

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 20, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-110-M
Petitioner	:	A.C. No. 02-00144-05563 A
	:	
v.	:	Sierrita Mine
FRED CHISMAR, employed by	:	
CYPRUS SIERRITA CORPORATION,	:	
Respondent	:	

**DECISION**

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Fred Chismar pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §820(c) (the “Act”). The petition alleges that Mr. Fred Chismar knowingly violated 30 C.F.R. §§ 56.15001 and 56.15006 of the Secretary’s safety standards. A hearing was held in Tucson, Arizona, and the parties filed post-hearing briefs.

**I. BACKGROUND**

**A. Summary of the Facts**

On November 25, 1997, MSHA Inspector Jack Sepulveda issued a citation and order under section 104(d)(1) of the Act against Cyprus Sierrita Corporation (“Sierrita”) for two alleged violations at its Sierrita Mine in Pima County, Arizona. The citation and order were issued following an accident at the mine. Sierrita contested the citation, order, and proposed penalty in WEST 98-254-M. On October 30, 1998, Commission Judge Todd Hodgdon approved a settlement in that case in which the characterizations as to gravity and negligence remained unchanged. In addition, the settlement did not change the unwarrantable failure and significant and substantial determinations made by the MSHA inspector.

On February 22, 1999, the Secretary filed this proceeding under section 110(c) of the Act alleging that Mr. Chismar “knowingly authorized, ordered, or carried out” these violations. Chismar admits that he is an agent of Sierrita, subject to the provisions of section 110(c), but denies that he knowingly authorized, ordered, or carried out the violations.

This case arose out of an accident at the Sierrita Mine on September 26, 1997. George Borquez was helping unload a truckload of lime into the tailings dam catch pond (the “tailings pond”) when he came in contact with a mixture of lime and the solution in the tailings pond. His legs were severely burned in the accident. The lime was being transported by an independent contractor, CTI Trucking (“CTI”). At the time of the accident the only two individuals at the tailings pond were Mr. Borquez and Warren Forrey, the driver of the CTI truck.

CTI regularly delivers lime to the Sierrita Mine, which is a large copper mine. On September 26, 1997, the lime was being placed in the tailings pond to neutralize an acidic mixture in the pond called raffinate<sup>1</sup>. The raffinate is produced during the solvent extraction (“SX”) process in which copper is leached from oxide ore through the use of sulfuric acid. As a result of a power failure and heavy rains, the tailings pond was considerably more acidic than usual. Sierrita decided to add lime (which is a base) to the tailings pond to neutralize the acid. This was a rare event at the mine and Mr. Chismar had only been responsible for adding lime to the tailings pond once since 1991. The tailings pond is about two and a half miles outside the main gate of the mine and one must travel on a county road to get there.

Mr. Chismar, who is the operations supervisor for the leach fields and the SXEW plant, ordered lime from CTI. He was present when the first truck was unloaded. The lime was contained in tanks on the truck and it was unloaded using a hose that can be attached to the truck. Each hose is about 20 feet long and is between 4 and 6 inches in diameter. Persons unloading the truck were not required to handle the lime. The lime is a dry powder and a pump on the truck blows the powder out the hose. Mr. Chismar sent Larry Whitman, a Sierrita employee, to get supplies needed to tie the hose to a pipe that joined the tailings pond with another tailings pond. Mr. Chismar instructed Mr. Whitman to wear personal protective equipment when he was working near the pond. The personal protective equipment consisted of rubber boots, rubber pants, rubber coat, and a face shield. This equipment is commonly called “acid gear” at the SXEW plant. Mr. Whitman wore protective clothing when he was near the tailings pond and removed it after he returned to the road adjacent to the tailings pond.

As the first truck was being unloaded, Mr. Chismar called Mr. Borquez to the tailings pond so that he could assume responsibility for escorting the lime trucks to the tailings pond from the mine gate. Mr. Borquez frequently acted as a relief supervisor when Mr. Chismar was absent and also as a lead man directing other employees who worked with him.

