FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 6, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HANSON AGGREGATES NEW YORK, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. YORK 2013-66-M A.C. No. 30-01283-310585 Mine: St. Johnsville Plant

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Appearances: Emily O. Roberts, Esq., U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

David P. Kurz, Hanson Aggregates New York, Inc., Jamesville, New York, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 815(d). An authorized representative of the Secretary, on behalf of the Mine Safety and Health Administration ("MSHA"), issued Citation No. 8708748 to Hanson Aggregates New York, Inc. ("Hanson" or "Respondent") for a violation of 30 C.F.R. § 46.9(b) because Hanson did not list the names of the training instructors or the duration of the training on MSHA Form 5000-23. Hanson, which is *pro se*, timely contested the citation and the case was assigned to me for disposition. The parties have jointly stipulated to the facts and filed cross-motions for summary decision.

I. STATEMENT OF THE CASE

Rather than hold a hearing, representatives for the Secretary and Hanson agreed that the facts in this matter were not in dispute and the case could be disposed through summary decision.

The parties jointly filed Stipulated Facts, then each filed cross-motions for summary decision. In addition, the Secretary filed a reply to Respondent's motion.[1]

The Secretary asserts the following: (1) that 30 C.F.R. § 46.9(b) requires operators using MSHA Form 5000-23 to include the information listed in section 46.9(b)(1) through (b)(5); and (2) that the plain language of the regulation and other explanatory materials provided fair notice of these requirements to Hanson. (Sec'y Mem. at 3–8; Sec'y Reply at 1–2.) Hanson contends that 30 C.F.R. § 46.9(a) limits the application of section 46.9(b) to forms other than MSHA Form 5000-23. (Resp't Mot. at 1–2.) Hanson also disputes the reasonableness of the Secretary's interpretation because MSHA Form 5000-23 does not provide spaces for the information required by section 46.9(b). (*Id.* at 2.) Further, Hanson claims it did not receive fair notice because MSHA inspectors did not bring the regulation to its attention prior to issuing Citation No. 8708748. (*Id.*) Finally, Respondent argues that MSHA Form 5000-23 does not provide fair notice because it does not explain that the information listed in section 46.9(b) is required. (*Id.*)

II. ISSUES

The issues before me are as follows: (1) whether 30 C.F.R. § 46.9(b) requires operators to provide the information listed in paragraph (b) when using MSHA Form 5000-23; (2) whether Hanson had fair notice of the Secretary's interpretation of section 46.9(b); and, (3) if a violation is found, whether the proposed penalty is appropriate. For the reasons that follow, the Secretary's motion for summary decision is **GRANTED** and Hanson's motion for summary decision is **DENIED**.

III. FACTUAL BACKGROUND

As set forth in the Stipulated Facts, the parties have stipulated to the following preliminary facts:

(1) On November 27, 2012, Respondent (hereinafter "Hanson") was the operator of [the] St[.] Johnsville Plant, a crushed/broken limestone surface mine (hereinafter "[the] Plant"), in Montgomery County, New York, Mine ID No. 3001283;

(2) The Plant is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h);

(3) On November 27, 2012, products of the Plant entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803;

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[1] For the purposes of this Decision, I refer to the Secretary's Memorandum in Support of the Secretary of Labor's Motion for Summary Decision as "Sec'y Mem.", Respondent's Motion for Summary Decision as "Resp't Mot.", and the Secretary's reply brief as "Sec'y Reply."

(4) Approximately 9,007 hours were worked at the Plant in the year [in] which the contested citation was issued;

(5) A copy of the citation at issue in this proceeding was served on Hanson by an authorized representative of the Secretary;

(6) Hanson timely contested the citation;

(7) Hanson is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case; and

(8) The proposed penalty will not affect Respondent's ability to remain in business.

The parties further stipulate to the following facts regarding Citation [No.] 8708748:

(1) In 2012, Hanson completed the annual refresher training required by 30 C.F.R. § 46.8;

(2) Hanson used MSHA form 5000-23 to certify that the training had been completed. A copy with two examples of form 5000-23 as Hanson completed them for the 2012 training is attached as Exhibit 1;

(3) Hanson did not record on MSHA form 5000-23 a list of competent instructor(s) who conducted [the] training or the duration of the training;

(4) MSHA form 5000-23 does not indicate a space in which to write the information described in (3);

(5) Hanson did not complete a supplement to MSHA form 5000-23 providing the information described in (3);

(6) MSHA Inspector Kevin Forgette issued Citation [No.] 8708748 to Hanson on November 27, 2012 under 30 C.F.R. § 46.9(b) because Hanson did not include the information described in (3) in its certification of annual refresher training;

(7) To abate the citation, Hanson entered the information described in (3) on the previously completed MSHA forms 5000-23. A copy of the forms as they appeared after abatement is attached as Exhibit 2.

