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May 14, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. CONMAT, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-9-M A.C. No. 11-00012-332726 Mine: Spread 4

ORDER DENYING CONMAT'S MOTION FOR SUMMARY DECISION & ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The case involves one 104(a) citation issued to Conmat, Inc. on February 23, 2011.

On March 13, 2014 the parties participated in a conference call with the undersigned.[1] The parties represented to the court that a dispute of fact did not exist, and that the case rested on an interpretation of law. To that end, the parties agreed that the issue could be decided on cross motions for summary decision. On March 28, 2014 Conmat filed its Motion for Summary Decision ("Conmat Mot.") and Memorandum in Support ("Conmat Memo") pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67. The Secretary filed his Motion for Summary Decision ("Sec'y Mot.") on April 11, 2014. For reasons set forth below, Conmat's Motion for Summary Decision is **DENIED**, and the Secretary's Motion for Summary Decision is **GRANTED**.

I. BACKGROUND AND STATEMENT OF UNDISPUTED MATERIAL FACTS

On June 3, 2013 Gordie Pearce task trained a miner on two pieces of equipment at Respondent's mine. Pearce noted the trainings on a task training form, then signed and dated the form on the line reserved for the "[s]ignature of person responsible for health and safety training[,]" which was located immediately below a statement which read: "I certify that the

[1] During the call the court informed the parties that it would obtain a transcript of the call. The transcript was received by the court on March 18, 2014. For purposes of this order the transcript is cited as "Call Tr."

above training has been completed[.]" Jt. Ex. 1.[2] While Gordie Pearce was competent to perform the task training, he was not designated in the mine's Part 46 MSHA-approved training plan as an individual responsible for health and safety training.

On June 25, 2013, Inspector Eric W. Crum with the Department of Labor's Mine Safety and Health Administration issued Citation No. 8741693 under section 104(a) of the Act for an alleged violation of 30 C.F.R. § 46.9(b)(5). The citation alleges the following:

> The task training form for one new miner was not signed by a person designated as responsible for the health and safety of the miners in the mine[']s part 46 training plan. The task training was signed by Gordie Pearce but the three people designated in the plan [as responsible for health and safety training] did not include Gordie Pearce.

Inspector Crum determined that this violation had no likelihood of contributing to injury or illness of a miner, and that, should an injury occur, it could reasonably be expected to result in no lost workdays. He determined that the violation was not significant and substantial ("S&S"), that no persons were affected, and that the violation was a result of low negligence on the part of the operator. The Secretary proposed a penalty of $100.00 for this citation.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

a. Conmat's Argument

Conmat argues that it is entitled to summary decision as a matter of law, and that Citation No. 8741693 should be vacated. The regulations require that task training need only be certified by a designated person once every twelve months. Twelve months had not elapsed since the task training occurred and, therefore, the citation was prematurely issued. Call Tr. 2.

According to Conmat, the task training for the new miner was "in progress." *Id.* at 3. Conmat therefore argues that it should have twelve months to certify that the training had been completed. *Id.* Task training is "not a one-shot deal;" Conmat envisions training a miner "one day on three or four things and then a week later you can be task trained on some more." *Id.* at 5. The twelve-month certification timeline is consistent with this reality. "[T]hat's why there's 20 spots on [the task training worksheet] to fill in all the task training." *Id.*

Conmat contends that its interpretation of the standard is justified by MSHA's Program Policy Manual. The manual states that "[a] 'record' of task training must be made at the

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[2] Conmat included pictures of the task training form in its motion, however, the form was unreadable due to the poor quality of the printed pictures. On May 5, 2015, the Secretary, after conferring with Respondent, emailed digital pictures of the training form to the court. This document has been marked Jt. Ex. 1. A printed version of the exhibit has been included in the file.

completion of new task training. New task training records must be 'certified' at least once every 12 months, or upon request by the miner." Conmat Memo Ex. RX-11. The Compliance Guideline for MSHA's Part 46 Training Regulations includes identical language, written in response to the question "Does task training have to be recorded and certified each time you train an employee in a specific task?" *Id.* at Ex. RX-6.

According to this interpretation, "recording" and "certifying" each miner's training is intended to be a two part process involving separate and distinct responsibilities. Conmat Memo 6. Part one requires operators to *record* the training, by written record, on a form of the operator's choosing. *Id.* Part two requires operators to *certify* the training, at least once every twelve months. *Id.* Conmat argues that it did not violate section 46.9(b)(5) by failing to certify the training because the certification need only be made within one year of the training. 30 C.F.R. § 46.9(d)(3). The citation was issued twenty-two days after the safety training was recorded, and long before the expiration of the twelve month period during which the operator had to certify the record.

b. Secretary's Argument

The Secretary argues that there are no genuine issues as to any material fact and that the citation should be affirmed because the individual who certified the record was not listed in the mine's training plan. The plain language of section 46.9(b)(5) requires an individual who certifies a miner's training form to be "designated in the MSHA-approved training plan for the mine as responsible for health and safety training." Sec'y Mot. 6-7. Gordie Pearce, who is not listed in the mine's approved training plan as someone who is "responsible for health and safety training," signed the miner's training form in the space clearly reserved for the signature of the individual who certifies the training. *Id.* at 4. Pearce's signature constituted an improper certification of the miner's task training form and, accordingly, a violation of section 46.9(b)(5). *Id.* at 4-5.