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<sup>1</sup> Raffinate is the “aqueous solution remaining after the metal has been extracted by the solvent; the tailing of the solvent extraction system.” *A Dictionary of Mining, Mineral, and Related Terms* 2<sup>nd</sup> edition, 443 (1997).

A road ran between the tailings pond and the adjacent tailings pond. Mr. Borquez's job was to wait at the main gate in a pickup truck. When a CTI truck arrived, he would instruct the driver of the CTI truck to follow him to the tailings pond. After they arrived at the tailings pond, Borquez would show him where to dump the lime. Mr. Chismar instructed Mr. Borquez to not let the lime build up along the side of the tailings pond.

When Mr. Borquez received a call from Mr. Chismar to report to the tailings pond, he was told to bring a flotation device. This flotation device consisted of several plastic barrels, each about the size of a "pony keg," that were tied together. A hose and a rope were attached to the flotation device and the device was put into the tailings pond. Mr. Chismar testified that he expected that once the flotation device was set up, everyone associated with this project would stay up on the road. The bank along the side of the road declined rather steeply to the tailings pond. Mr. Chismar expected that as each lime truck arrived, the driver of the truck would attach his hose to the end of the other hose at the road and that the far end of this hose would remain attached to the flotation device. He also believed that if the flotation device needed to be moved to a different location in the tailings pond, the employees would pull it out by the rope, move it to a lime-free area of the pond, and throw it back into the pond. Government Exhibit 1 shows the proximity of the road to the tailings pond and the steep bank that separated the two.

During most of the day, Mr. Borquez simply escorted trucks to and from the main gate. Near the end of his work day, the Sierrita employee who was assisting him had to leave. When the sixth CTI truck arrived, Mr. Borquez stayed at the tailings pond and assisted the CTI driver, Mr. Forrey. Mr. Borquez noticed that the hose had come loose at the flotation device and the lime was shooting straight up rather out into the pond. He walked down the bank to the edge of the tailings pond to fix the problem. He was not wearing any protective clothing. As he turned to return to the road, both of his feet fell into the tailings pond. Apparently he was not standing on solid ground, but was standing on a crust of lime that had built up on top of the pond. When lime and water mix, intense heat is produced in an exothermic reaction. Large portions of his legs got wet as he exited the tailings pond. Mr. Borquez realized that his legs were badly burned and he went to his truck as quickly as possible to pour eye wash onto his legs. He then drove to where there was water in an Igloo container. He called Mr. Chismar on the radio who advised him to go to the adjacent reclaim tank to rinse off. Mr. Borquez declined and told Chismar that he was going to the main gate where there were showers.

The mine's "first responders" were notified and met Mr. Borquez at the gate. They assisted Mr. Borquez by removing his clothing and getting him into the shower. He showered for about 20 minutes and then Mr. Chismar drove him to a hospital. Mr. Borquez received very serious burns on his legs and he required skin grafts. Although Mr. Borquez is still employed at Sierrita, this accident was a life-altering event for him.

## B. MSHA's Enforcement Action

MSHA did not investigate this accident until it received an anonymous complaint. At the conclusion of its investigation, MSHA issued one citation and one order dated November 25, 1997, under section 104(d)(1) of the Mine Act. Citation No. 4718158 alleges a violation of 30 C.F.R. § 56.15006 as follows:

Safe equipment or protective clothing was not used [by] an employee who on Sept. 26, 1997, suffered chemical (lime) burns, after he fell in lime.

The employee was assisting in dumping (unloading) lime at the south-side of the Sierrita tailings dam, at a catch pond.

Management engaged in conduct constituting more than ordinary negligence in that they knew employees were working around/with caustic material and did not have suitable protective clothing. This violation is an unwarrantable failure. Fred Chismar, SXEW Supervisor.

This citation was modified a number of times and the language above represents the final language adopted by MSHA on December 22, 1997. The citation was terminated on November 25, 1997. Section 56.15006 provides that “[s]pecial protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.”

