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. WEST 2012-0894-M A.C. No. 02-00112-287258 MWX
v.	
MARCO CRANE, Respondent	Mine: Freeport McMoRan Miami Inc.

DECISION GRANTING SUMMARY DECISION
DISMISSAL ORDER

Before: Judge Gill

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This case concerns a single 104(a) citation, Citation No. 6585510, and was originally set for hearing on October 1 and 2, 2013.

PROCEDURAL HISTORY

On August 9, 2013, the Respondent, Marco Crane, filed a motion for summary decision. The Secretary of Labor opposed this motion and filed a memorandum in response on August 23, 2013. After reviewing the pleadings, I determined that the citation was issued under the wrong standard. The Commission's case law suggested that the most appropriate response would be to order the Secretary to show cause why the citation should not be amended. The hearing was continued, and the Secretary was ordered to show cause as to why the citation should not be modified from a violation of 30 C.F.R. § 56.16007(b) to a violation of 30 C.F.R. § 56.14100(c) by filing a written explanation with the court. In the order to show cause, I indicated that I was inclined to grant the operator's motion for summary decision if the citation was not amended. The Secretary responded to the order, and Marco Crane requested and was granted permission to file a reply to the Secretary's response.

UNDISPUTED FACTS

Marco Crane, a crane company, was providing general hooking and hoisting services to the Freeport McMoRan Miami Inc. mine, when it was cited for a violation of 30 CFR § 56.16007(b) on February 28, 2012. Section 56.16007(b) requires that hitches and slings used to hoist materials shall be suitable for the particular material handled. The inspector issued a

citation after finding two frayed slings among the items stored in the storage compartment of a flatbed truck trailer during his inspection. The inspector did not observe the damaged slings being used during his inspection, and he destroyed them after issuing the citation. The trailer where the slings were stored was not capable of hoisting materials. The slings were not in use during the inspection, and the truck was not being used to hoist anything.

THE PARTIES' ARGUMENTS

In his response, the Secretary declined to seek leave to modify the citation. Instead, the Secretary argues that the cited standard was the appropriate standard. He contends that the phrase "used to hoist materials" was included to clarify that 30 C.F.R. § 56.16007(b) applies to slings that are intended for the purpose of hoisting material, as opposed to slings meant for other purposes, and that the standard does not require a defective sling to be hoisting material during an MSHA inspection for a violation to occur. Finally, the Secretary argues that the inspection reveals that the defective slings were used by the Respondent to hoist material.

In its reply to the Secretary's response, Marco Crane argues that the phrase "used for hoisting" means that the slings in question must be in use, or at least have been used, before a citation can be issued, and the record does not support that the slings were "intended to be used" or "damaged from use." The operator further argues that the Secretary's interpretation of the regulation makes it virtually impossible to comply with the standard, and that the Secretary has provided neither justification for deference to its interpretation nor notice of its intended interpretation.

ANALYSIS

The granting of motions for summary decision by a Commission ALJ is governed by Commission Rule 67, 29 C.F.R. §2700.67. This rule states that 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.

As discussed in the order to show cause, I find that there are no contested issues of material fact in relation to the citation at issue. This satisfies the first requirement of the summary decision standard.[1] Because that part of the standard has been satisfied, I must examine whether the moving party is entitled to summary decision as a matter of law. For the reasons discussed below, I find that the undisputed facts in the pleadings, read in the light most favorable to the Secretary, are not sufficient to prove a violation of 30 C.F.R. § 56.16007(b).

The citation at issue, Citation No. 6585510, was issued as a violation of 30 C.F.R. § 56.16007(b). This regulation states that "[h]itches and slings used to hoist materials shall be suitable for the particular material handled." 30 C.F.R. § 56.16007(b). The interpretation of this

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1. The Secretary argues that Marco Crane's denial of a request to admit that the defective slings were not tagged out of service constitutes a disputed issue of material fact, but that is not a material fact under the standard at issue here.

citation is disputed by the parties, with the conflict centered around the phrase "used to hoist materials."

Commission case law states that if the meaning of a regulatory provision is plain, the provision should be interpreted so as to give effect to that plain meaning. *Exportal Ltd. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). When "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." *Martin Cnty. Coal*, 28 FMSHRC 247, 255 (May 2006). In determining whether a provision's meaning is plain, courts apply all of the traditional tools of interpretation, including both the language of the particular provision at issue and the language, structure, and purpose of the statutory scheme as a whole. *Tacoma, Wash. v. FERC*, 331 F.3d 106, 114 (D.C. Cir. 2003); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001). If the regulation is ambiguous, the Court will defer to the Secretary's interpretation of the regulation unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

To prove a violation of 30 C.F.R. § 56.16007(b), the Secretary would have to present evidence of 1) use of a hitch or sling 2) to hoist materials. The Secretary would then have to present evidence that 3) the sling is inappropriate for the particular materials handled. This gives effect to the full text of the regulatory provision and is reasonable in the context of the regulatory scheme. There is potential ambiguity in that the regulation does not specify past, present, or future use, but the remainder of the provision indicates that something more than mere availability for use is meant. The word "particular" is key in this analysis, as it is impossible to know whether the slings are "suitable for the particular materials handled" absent evidence that the slings have actually been, or will actually be, used to hoist materials. Thus, an interpretation that reads actual use out of the regulation is erroneous. The reading proposed by the Secretary, stating that actual use is not required and that "slings used to hoist materials" means slings that are generally intended for the purpose of hoisting materials, as opposed to other types of slings, is plainly inconsistent with the regulation.[2]

The Secretary's interpretation of the provision is problematic because would have far-reaching results that are inconsistent with the regulation. The Secretary's concern with potential, inadvertent use of inappropriate slings features heavily in his response to the order to show cause. He explains that the Respondent was cited because worn out slings were found in a storage compartment with other slings. Because these slings were of a type that are generally "used to hoist materials" and were stored with other, undamaged slings, the Secretary fears that an inattentive miner could potentially retrieve and use a damaged sling for hoisting. This is a valid concern, but it is not the type of hazard that this regulation is intended to address.