(Stipulated Facts at 1–2.)

IV. PRINCIPLES OF LAW

A. Summary Decision

Commission Rule 67 provides the standard for granting any motion for summary decision:

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

B. Principles of Regulatory Interpretation

Regulatory interpretation is a two-step process. *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1080 (10th Cir. 1998). First, the Commission determines whether a regulation is ambiguous. *Id.* A regulation is ambiguous when its meaning is open to "plausible and divergent interpretations." *Daanen & Janssen*, 20 FMSHRC 189, 192 (Mar. 1998). Unambiguous regulatory provisions "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." *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006). Second, if the regulation is ambiguous, the Commission "determine[s] whether the Secretary's interpretation of [a] regulation is reasonable and whether the operator was given fair notice of its requirements." *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992). The Secretary's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

C. Fair Notice

An operator has received fair notice when "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Published notices informing the regulated community of the Secretary's interpretation are are a factor in determining fair notice. *See Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010).

V. DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW

A. Summary Decision is Appropriate

The parties have jointly stipulated to the facts but disagree over the application of the regulation to those facts. Based on the entire record, I determine that there is no genuine issue as to any material fact. Therefore, I conclude that the issues before me are appropriate for summary decision pursuant to Commission Procedural Rule 67(b), 29 C.F.R. § 2700.67(b).

B. Interpretation of 30 C.F.R. § 46.9(b)

MSHA cited Hanson for violating section 46.9(b), which is a recordkeeping regulation for purposes of miner training oversight. Section 46.9(b) states that "[t]he form must include . . . the duration of training [and] the name of the competent person who provided the training. . . ." 30 C.F.R. § 46.9(b). Hanson stipulated that it did not include the duration of training and the name of the competent person who provided the training when filling out MSHA Form 5000-23. (Stipulated Facts at 2.) Thus, the issue here is whether the "form" mentioned in section 46.9(b) includes MSHA Form 5000-23. For the reasons below, I determine that the regulation is ambiguous, but the Secretary's interpretation of the regulation is reasonable and entitled to deference. Consequently, I conclude that section 46.9(b) requires operators using MSHA Form 5000-23 to provide the information listed in section 46.9(b)(1) through (b)(5), even though MSHA Form 5000-23 does not request or provide space for that information.

1. The regulation is ambiguous.

A regulation is ambiguous when it is open to "plausible and divergent interpretations." *Daanen & Janssen*, 20 FMSHRC at 192. The Secretary asserts that the term "form" clearly applies to MSHA Form 5000-23. (Sec'y Mem. at 3.) However, section 46.9(b) does not define "form" or explicitly include MSHA Form 5000-23. 30 C.F.R. § 46.9(b). Instead, paragraph (a) of section 46.9 discusses two types of "form[s]" that section 46.9(b) may include. *See generally Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (requiring provisions to be read harmoniously). Section 46.9(a) states as follows: "You must record and certify on MSHA Form 5000-23, or on a form that contains the information listed in paragraph (b) of this section, that each miner has received training required under this part." I note that section 46.9(a) uses commas to set apart from "MSHA Form 5000-23" the phrase "or on a form that contains the information listed in paragraph (b) of this section." 30 C.F.R. § 46.9(a). This phrasing therefore permits an alternative interpretation whereby the "form" mentioned in section 46.9(b) could refer *solely* to "a form that contains the information listed in paragraph (b) of this section" mentioned in section 46.9(a), thereby excluding MSHA Form 5000-23. Accordingly, I determine that the regulation is ambiguous. *See Daanen & Janssen*, 20 FMSHRC at 192.[2]

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[2] Section 46.9(b) does not specifically reference MSHA Form 5000-23, and I need not address the form's implications because I have determined that the text of section 46.9 itself