Even if the plain language of the standard is ambiguous, deference should be afforded the Secretary's reasonable interpretation that Pearce's signature constituted a violation of section 46.9(b)(5). *Id.* at 7-8. If Conmat's argument were accepted, i.e., that a violation is premature until the expiration of the twelve month window, then the signing of the form would have no effect until the twelve month period expired. *Id.* While mine operators do have twelve months to certify task training, certification can occur prior to the expiration of the twelve month period. *Id.* at 5-6. The twelve month period set forth in section 46.9(d)(3) is the maximum time allowed before certification of task training is required. *Id.* at 6. Here, Pearce certified the miner's training form, albeit improperly, the same day the training occurred. MSHA inspectors cannot be expected to decipher whether the individual who signed the signature line to certify a record intended to certify the record. *Id.* at 5. Given Congress' "deep concern over the problem of poorly trained miners," mine operators' responsibility to conduct training and maintain proper records, and MSHA's reasonable expectation that the records and certificates presented to its inspectors will be correct, deference should be afforded the Secretary's interpretation. *Id.* at 7-9.

III. DISCUSSION

Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answer 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.

The parties agree that there are no genuine issues as to any material fact and that this matter should be decided based on the information presently before the court. This case presents questions of regulatory interpretation regarding section 46.9 of the Secretary's regulations, which is titled "Records of training." While Conmat argues that the training form was only a "record" of training, and that the citation was issued prematurely, the Secretary asserts that the form was "certified," albeit improperly, and that a violation existed. For reasons that follow, I agree with the Secretary and find that Pearce's signature constituted an improper certification of the miner's task training in violation of section 46.9(b)(5).

The Commission has explained that, with regard to regulatory interpretation, "'the language of a regulation ... is the starting point for its interpretation.'" *Mach Mining*, LLC, 34 FMSHRC 1769, 1773 (Aug. 2012) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987)). Further, "[w]here the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Id.* (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) and *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)).

The citation in this case was issued for an alleged violation of section 46.9(b)(5) of the Secretary's regulations, which requires that safety training forms include "[a] statement signed by the person designated in the MSHA-approved training plan for the mine as responsible for health and safety training, that states 'I certify that the above training has been completed.'" 30 C.F.R. § 46.9(b)(5).

The plain language of section 46.9(b)(5) clearly states that only individuals designated in the mine's approved training plan may certify a miner's completion of training by signing a statement that reads "I certify that the above training has been completed." This much does not seem to be in dispute. However, the parties are at odds over whether the particular training form presented to the inspector had been certified.

I agree with Conmat that the regulations and MSHA guidance materials differentiate the creation of a "record" of training from the "certification" of the record of training. Section

46.9(c) requires that a "record" of training be created "[u]pon completion of new task training[.]" 30 C.F.R. § 46.9(c). The record must include the name of the miner being trained, the type of training, the duration of training, the date of training, the name of the trainer, the name of the mine or independent contractor, the MSHA mine identification number, the location of the training, and a statement regarding false certification of the record. 30 C.F.R. §§ 46.9(b)(1)-(4). Proper "certification" of the training occurs when a statement reading, "I certify that the above training has been completed" is signed by an individual designated to do so in the mine's MSHA-approved training plan. 30 C.F.R. § 46.9(b)(5).

The Secretary's regulations do not specify a particular form that must be used to record and certify training and, rather, only require that, in creating the record and certification, certain specific information is provided on the document. 30 C.F.R. §§ 46.9(a) and (b). Given the flexibility afforded mine operators as to how to record and certify training, it is certainly reasonable to expect operators to familiarize themselves with the form they choose to use. Respondent chose to use the form depicted in Jt. Ex. 1.[3] There is no evidence in the record that MSHA required the use of this form, or that Respondent was unfamiliar or confused by the form.

The form, in its blank state, provides input space for all of the information required by 30 C.F.R. §§ 46.9(b)(1)-(3). Further, it includes the required statement regarding false certification required by 30 C.F.R. § 46.9(b)(4). Finally, and as particularly relevant to this analysis, the form includes a statement which reads "I certify that the above training has been completed," followed by a signature line for the "[s]ignature of the person responsible for health and safety[.]" The statement and signature line are clearly intended to satisfy the requirements of 30 C.F.R. § 46.9(b)(5), which outlines what is necessary to properly certify a miner's training record.