Order No. 4718159 alleges a violation of 30 C.F.R. § 56.15001 as follows:

An employee was seriously injured when he fell in lime to about waist high. This employee was not provided with water or neutralizing agents in an appropriate amount to counteract harmful substances being used. This occurred on Sept. 26, 1998, at about 1600 hours.

The occurrence was at the South-side of the Sierrita tailings dam and at the catch pond.

Management engaged in aggravated conduct constituting more than ordinary negligence in that they knew employees were working around/with caustic material and did not provide suitable or an adequate supply of water or neutralizing agents. This

violation is an unwarrantable failure. Fred Chismar, SXEW Supervisor.

This order was also modified a number of times and the language above incorporates the modifications. The order was also terminated on November 25, 1997. Section 56.15001 provides, in part, that “[w]ater or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.”

### C. Summary of the Parties’ Arguments

#### 1. Secretary of Labor

Mr. Chismar was aware that chemical hazards were present in the tailings pond that were capable of causing injury or impairment. Mr. Chismar planned the entire liming project. He was familiar with the hazards and knew that protective clothing should be worn. At the hearing, he admitted that he did not even think about having water present as a first aid precaution. His only defense in this case is his testimony that he did not think that the precautions required by the standards were necessary, given the work to be performed at the tailings pond.

A supervisor’s blind acquiescence to unsafe working conditions is not permitted under the Mine Act. Mr. Chismar failed to require Mr. Borquez to wear protective clothing. Chismar failed to recognize that Borquez would be exposed to the hazard even though Chismar observed other employees working very close to the tailings pond. He failed to task train Mr. Borquez on how to perform his work safely. He never specifically told Borquez to stay away from the edge of the tailings pond. Chismar also failed to have the minimum amount of clean water at the worksite available to ensure emergency treatment in the event of an accident. Mr. Chismar’s “see no evil” approach does not protect him from liability. Chismar’s inexcusable failure to provide Mr. Borquez and the other employees who worked on the liming project with the minimum level of protections required by MSHA’s standards clearly amounts to aggravated conduct. Mr. Chismar knowingly authorized, ordered, or carried out the violations set forth in the citation and order at issue.

#### 2. Sierrita

Mr. Chismar did not knowingly violate section 56.15006. He did not have knowledge, either direct or constructive, of the violation regarding protective clothing. Such clothing was not necessary to perform the tasks that Mr. Chismar assigned to Mr. Borquez. Chismar reasonably did not expect anyone to handle the hose while the lime was being unloaded. He expected that the flotation device would be moved by using the rope attached to it. Mr. Chismar was aware of the hazard as indicated by the fact that he told Whitman to put protective clothing on when he was required to go down to the tailings pond earlier that day. He did not expect Mr. Borquez or anyone else to do so without wearing protective clothing. The evidence clearly establishes that if Chismar had been at the tailings pond when Borquez walked down to bank to

the pond, he would have ordered him away or told him to get his protective clothing. Chismar reasonably believed that Mr. Borquez was aware of the hazard.

The Secretary did not establish a violation of this standard because it is unconstitutionally vague. Mr. Chismar also did not knowingly violate section 56.15001. Given the scope of the work to be performed, Mr. Chismar did not believe that there was a potential hazard present that merited his providing clean water in the immediate area. He believed that Mr. Borquez and other Sierrita employees would simply be escorting the CTI trucks between the gate and the tailings ponds and, if they needed to assist the CTI driver in unloading the lime, they would perform this task without exposing themselves to the hazard presented by the lime.

## II. DISCUSSION WITH FINDINGS AND CONCLUSIONS

Whenever a corporate operator violates a safety or health standard, any director, officer, or agent of such corporation “who knowingly authorized, ordered, or carried out such violation” shall be subject to civil penalties. 30 U.S.C. § 820(c). In order to assess penalties against Mr. Chismar in this case, I must find that (1) Sierrita committed the alleged violations set forth in the citation and order; (2) Mr. Chismar was a director, officer, or agent of Sierrita; and (3) Mr. Chismar knowingly authorized, ordered, or carried out the alleged violations. Chismar stipulated that he was an agent of Sierrita. (Stip. 7).