2. The Secretary's interpretation of the regulation is reasonable and entitled to deference.

As I have determined the regulation to be ambiguous, I must therefore determine whether the Secretary's interpretation of the regulation is reasonable. *See Walker Stone Co.*, 156 F.3d at 1080. The Secretary interprets "form" in section 46.9(b) to include both MSHA Form 5000-23 and the alternative "form" mentioned in section 46.9(a). (Sec'y Mem. at 3.) For the following three reasons, I determine the Secretary's interpretation of the regulation to be reasonable. First, the Secretary's interpretation is consistent with the language of the regulation. Here, the Secretary interprets "form" in section 46.9(b) as a general term that encompasses every type of form mentioned in section 46.9(a), including MSHA Form 5000-23. (Sec'y Mem. at 3.) Looking at the text, the regulation does not provide definitions that restrict the meaning of "form" in section 46.9(b) to a particular type of form. 30 C.F.R. § 46.9. Although the lack of definitions does not necessarily prohibit a more restrictive reading, the Secretary's interpretation is a permissible reading of the regulation.

Second, the Secretary's interpretation is consistent with the dual purposes underlying this recordkeeping regulation: (1) consistency of information; and (2) flexibility. *See* Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines: Final Rule, 64 Fed. Reg. 53,080, 53,099, 53, 121 (Oct. 2, 2000) [hereinafter "Final Rule"]; *see also Ideal Cement Co.*, 12 FMSHRC at 2414 ("[A regulation] must be construed in light of its underlying purpose."). Indeed, MSHA intended for section 46.9(b) to apply generally to "training records and certificates" rather than a particular type of form. Final Rule, 64 Fed. Reg. at 53,099. Further, section 46.9(a) allows operators flexibility in choosing a form approved by the Secretary with the intent to minimize their paperwork burden. *Id.* at 53,121. Accordingly, section 46.9(a) operates to approve any form containing the "minimum information" listed in section 46.9(b). *Id.* Specifically, section 46.9(a) approves the use of existing MSHA Form 5000-23, which some operators have used to comply with the Secretary's Part 48 rules.[3] *Id.* Thus, the Secretary's interpretation of "form" in section 46.9(b) to include MSHA Form 5000-23 ensures that mine operators will provide the required information regardless of the form used and allows those operators flexibility in the form used. The Secretary's interpretation is therefore consistent with

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permits alternative readings. Nevertheless, I note that MSHA Form 5000-23 includes neither space for operators to provide the information required by section 46.9(b) nor instructions to do so. (*See* Stipulated Facts at 2, Ex. 1.) Such a design likewise contradicts the Secretary's claim that section 46.9(b) unambiguously applies to MSHA Form 5000-23.

[3] The preamble explains that operators already used MSHA Form 5000-23 to comply with training certification requirements under 30 C.F.R. part 48. Final Rule, 64 Fed. Reg. at 53,121. Accordingly, section 46.9(a) allows operators to adapt MSHA Form 5000-23 for dual use under 30 C.F.R. part 46, rather than developing another form, "so long as the information required by final [section] 46.9(b) is included on the form." *Id.*

his purpose of maintaining consistent records and allowing operator flexibility to reuse MSHA Form 5000-23 for 30 C.F.R. part 46 compliance.

Third, the Secretary's interpretation of the regulation is consistent with the safety-promoting purposes of the Mine Act. *See Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (requiring regulatory interpretations to be consistent with the purpose of the underlying statute). Miner training is a critical element of an effective safety and health plan that protects the safety of the miner. *See* 30 U.S.C. § 801. The duration of the training and the name of the instructor who provided the training allow MSHA to determine if operators have provided adequate training to their miners. Final Rule, 64 Fed. Reg. at 53,122. Requiring operators using MSHA Form 5000-23 to provide the information listed in section 46.9(b) facilitates effective oversight of miner training, which promotes the health and safety of miners. Conversely, a more restrictive reading of "form" in section 46.9(b) would permit operators using MSHA Form 5000-23 to withhold important information at the expense of the health and safety of their miners.

Where the Secretary's interpretation of a regulation is reasonable, deference is accorded to that interpretation even if it differs from what "a first-time reader of the regulation . . . might conclude was the 'best' interpretation of [the] language." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1994) (citation omitted). Because I have determined that the Secretary's interpretation of the regulation is reasonable and consistent with the purposes of the regulation and the Mine Act, I must defer to the Secretary's interpretation.

