

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**MAY 13 2014**

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

v.

ALDEN RESOURCES, LLC,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2013-959  
A.C. No. 15-17691-325489-01

Docket No. KENT 2013-960  
A.C. No. 15-17691-325489-02

Docket No. KENT 2013-563  
A.C. No. 15-17691-313350

Docket No. KENT 2013-118  
A.C. No. 15-17691-331536

Mine: No. 3

**ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION**

Before: Judge McCarthy

These cases are before me upon four Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This matter is set for hearing in London, Kentucky on June 24, 2014.

On April 28, 2014, Respondent filed a Motion for Summary Decision concerning Citation No. 8378384 in Docket No. KENT 2013-960.<sup>1</sup> Respondent alleges that on undisputed facts, the defective lifeline violation of 30 C.F.R. § 75.380(d)(7)(vii) cited in Citation No. 8378384 does not form the basis for an "inadequate pre-shift examinations" violation under 30 C.F.R. § 75.360(b)(1) because it does not involve the presence of methane, lack of oxygen and/or improper airflow, and does not involve hazardous conditions and/or violations relating to the nine mandatory health or safety standards in paragraph 75.360(b)(11). R. Mot., 2.

On May 5, 2014, the Secretary filed a Response in Opposition. The Secretary alleges that the mine's lifeline was missing several components for nine days, that the defective and deficient lifeline was a hazardous condition that exposed miners to fatal injuries, and that mine examiners did not recognize the hazardous conditions and were not performing adequate examinations as required by 30 C.F.R. § 75.360(b)(1). The Secretary argues that 30 C.F.R. § 75.360(b)(1)

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<sup>1</sup> Respondent mistakenly cited Citation No. 8378383 instead of the correct Citation Number 8378384.

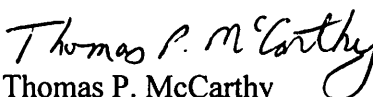
requires Respondent to look for hazardous conditions and not simply for the presence of methane, lack of oxygen and/or improper airflow (and/or the violations of the nine standards referenced in § 75.360(b)(11)), as Respondent contends. Sec’y Opp., 2-3.

Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that: “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, 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.” The Commission has long held that:

Summary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard. Under our rules, a party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law.

*Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) (footnote omitted). It “is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

Genuine issues of material fact and law exist, including the legal issue of whether the Secretary’s interpretation of 30 C.F.R. § 75.360(b)(1) is entitled to *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Accordingly, Respondent’s Motion for Summary Decision is **DENIED**.

  
Thomas P. McCarthy  
Administrative Law Judge

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