It appears that Pearce correctly provided the information required by sections 46.9(b)(1) through (b)(3). *See* Jt. Ex. 1. I agree with Conmat that this information, along with the statement regarding false certification, created a "record" of training. However, I disagree with Conmat that the record of training was not "certified."

Pearce's signature constituted an improper certification of the miner's training record. While Respondent argues that Pearce's signature and date below the statement that "I certify that the above training has been completed," on a signature line for the "[s]ignature of the person responsible for health and safety[,]" is without effect and does not amount to a "certification" of the record, I find to the contrary. I agree with the Secretary that, absent the signature, a violation would not have existed. The statement and signature line for the designated individual have little meaning when a signature *is not present*. Contrarily, the statement and signature line, which is explicitly reserved for a designated individual, must have meaning when a signature *is present*.

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[3] Respondent makes passing reference to the training form being in the private possession of the miner at the time the inspector observed it, and not in the possession of an agent of the mine. While Respondent asserts that the form was "not purported to be certified by CONMAT" it acknowledges that the form "was in fact a record[.]" Conmat Memo 6. While Conmat does not explicitly argue that a difference exists between records in the possession of an agent of the mine and those in the private possession of its employees, given its acknowledgement that the form was, at a minimum, a "record," I need not address the issue.

Pearce's signature was a representation, or in this case a misrepresentation, that he "certified that the . . . training had been completed" and was "the person [designated in the mine's approved training plan as] responsible for health and safety."

I agree with the Secretary that MSHA inspectors cannot be expected to deduce the intent of an individual who signs a training form in an area which is clearly intended to be signed by the individual certifying the training. Moreover, given the strict liability imposed by the Mine Act, neither the inspector nor the court need reach the issue of whether Pearce intended, or meant, to certify the form. However, based upon the record evidence before me, and my conversations with the parties, I do not believe that the signature was an overt attempt by Pearce or the Respondent to avoid compliance.[4] Rather, I am inclined to believe that Respondent had a good faith belief that it was complying with the regulations. After all, the parties agree that this was simply a paperwork violation, from which no apparent benefit could be derived by the operator for violation of the standard. While the violation can seemingly be chalked up to simple mistake on the part of Respondent, the fact remains that the purpose of the statement and signature line is to certify the training. To find otherwise would fly in the face of the plain language of both the cited standard and the form chosen by the operator. Accordingly, I find that Pearce's signature amounted to an improper certification of the training form in violation of section 49.6(b)(5).

The Respondent argues that the citation was prematurely issued given that the Secretary's regulations afford twelve months for the designated person to certify the training. The Respondent relies upon section 46.9(d)(3), which states that the operator "must ensure that all records of training . . . are certified under paragraph (b)(5) of this section and a copy provided to the miner . . . [a]t least once every 12 months for new task training, or upon request by the miner, if applicable[.]" 30 C.F.R. § 46.9(d)(3). Respondent avers that, given twelve months had not elapsed since the time of training, time remained for one of the three individuals designated in the approved training plan to correctly certify the training. I find no merit to this argument.

The regulation is clear and requires that a record of training be certified "*at least* once every 12 months for new task training." (emphasis added). I have already found that the task training form was certified, albeit by a person not qualified to do so. The standard requirement for certification "at least once every 12 months" is a baseline/minimum for certification of task training. While operators need only certify the training once every twelve months, they are free to, and for that matter probably encouraged to, do so more often. Here, Gordie Pearce improperly certified the training form the same day the task training occurred. Pearce's improper certification, which was presented to the inspector by the miner who had been trained by Pearce, amounted to a violation at the time the inspector issued the citation. Given this finding, I need not speculate on the issue of whether a subsequent signature and certification by one of the individuals designated in the approved plan would have avoided a violation had the appropriate person signed the form at a time prior to the inspector viewing the form.

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[4] The Secretary has made no allegation that Pearce's action rose to the level of a "false certification" contemplated by 30 C.F.R. § 46.9(b)(4).

Consistent with my above analysis, I find that the text of the regulation is clear and that the terms of the relevant provisions, when applied to the facts of this case, require that the fact of violation be upheld.[5] In addition, I affirm the Secretary's findings regarding gravity, all of which are already at the minimum, as well as his negligence finding. While Conmat asserts that it was not negligent, Conmat Memo 2, its argument is based entirely on its assertion that there was no violation. Given that I have already found a violation, and based upon my review of the information before me, I affirm the Secretary's "low" negligence designation.

IV. ORDER

Conmat's Motion for Summary Decision is **DENIED**. The Secretary's Motion for Summary Decision is **GRANTED**. Citation No. 8741693 is **AFFIRMED** as issued. Conmat is **ORDERED TO PAY** the Secretary of Labor $100.00 within 30 days of the date of this order.

Margaret A. Miller
Administrative Law Judge

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[5] In the unlikely event that some ambiguity could be read into the pertinent language of section 46.9, I would find that the Secretary's interpretation is entirely reasonable and logically consistent with both the language of the text and intent of the standard. *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001).