FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 11, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-88
Petitioner	:	A. C. No. 15-14324-03511
v.	:	
	:	Preparation Plant
EXCEL MINING LLC,	:	
Respondent	:	

ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION

This case is before me on a Petition for Assessment of Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent has filed a motion seeking summary decision on two of the three citations at issue in the case. The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

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 (November 1981) (footnote omitted). It "is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) [quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)]. Here, the company has failed to show that there is no genuine issue as to any material fact.

Excel asserts that summary decision should be granted for Citation Nos. 7367802 and 7367805. Citation No. 7367802 alleges a violation of section 77.210 of the Secretary's regulations, 30 C.F.R. § 77.210, because:

> Taglines or other devices were not used to guide a suspended load that required guidance during a material hoisting operation. While reaching out to guide a suspended chemical barrel from the open hoistway [*sic*] onto the third floor of the preparation plant, an employee fell approximately 55 feet to the ground, sustaining fatal injuries.

Section 77.210 provides, in pertinent part, that: "(c) Taglines shall be attached to hoisted materials that require steadying or guidance."

Citation No. 7367805 alleges a violation of section 77.1713(a), 30 C.F.R. § 77.1713(a), in that:

> Inadequate daily inspections were conducted on the third floor of the preparation plant. The metal supports and other structural members of the railing surrounding the open material hoistway [*sic*] had corroded to the point that the railing was ineffective. Although daily on-shift inspections were conducted, the condition was not reported or corrected.

Section 77.1713(a) requires that:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active working surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

With respect to Citation No. 7367802, the company argues that no violation can be proved because the regulation only requires taglines "when hoisted materials require guidance or steadying and . . . there is no evidence that the load in question required guidance or steadying." (Motion at 8.) On the other hand, the Secretary asserts that the facts available to her, as attested to in the declaration of Robert Bates, "establish that a tagline was necessary to steady or guide the barrel in question so that the employee would not put himself in a position of peril as happened in this accident." (Response at 4.) I find from the evidence apparently available to the Secretary that there clearly is a material question of fact as to whether a tagline was necessary in this case.

Turning to Citation No. 7367802, Excel agrees that "if an examination is required, it must be accomplished in a manner that would reveal hazards that would be discernable to a reasonably prudent miner who is looking out for the safety of his fellow works and himself." (Motion at 11-12.) However, it maintains that "it was not reasonable to expect an on-shift examiner to see the corrosion that MSHA concluded was the cause of the accident." (Motion at 12.) I find that whether it was reasonable to expect the on-shift examiner to see the corrosion and whether the examination was carried out in a reasonably prudent manner are material questions of fact which must be decided in this case.

Accordingly, the Motion for Partial Summary Decision is **DENIED**. Counsel for the Secretary shall initiate a telephone conference call with the Respondent's counsel and the judge, at any time convenient to the parties, but not later than **July 19, 2001**, for the purpose of setting a hearing date.

T. Todd Hodgdon
Administrative Law Judge
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