C. MSHA Provided Fair Notice of the Secretary's Interpretation

The Secretary does not claim that Hanson had actual notice, and I have determined section 46.9(b) to be ambiguous. However, MSHA does not have to provide Hanson with actual notice, inasmuch as MSHA has provided sufficient notice of the Secretary's interpretation by publishing multiple explanatory notices on its Web site. *See generally Mainline Rock & Ballast*, 693 F.3d 1181, 1187 (10th Cir. 2012) (holding that adequate notice of regulatory requirements can be derived from published explanatory notices). These explanatory notices plainly indicate that operators must include the duration of training and a list of competent instructors on MSHA Form 5000-23 if they elect to use the form under part 46. (Sec'y Mem. at Ex. P–3, Ex. P–5.) Moreover, the Final Rule implementing section 46.9(b) also indicates that training records and certificates must include this information regardless of the particular type of form. 64 Fed. Reg. at 53,121. A reasonably prudent person familiar with the mining industry and the protective purposes of this recordkeeping regulation would have availed themselves of the various materials that described the specific requirements of this standard. Accordingly, I conclude that Hanson had fair notice regarding the requirements of section 46.9(b).

In sum, I defer to the Secretary's reasonable interpretation and determine that section 46.9(b) requires operators using MSHA Form 5000-23 to provide a list of the competent instructor(s) who conducted the training and the duration of the training. Hanson stipulated to

omitting this information on MSHA Form 5000-23. Furthermore, MSHA provided Hanson with fair notice of the Secretary's interpretation of 30 C.F.R. § 46.9(b) by publishing explanatory notices on its Web site. Consequently, I conclude that Hanson violated 30 C.F.R. § 46.9(b), and the Secretary is entitled to summary decision as a matter of law under Commission Rule 67, 29 C.F.R. § 2700.67(b). Citation No. 8708748 is, therefore, **AFFIRMED** as written.

VI. PENALTY

The Commission assesses penalties *de novo* for violations of the Mine Act. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600–01 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

I recognize that this case is before me because Hanson relied on common sense rather than a lawyer. In fact, when informed of the section 46.9(b) requirements, Hanson provided the requested information to abate the citation in good faith. (Stipulated Facts at 2.) Perhaps Hanson would have provided the required information earlier if it had engaged in a detailed, legal analysis of an ambiguous regulation. Instead, Hanson trusted that MSHA Form 5000-23 would contain all the requirements for compliance. It may be time for MSHA to reconsider its earlier determination and provide the regulated community with a straightforward, sensible form. Although section 46.9(a) does not mandate the use of MSHA Form 5000-23, the form's design predictably misleads operators into violating the standard. Indeed, commentators predicted this misplaced trust and suggested that MSHA Form 5000-23 be revised because it was "confusing." Final Rule, 64 Fed. Reg. at 53,121. Despite MSHA's determination that MSHA Form 5000-23 was not "so confusing as to be unusable," *id.*, the Secretary may be well-advised to adopt loftier goals than providing a "[not] unusable" form. Given the circumstances and confusing design of the form, I find Hanson's negligence to be on the very low end of the spectrum.

Moreover, I find that the gravity of the violation is minimal, as I agree that Hanson's failure to provide complete training records in this case created no likelihood of injury and was expected to result in no lost workdays because the required training had been provided. (Sec'y Mem. at Ex. P–1; Stipulated Facts at 2.) Looking at MSHA's public, online retrieval database, I note Hanson's insignificant history of prior violations at the St. Johnsville Plant, which is limited to eight citations and does not include any prior citations regarding section 46.9(b). *See* Mine Safety & Health Admin., *Mine Data Retrieval System*, http://www.msha.gov/drs/drshome.htm (last visited August 5, 2014). I have also considered Hanson's size and the penalty's lack of effect on Hanson's ability to continue business. (Stipulated Facts at 1–2.) In light of the factors above, especially as they relate to Hanson's degree of negligence, I conclude that a penalty of $50.00 is appropriate for Citation No. 8708748.

VII. ORDER

In light of the foregoing, **IT IS ORDERED** that the Secretary's motion for summary decision is **GRANTED** and Hanson's motion for summary decision is **DENIED**. Hanson Aggregates New York, Inc. is hereby **ORDERED** to **PAY** a penalty of $50.00 within 40 days of this decision.[4]

Alan G. Paez
Administrative Law Judge

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[4] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.