

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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December 27, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-1592-M
Petitioner	:	A.C. No. 15-04469-159947
	:	
v.	:	
	:	MINE: Kosmos Cement Co.
CEMEX, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Secretary of Labor;  
Gayle R. Harrison, Safety Manager, Cemex, Inc., 15301 Dixie Highway, Louisville, KY 40272, on behalf of Cemex, Inc.

Before: Judge Rae

This case comes before me on a Petition for Assessment of Civil Penalties filed in accordance with Section 105 (c) of the Federal Mine Safety and Health Act of 1977, the “Act,” 30 U.S.C. §§ 801, et seq. In contest is one §104(d)(1) citation issued in violation of 30 C.F.R. §56.18002(a) of the Act by an Mine Safety and Health Administration (“MSHA) inspector. The case was heard, as proposed by the parties, via telephone on November 4, 2010.

At hearing, the parties proffered that a partial settlement had been reached regarding four additional citations numbered 7750727, 7750728, 7754413 and 7754428. A formal motion for settlement of those charging documents was submitted post hearing proposing civil penalties of \$17,400 for the violations charged therein. I have reviewed the documentation and representations submitted and find that the proposed settlement is acceptable under the criteria set forth in section 110(i) of the Act. Accordingly, an order directing payment of those penalties has been signed and will also be incorporated in this decision.

Findings of Facts- Conclusions of Law

Cemex is a metal/nonmetal cement plant operating full time with four crews, or 155 miners in total. It is characterized as a relatively large mine with annual hours worked between 300,000 and 500,000. TR 17 and Gov. Ex 1. On March 17, 2008, Citation 7750542 was issued to Cemex, Inc. (“Cemex”) for failure by the operator to conduct adequate on-shift examinations

evidenced by a number of violations issued during an inspection conducted the week of March 3, 2008. This citation was issued several days after the inspection by MSHA certified inspector Handshoe who was present during the inspection. He did not testify to having written any of the citations issued during the inspection itself.

### The Citation

Citation No. 7750542 reads as follows:

Persons designated by the operator to examine each working place for conditions affecting safety or health were not observing and reporting obvious hazards. Hazards found during the inspection which were also cited during the past 2 years included: 56.1101, cited 22 times; 56.12018, cited 10 times; 56.20003, cited 15 times. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence by not ensuring an adequate examination was conducted for obvious and apparent hazards. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 1.

The gravity of the violation was assessed as reasonably likely to result in a fatal injury and as significant and substantial.<sup>1</sup> It was also written as a Section 104(d) (1) violation, an unwarrantable failure to comply with a mandatory standard.<sup>2</sup> The operator's negligence level was assessed as high and the proposed fine is \$10,437. Gov. Ex. 2.

The citation was later amended on March 28, 2008 by removing the words "Persons designated by the operator to examine each working place for conditions affecting safety or health were not observing and reporting obvious hazards." The sentence was replaced with the words, "Persons conducting the workplace examinations were not reporting obvious hazards and the operator failed to initiate prompt corrective action."

### The Standard

30 C.F.R. §56.2008(a) provides:

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<sup>1</sup> A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

<sup>2</sup> An unwarrantable failure is aggravated conduct beyond ordinary negligence characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." See *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987) at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); and *Buck Creek Coal Inc. v. MSHA*, 52 F. 3d 133, 136 (7<sup>th</sup> Cir. 1995)(approving Commission's unwarrantable failure test).

(a) 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.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

### The Evidence

Inspector Handshoe, a certified MSHA metal/nonmetal inspector, testified that during the week of March 3, 2008, he was one of several inspectors who conducted a week-long inspection of Cemex's Kosmos Cement Plant. Because he was recovering from knee surgery, he remained on the ground near the office and did not make the physical inspection of the areas requiring climbing or traveling. TR 17. The inspectors held a pre-inspection conference with mine representatives during which they reviewed the on-shift examination reports. These on-shift examination reports are for the purpose of identifying and reporting hazards so that they can be timely corrected. The reports are kept for a period of one year. Handshoe testified that the reports were being made by competent people, as far as he could recall. TR 18-22.

