The facts surrounding the alleged violation as set forth below are uncontested by the parties and on January 31, 2014 the Secretary filed a Motion for Summary Decision in accordance with Section 2700.67 of the Federal Mine Safety and Health Review Commission's Procedural Rules, 30 C.F.R. § 27.00.67 which the Respondent has opposed. For the reasons set forth herein, I DENY the Secretary's Motion and VACATE the sole citation.

Summary Decision Standards

Commission Rule 67 sets forth the guidelines for granting summary decision:

(b) 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).

The Commission "has long recognized that [ ] 'summary decision is an extraordinary procedure,' and has analogized it 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.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in "the light most favorable to...the party opposing the motion." *Hanson Aggregates* at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962). Any inferences "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 motions.'" *Hanson Aggregates* at 9 (quoting *Unites States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The issues presented in this penalty proceeding are whether the defective head lights on a skid steer loader violated either subsection (b) or (c) of mandatory standard section 56.14100. Subsection (b) requires the operator to correct in a timely manner defects on equipment that affect safety while subsection (c) requires the operator to remove from service defective equipment when continued operation of such would be hazardous. Subsection (a) of that standard requires the operator to inspect all self-propelled mobile equipment to be used during a shift before it is placed in operation. 30 C.F.R. §56.14100.

Findings of Fact and Legal Analysis

The undisputed facts are that on October 23, 2012, MSHA inspector Rickie Knupp was conducting an inspection at the Greenwood quarry. While accompanied by Martin Marietta personnel, Harry Danforth and Chris Bollinger, he inspected the cited Case 1840 skid loader located in the equipment shop. He found that the headlights were not functioning on the loader at that time. The loader had been used the day before and the headlights had worked properly. The loader had not been put into use on the day of the inspection and Knupp was informed by Lambert that it had not yet been inspected for use that day. It was not locked or tagged out to prevent use when Knupp inspected it. A faulty switch was found to be the culprit, which was replaced by Danforth and the violation was abated by Knupp when he rechecked it the following day. The loader is used to clean up the primary and secondary crusher areas of the mine during the day. The mine does not operate a night shift.

The Secretary alleges a violation of subsection (b) of the cited standard based upon the theory that the Act imposes strict liability for this violation even taking into consideration the "timely manner" language incorporated into this subsection. He argues that because the lights did not work when inspected, although working the day before, the operator should have known about the faulty switch and corrected it or taken it out of service "at least after a pre-shift examination." Sec'y's Motion. He cites several cases in support of his position but does not present any evidence to ascertain when the operator first knew or should have known of the defect as required by law. *See Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001) (ALJ properly vacated a citation where the Secretary could not prove a defect was known to operator, how long it existed and that it was not corrected in a timely manner); *Barrett Paving Materials,*

Inc., 15 FMSHRC 1999 (Sept. 1993) (citation vacated where there was no evidence of length of time defect existed or equipment examined); *Sweetman Construction Co.*, 21 FMSHRC 101 (Jan. 1999) (ALJ) (violation established because defective truck was in use at the time the inspector found the defect); *Walker Stone Company,* 20 FMSHRC 1225 (Oct. 1998) (ALJ) (violation established where the operator had been using equipment without functioning headlights for a long period of time due to a lack of knowledge that MSHA required them).

The undisputed evidence is that the lights had functioned the day before the inspection. The equipment had not yet been put into service that day and the pre-use inspection had not yet been done. The Secretary, under these set of facts, cannot establish that the operator knew or should have known of the defect or that it would not have fulfilled its duties under subsection (a) of the standard and performed the pre-use inspection, thereby identifying and repairing the defect in a timely manner before the loader was put to use.

The Secretary argues in the alternative that the facts establish a violation of subsection (c) because at "some point, the non-functioning headlights on the skid loader would rise to the level of a hazardous defect." The loader was still available for use as it lacked a tag or other indication that it should not be used in its present condition. Again, the Secretary cites several cases in support of his position which in fact do not support it. First he cites *LaFarge North America,* 35 FMSHRC 2472 (Dec. 2013) in which the Commission remanded the case where the ALJ vacated a citation issued in section 56.14100(c) for lack of notice of the standard of measurement to be used for play in ball joints. The "continued operation" of defective equipment was not at issue in this case. It next cites *North Idaho Drilling, Inc.*, 35 FMSHRC 2472 (Aug. 2013) (ALJ). This case is illustrative of the significance of the language "continued operation" contained in subsection (c) of this standard and why it does not apply in the instant case. Judge Manning found a violation where the outrigger float on a crane was damaged and could have led to its capsizing and endangering miners. The crane had been in use for 45 minutes when the inspector cited it. Judge Manning found that the "respondent used the crane while the damage to the float and outrigger existed...." Similarly, Judge Miller found a violation of this subsection where a faulty brake light had been recorded repeatedly in the pre-use examination book and had been found in service when cited. *Boart Longyear Co.*, 34 FMSHRC 2715 (Oct. 2012).

As the Respondent correctly argues, there is no evidence of "continued operation" as required by the standard and as underscored by cases cited above. The headlights had functioned the day before, the skid loader had not yet undergone its pre-use inspection and it had not been used since its headlights ceased to function. There is no evidence that the operator would have failed to conduct this required inspection identifying the defect and repairing it before placing it into operation. There was no instance in time at which the operator could have known or should have known that the defect existed nor is there any evidence that the loader would have been used again in its defective condition.

For the reasons set forth herein, the citation is VACATED and the matter is DISMISSED.

Priscilla M. Rae
Administrative Law Judge

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