FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-510 A.C. No. 15-02132-311939
v.	
WEBSTER COUNTY COAL, LLC, Respondent	Mine: Dotiki Mine

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Rae

This docket is before me on petition for assessment of a civil penalty filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) (the "Mine Act").

Webster County Coal, LLC, ("Respondent" or "WCC") was cited by Mine Safety and Health ("MSHA") inspector Sparks on November 13, 2012 for several alleged violations, three of which Respondent seeks to have summarily dismissed as a matter of law. The three subject citations allege a violation of mandatory standard 30 C.F.R. §75.1714-7(a) which provides, "[a] mine operator shall provide an MSHA-approved, handheld, multi-gas detector that can measure methane, oxygen, and carbon monoxide to each group of underground miners and to each person who works alone, such as pumpers, examiners, and outby miners."

The citations were issued by Sparks when he observed miners working alone in three different areas of the mine with their multi-gas detectors switched off. The citations note that the operator was cited with this standard several times in the preceding two years. It is the Secretary's position that the operator knew or should have known that the miners were engaging in this pattern of behavior of turning off the gas detectors and should have done more to ensure they were being used properly. Respondent asserts that the operator need only "provide" or furnish the miners with the detectors within the plain meaning of the standard. For the reasons set forth below, I concur with the Secretary's interpretation of the standard and further find additional facts relating to the operator's conduct are necessary to determine whether the violations have occurred. I therefore DENY the Respondent's motion for summary decision.

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)).

There is a paucity of case authority discussing the meaning of the term "provide" as it relates to the cited standard. In an effort to give meaning to the term, Respondent asserts that the Commission has relied upon the plain meaning of a term when not defined by statute or regulation. (Citations omitted.) The plain meaning of "provided", then, can be determined by Merriam-Webster's Dictionary which defines it as "to supply what is needed, to supply for use, to take measures beforehand." WCC asserts that because it gave each miner the detector that functioned properly when tested, it has complied with the regulation. An analogy is made by WCC to the language in mandatory standard 30 C.F.R. §77.1710(g) which states an employee "shall be required to wear" safety belts and harnesses when there is a danger of falling. It cites several cases for the proposition that the Commission has interpreted the language in that standard to mean an operator need do nothing more than have fall protection available for the miners' use. The Respondent has misread these cases. In *Southwestern Illinois Coal Corp.*, the operator had given all miners its safety program booklet, provided a seminar in the use of fall protection and had a disciplinary program in effect for violations of mandatory rules and regulations. The Commission held that it had still violated the standard when a miner was found working at elevation without fall protection. This was because the operator failed to show specific and diligent on-site enforcement action. The Commission stated "when an operator requires its employees to wear belts when needed, and **enforces** that requirement, it has discharged its obligation under the regulation." *Southwestern Illinois Coal Corp*, 5 FMSRHC 1675. (Emphasis added.) None of the remaining cases cited by Respondent holds otherwise.

At heart in determining the proper meaning of terms such as "shall be required to wear" or in this instance "shall be provided" is the overall protective purpose of the Mine Act and the

specific standard at issue. *See The American Coal Co.*, 29 FMSHRC 941 (Dec. 2007) (An escapeway that was not easily accessed from other working areas of the mine was not "provided" within the meaning of the standard.). If the operator were required to do nothing more than hand each miner a multi-gas detector on his first day of employment at the mine, this standard would be a hollow one. The standard is designed to protect miners against being overcome by dangerous gases while working alone and unable to call for help. Miners do not always do what is most prudent when left to their own devices. It is, therefore, the operator's responsibility under the Act and its mandatory standards to provide them with adequate protection from safety and health hazards. It discharges this duty by employing specific and diligent on-site supervision and enforcement action. Whether this obligation was properly undertaken by WCC cannot be determined at this juncture, making summary decision unavailable here. It is a question of fact reserved for a hearing on the merits.[1]

The Respondent's motion for summary decision is DENIED.

Priscilla M. Rae
Administrative Law Judge

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[1] A hearing on this matter has been previously scheduled to commence on April 16, 2014 in Henderson, KY.