Following the completion of the inspection, the inspectors involved met to discuss their findings and determined that issuing the instant citation was appropriate based upon the nature of the violations issued during the inspection.<sup>3</sup> It was also determined that the citation was appropriate based upon the purported past history of 22 citations for safe access, 10 citations for electrical violations and 15 citations for housekeeping issues over some period of time.<sup>4</sup> TR 28

Handshoe testified that "some violations" were issued for hazards not reported on the on-shift examination reports. He explained the nature of the violations as some being for "spillage", "safe access," "electrical" and "housekeeping issues" that were obvious, in his opinion. TR 22. He described the location of the spillage violations in more detail as follows:

"At work platforms, on walkways, elevated walkways, tunnels, just different locations. And without my – the citations, I couldn't give you exact locations. But spills can occur

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<sup>3</sup> The Secretary did not introduce any of the citations issued during the March 3-7, 2008 inspection into evidence or the inspectors' notes.

<sup>4</sup> The Secretary did not introduce a mine history report for the time period prior to March 2008.

at any place, any time, and that needs to be addressed and found during workplace examination. (Sic.). That way, it can be reported and corrected.”

TR 23.

When questioned concerning his belief that the spillage at “some locations” was obvious and not corrected during the shift in which they occurred, he said it was based upon “the amount of spillage at some of the locations...it was obvious that some of the spillage had taken place over a period of time...maybe a couple of days, two or three days.” In support of his belief that the condition existed for more than one shift, he stated that there were footprints in some of the areas where spillage was found. He was unsure of whether the areas in question were traveled regularly but concluded that generally at “any given time, any place in the plant could be accessed at any time” for some purpose. This was sufficient in his mind to determine what exposure to miners this condition posed. TR 23-24. Other violations Handshoe described as the “main issue” were related to safe access and housekeeping located in “tunnels” or on “elevated walkways” of which there are many in a mine of this size. TR 29. In “some places” there was a danger of rocks falling off the raised platforms. TR 32. The exposure to such hazards was quantified as being that “anybody could walk anywhere at any given time... so anybody could walk anywhere during any time that day or shift, the weekend shift.” TR 31.

The type of injury Handshoe anticipated from the spillage, safe access and housekeeping violations found during the inspection would be a sprained ankle or broken wrist. He felt it was reasonably likely to occur because “it was more reasonably likely than not for them to cause an injury than not to cause an injury.” TR 34. He said he marked the gravity on the “bulk” of the citations issued, as well on this instant citation, as “fatal” based upon the fact that “usually, when I mark ‘fatal’ on something like this, the majority of the citations that were issued that could have been found with a workplace examination are more likely than not to cause a fatal injury than not.” When asked, “would that be related to some of the electrical violations that you found?” he answered, “correct.” TR 34. He assessed the negligence level of the operator for the instant citation as “high” because the hazards cited during the inspection were obvious and should have been recorded and reported in a timely manner. TR 35. The basis for his belief that management had notice of the inadequate inspections was “just the numerous obvious hazards that were detected or observed during this inspection.” TR 37. Handshoe stated the inspectors “didn’t turn over no rocks “ (sic) to find the violations for which they issued citations. TR 26-27.

On cross-examination, Handshoe could not recall whether there were three or four inspectors present and he had not reviewed his notes and did not have other inspectors’ notes to refresh his recollection. When asked to indicate where in the standard the adequacy of an inspection is mentioned, he responded that the citation was modified to state that persons conducting the examinations were not reporting obvious hazards and not initiating prompt corrective action. TR 46. Finally, he acknowledged that the standard does not determine the adequacy of the examination. TR 47. When asked if Cemex was reporting hazards in their on-shift examination reports, the following exchange took place:

Q. But they had been reporting hazards, though, right?

A. You know.. and I'm sure I made copies, and I don't have those copies in front of me, Gayle, so I can't really....

Q. But if you did not find any hazards listed...hazards listed, or if you did not find any record that even the inspection had been... had been completed, you would have reacted, though, to that, would you not?