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2. The Secretary misconstrues the Court's interpretation of the standard, arguing that under the Court's interpretation, an operator could only be cited for a violation of 30 C.F.R. § 56.16007(b) if an MSHA inspector observed damaged or otherwise improper slings in use during an inspection. This is not the case. Witness testimony or circumstantial evidence could be used to establish that a sling is not suitable for the material it is, was, or would soon be used to lift.

The Secretary's proposed interpretation only makes sense in the context of slings that are inappropriate for use because they are damaged. Different types of slings are appropriate for different types of lifts. If several types of slings are available in an operator's on-site supply storage areas, it is also possible that an inattentive miner could select the wrong type of sling to lift a load. Thus, under the Secretary's version of the regulation, an operator could be cited for simply having multiple different types of slings available. This is an absurd result. Requiring that slings be appropriate "for the particular material handled" suggests that Section 56.16007(b) contemplates the on-site availability of multiple different types of slings. This further supports the proposition that the regulation is concerned with the actual use of slings that are inappropriate for the particular material handled, not the mere availability of inappropriate slings.

The overall structure of the statutory scheme also counsels against the Secretary's interpretation. The Secretary's concern with the potential for inadvertent use of damaged slings is addressed under a different standard. Section 56.14100(c) requires that "[w]hen defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected." 30 C.F.R. § 56.14100(c).[3] The fact that this provision addresses the hazard posed by the availability of damaged equipment, which would include damaged slings, further indicates that the cited standard, 30 C.F.R. § 56.16007(b), was not meant to deal with that specific hazard. A citation under this standard would address the risk of inadvertent use that the Secretary has identified, and Citation No. 6585510 should have been modified accordingly.

Having established that this citation requires something more concrete than the mere availability of inappropriate slings, I find that the Secretary cannot prove a violation of the cited standard based on the facts in the record. In addition to discussing the risk of accidental use, the Secretary states that there is evidence that the damaged slings had actually been used in violation of the regulation. In support of this contention, the Secretary states that

> "Respondent is a crane company that uses slings to lift heavy objects. At the time of the inspection the lifting involved the rebuilding of haul trucks and other equipment. The worn slings at issue in this case were found in a box with undamaged slings in the toolbox on a flatbed truck. The slings were damaged from use. They did not become damaged sitting in the toolbox."

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The Secretary expects me to infer, based on the fact that that the damaged slings had been found in a toolbox in one of Marco Crane's flatbed trucks, that the slings had been used to hoist materials. This is not an unreasonable inference, but it is only the first step in a longer chain of inferences that I would have to make in order to conclude that a violation occurred. In addition

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3. I note that because there is a factual dispute over whether the slings had been tagged out or otherwise taken out of service, a citation under this standard would survive a motion for summary judgment based on the pleadings.

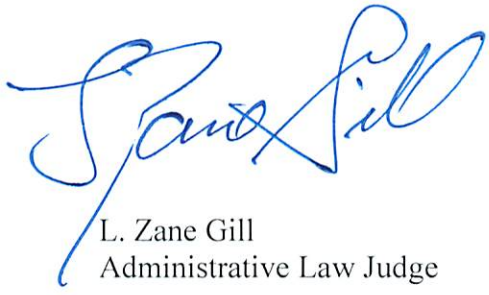
to concluding that they had been used to hoist materials, I would have to conclude either that the damage was caused by inappropriate use instead of normal wear and tear, or that the slings had been used in their damaged state. In this case, however, the sling was found in a storage compartment in a truck that both parties admit was incapable of hoisting anything at all on the day of the inspection. The Secretary has presented no additional evidence with regard to what materials the slings had been used to hoist, which makes it unreasonable for me to reach either one of those conclusions. Moreover, there is no evidence whatsoever that the slings would actually be used in the future.

The regulations promulgated under the Mine Act are intended to protect the safety and health of miners, and as a Commission judge I have a duty to do the same. I also have a duty to interpret and apply these regulations fairly and correctly, and to hold the Secretary to his burden of proof. It would be inappropriate to stretch and twist the plain meaning of a regulatory provision so that the Secretary can prove a citation that was issued under the wrong standard, but that is what the Secretary is asking me to do. This request is especially problematic in light of the availability of a much more appropriate provision and the explicit opportunity I provided to amend the citation.

Reading the undisputed facts in the light most favorable to the non-moving party, I find that a reasonable finder of fact could not determine that the Secretary has proved a violation of 30 C.F.R. § 56.16007(b). Wherefore, the operator's motion for summary decision is **GRANTED**.

ORDER

Wherefore, it is **ORDERED** that Citation No. 6585510 is **VACATED** and Docket No. WEST 2012-0894-M is **DISMISSED**.



L. Zane Gill
Administrative Law Judge

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