The principal issue is whether Mr. Chismar knowingly authorized, ordered, or carried out the violations set forth in the citation and order.<sup>2</sup> The Secretary must establish that Mr. Chismar knew or had reason to know of the violative conditions. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981). She must prove that Mr. Chismar knowingly acted, not that he knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992). An individual has knowingly acted when he “fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.” *Richardson*, at 16. The Secretary is required to show that the person charged demonstrated aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines*, 14 FMSHRC 1232, 1245 (August 1992). A finding of ordinary negligence will not, by itself, support a violation of section 110(c). *Freeman United Coal Mining Co.*, 108 F3d. 358, 364 (1997).

### A. Failure to Wear Protective Clothing, § 56.15006

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<sup>2</sup> Mr. Chismar also contends that the Secretary’s investigation and issuance of the proposed civil penalties in this case were unreasonably delayed by the Secretary and that the case should be dismissed on that basis. Mr. Chismar’s motion is denied. In an unpublished order dated July 2, 1999, I set forth the chronology of MSHA’s investigation in this case. Based on that chronology and the stipulations filed by the parties (Nos. 24-35), I find that the Secretary did not unreasonably delay the investigation and prosecution of this case.

On September 26, 1997, Mr. Chismar determined that, due to a power failure and heavy rains, the raffinate in the tailings ponds was too acidic and needed to be neutralized. He called CTI and ordered lime to be delivered by truck. Although Sierrita orders lime for other purposes, it is unusual for Sierrita to put lime in the tailings pond.<sup>3</sup> When the first CTI truck arrived at the gate, Mr. Chismar escorted it to the tailings pond. Mr. Larry Whitman was with him and the hose from the truck was first placed over the bank directly into the tailings pond. When the CTI driver attempted to unload the lime through the hose, it did not work well. Mr. Chismar stopped the unloading process and told Mr. Whitman to get his protective clothing and other supplies. Mr. Whitman's protective clothing was in his locker at the SX shop.

When he returned, Mr. Whitman put on his protective clothing, went down to the tailings pond, and attached the hose with wire to a culvert that extended into the pond. After Whitman secured the hose to the culvert, he returned to the road and Mr. Chismar told the CTI driver to start pumping the lime again.

A short time later, Mr. Chismar called Mr. Borquez on the radio and told him to report to the tailings pond and to bring a flotation device. Chismar frequently used Borquez as a "lead man" and Borquez also functioned as his relief supervisor from time to time. Because of his work history at several copper mines, Chismar believed that Borquez was fully aware of the hazards of working around lime. Mr. Borquez had never worked around the tailings pond at Sierrita and testified that he was not aware of the hazard. When Borquez arrived, Whitman was up on the road and he may have been wearing some of his protective clothing. Mr. Borquez brought Bobby Martinez along to assist him. Chismar did not tell Borquez to bring his protective clothing and Borquez left his protective clothing in his locker in the SX shop.

When he called, Chismar told Borquez to bring a flotation device so that a hose could be attached to it. Chismar decided that a hose should be attached to the flotation device and that it should be placed in the tailing pond so that as the lime was pumped out, it would spray out into the pond rather than accumulate along the shore. He testified that he used this system so that Sierrita employees would not be required to handle the hose or go down the bank to the pond. He stated that it was his expectation that everyone would stay up on the road. Mr. Whitman briefed Mr. Borquez about the project. Borquez was told that he would be "taking over" the project and that his principal duty would be to escort the CTI trucks to the tailings pond. Mr. Borquez was not given any safety training with respect to this project by Mr. Chismar. Mr. Borquez took the floater off his pickup and put it about 10 to 15 feet from the pond. Borquez then went to escort the next CTI truck in. Mr. Whitman left the area at some point after Mr. Borquez arrived to attend to other duties. The record does not reveal who placed the flotation device into the tailings pond or how close anyone was to the pond when this task was performed.

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<sup>3</sup> On the most recent occasion, CTI delivered lime in dump trucks and the lime was dumped directly into the tailings pond.