A. I probably would have.

Q. And what would have been your reaction?

A. But I don't have anything in front of me, so I can't...

Q. Well, what would have been your reaction had you found out?

A. Had I found out what now?

Q. Had you found that they had not been completed, nothing listed; in other words, it was a blank sheet of paper.

A. Well, then, if it was a blank sheet of paper, then I would have written a citation for not completing workplace examination. (Sic)

Q. And understandably so. But you didn't find that, because we had done that, right?

A. Okay. Evidently, yes.

TR 48-49.

Jesse McCoy, a processor for Cemex who is responsible for making safety rounds in the mine, testified that he records all safety hazards that he finds when doing his on-shift examinations. TR 63.

### Discussion

The Secretary's evidence in this case fails to meet the requisite burden of proof to support this citation. There is a fatal paucity of evidence present upon which to find that any hazards existed at the time the on-shift examinations were conducted. The mere fact that conditions existed at the time of the inspection is insufficient evidence from which to infer the conditions existed at the time of the on-shift examination or that the operator knew or should have known of their existence.

Inspector Handshoe was neither the issuing inspector nor did he have the issuing inspector's notes or citations when testifying. His hearsay testimony lacked specificity as to what standards were violated, where the violations occurred. His only description was in various "tunnels," or "elevated walkways" of which there were many at this mine. He indicated there were "some" violations of a "housekeeping" nature and "some" electrical and safe access issues.

He referred very vaguely to spillage that existed at the time of the inspection that he believed existed for at least one shift because of its depth and the fact that there were footprints in it. However, there were no specific facts provided with regard to who cited it, where it was located, whether measurements were taken of the spillage, what type of material it was, what sort of work had been done in that area and when in order to determine when the material might have spilled, when management knew or should have known about it, what discrete safety hazard it posed or how many miners were exposed to it or when corrective action was initiated. There was no evidence of whether it was in an active part of the mine or how many, or how often, any miners had been in that area. The same lack of evidence exists for the remainder of the alleged conditions underlying the issuance of this citation. While it might be inferred that the spillage on an elevated walkway was the basis for housekeeping as well as safe access violations, there was no evidence presented on what electrical violations were found which Handshoe testified were the basis for a fatal injury. Furthermore, the on-shift examination reports were not submitted pertaining to the areas in question to prove that these conditions were unreported as alleged.

Because none of the underlying violations issued during the March 3, 2008 inspection were adjudicated at the hearing, and are still unsettled, there is no basis to conclude that there were standards violated or whether the operator knew or should have known of any violations prior to the inspection.<sup>5</sup>

The alleged past history of violations provides no greater support for the Secretary's theory that the discovery of obvious violations in March in any way served to put the operator on notice that they were conducting inadequate on-shift inspections in support of this section 56.18002(a) citation. The Secretary did not introduce the mine history of violations prior to March 2008. Inspector Handshoe testified that the mine had received a number of citations for housekeeping, safe access and electrical violations in the past. These categories are so broad and can relate to so many different situations that the numbers alone have no useful evidentiary value. For instance, there is no evidence that any past violations were for the same sort of spillages, or for repeatedly failing to maintain toe boards on elevated walkways. There is no evidence that any prior violations were for failure to recognize or report obvious hazards or for failure to initiate corrective action on any prior violation. Because the testimony was sparse as to the exact nature and location of the violations found during the March inspection, and no information regarding the specifics of the past violations was provided, it cannot be determined that they were of a similar nature or occurred under similar circumstances. Furthermore, the prior violations presumably were abated in a timely manner and therefore the operator would have just cause to believe their remedial steps eliminated those prior conditions. There was no evidence that any failure to report a hazard was discussed with the operator in the past to put them on notice their on-shift examinations needed greater attention. The qualifications of the examining employee were not questioned and Handshoe admitted that Cemex was conducting the inspections. Therefore, no greater notice for failure to report obvious hazards can be imposed upon Cemex based upon a past history of individual violations in this case.

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<sup>5</sup> The violations settled by the parties addressed herein were issued at an inspection conducted four months later.

It is unclear from the record whether the Secretary sought to support the assessment of an unwarrantable failure with the past history of violations. However, for the same reasons as discussed above, that assessment is unsupported by the record. In order to find an unwarranted failure there must be sufficient evidence of aggravated conduct beyond mere negligence such as reckless disregard or intentional misconduct. *Emery Mining Corp.*, supra. The relevant factors in determining whether a violation is unwarrantable are the extent of the violative condition, the length of time that it existed, the operator's efforts at abating the condition, whether the operator has been placed on notice that greater efforts are needed for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious and whether the violation poses a high degree of danger. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001); *San Juan Coal Co.*, 29 FMSHRC 125 (March 2007). Assuming that Cemex was failing to report obvious hazards on their examinations, and assuming the "adequacy" of the examination is contemplated by the standard, there is no evidence as to the length of time this failure existed, what actions the operator took to correct the condition, whether the operator has ever been cited for a failure to report hazards before, or whether the issue has ever been discussed with the operator in the past to put them on notice of a need to take greater care in performing the examinations. Thus, I find that even if the inadequacy of the examinations violated § 56.18002(a) in this case, the assessment of an unwarrantable failure is not substantiated.

I find, however, case law and the Secretary's Program Policy Manual further undermine the Secretary's position that the inadequacy of the examination alone justifies the § 56.18002(a) citation. As Judge Manning stated in a case essentially identical to this one, "that fact that five citations were issued citing visible safety problems is too slender a reed on which to hang a violation of section 56.18002(a)." *Dumbarton Quarry Association v. SOL*, *SOL v. Dumbarton*, 21 FMSHRC 1132 (Oct. 1999). Judge Manning further referred to the Secretary's Program Policy Manual concerning §56. 18002 which states "although the presence of hazards covered by other standards may indicate a failure to comply with this standard, MSHA does not intend to cite § 56.18002 automatically when the Agency finds as imminent danger or a violation of another standard." *Program Policy Manual*, Volume IV, Subpart Q, <<http://www.msha.gov/reg/complain/ppm/pmvol4e.htm#77>>.

In another similar case involving the issuance of alleged obvious safety violations as the basis for a § 56.18002 citation, Judge Hodgdon found that the standard is violated only if examinations are not being conducted or corrective action is not being taken as neither the regulation nor the Program Manual mentions "adequacy" in the language. *SOL v. Lopke Quarries, Inc.*, 22 FMSHRC 899 (July 2000). Acknowledging "while there may be cases where the violations are so obvious and so egregious that a finding that §56.18002(a) was violated is appropriate" citations for unsafe access, electrical issues and fire extinguisher problems did not present such egregious violations. Judge Weisberger interpreted the language of the standard in the same way as Judge Hodgdon in *SOL v. TXI Port Costa Plant*, 22 FMSHRC 1301 (Nov. 2000) in a case involving a 6" deep accumulation of material with no evidence presented regarding who traveled in the area or how frequently so as to make the safe access violation an appropriate basis for issuing a § 56.18002(a) citation.

I agree with my colleagues. There may be situations in which a hazard or danger is so patently obvious and so egregious that the failure to report it is tantamount to a failure to conduct an on-shift examination. Finding such a situation could justifiably trigger a § 56.18002(a) violation for inadequate examinations as contemplated by the Program Policy Manual. In this case, however, there is no evidence from which to infer the violations, which are so vaguely described by the inspector, are of such an egregious nature.

### **Order**

Based upon the foregoing, Citation No 7750542 is hereby vacated. Pursuant to the motion for partial settlement filed herein, Cemex, Inc. is directed to pay additional civil penalties of \$17,400 within 40 days of the date of this decision on Citation Nos. 7750727, 7750728, 7754413 and 7754428.<sup>6</sup>

Priscilla M. Rae  
Administrative Law Judge

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<sup>6</sup> Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.