Mr. Chismar escorted the third truck in and Mr. Borquez escorted the fourth CTI truck. At some point, Mr. Chismar was called away to the SX plant and so Mr. Borquez continued escorting the trucks from the mine gate to the tailings pond. Mr. Martinez stayed in the tailings pond area while the trucks were unloaded by the CTI drivers.

Sometime between one and two that afternoon, Mr. Chismar traveled to the tailings pond to check on the status of the liming project. He observed Mr. Martinez down near the pond holding the flotation device while shooting the lime across the pond. Chismar yelled at Martinez and told him to get away from the tailings pond. Mr. Borquez was present when Chismar ordered Martinez back up to the road. Chismar did not tell anyone to get protective clothing.

Later that afternoon at about 2:30, Mr. Chismar returned to the tailings pond area with his supervisor Ramon Hernandez. Mr. Hernandez saw Mr. Borquez in his pickup on the road near the tailings dam and told Mr. Borquez to be careful around the lime because it can get very hot.<sup>4</sup>

Later that afternoon, Mr. Borquez called Mr. Chismar to tell him that Mr. Martinez was leaving for the day. Borquez told Chismar that he would finish the job. Chismar told Borquez not to allow lime to accumulate along the bank of the tailings pond and to move to a "clean" area whenever it was necessary. At about 3:45 p.m., Mr. Borquez called Chismar to tell him that he had been burned by the lime. Only the CTI truck driver and Mr. Borquez were present when the accident occurred. As stated above, Mr. Borquez walked down the bank to the tailings pond to adjust the hose on flotation device. Without knowing it, Mr. Borquez walked onto the pond and was standing on accumulations of lime. When he fell in, he was badly burned.

I find that the Secretary established that Sierrita committed a violation of section 56.15006.<sup>5</sup> As discussed above, the liming project was an unusual undertaking. Sierrita did little to plan the project or consider the potential hazards present. Sierrita's safety department did not send a safety representative to the area to evaluate the hazards. Mr. Borquez and the other Sierrita employees had little or no experience in the work involved or the hazards present. Mr. Borquez and the other employees should have been told to bring their protective clothing to the tailings pond area and told not to walk down from the road to the tailings pond without wearing their protective clothing under any circumstances. Sierrita's failure to properly instruct

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<sup>4</sup> At the hearing, Mr. Borquez was not asked whether he observed Chismar ordering Martinez away from the tailings pond or whether Mr. Hernandez warned him that the lime could get hot. I credit the testimony of Messrs. Chismar and Hernandez with respect to these events. This testimony is consistent with the statements they gave to the MSHA special investigator.

<sup>5</sup> Under the principles set forth in *Kenny Richardson*, I am required to independently determine whether Sierrita violated the safety standards despite the fact that Sierrita admitted liability for purposes of the Mine Act when it settled the civil penalty case brought against it. 3 FMSHRC at 9-11.



its employees as to these requirements constitutes a violation of the safety standard. Moreover, because the Mine Act imposes strict liability on mine operators, Sierrita is responsible for Mr. Borquez's failure to wear protective clothing when he walked down to the tailings pond.

I find, however, that the Secretary did not establish a knowing violation of section 56.15006. Mr. Chismar did not know or have reason to know that Mr. Borquez or any other employee would walk down the bank at the edge of the road to the tailings pond without wearing protective clothing. Mr. Chismar testified that he understood that Mr. Borquez had worked around lime for a number of years at the Sierrita Mine and at the Anamax Mine, an unrelated copper mine. Mr. Borquez had protective clothing in his locker and he had been warned just 45 minutes earlier by Mr. Hernandez, in Mr. Chismar's presence, that the lime in the tailings pond could get very hot. When Chismar observed Mr. Martinez near the tailings pond, he ordered Martinez to return to the road in Mr. Borquez's presence. Mr. Chismar credibly testified that, because he did not expect Mr. Borquez to walk down to the tailings pond, Chismar did not believe that protective clothing was necessary.

The Commission's holding in *Roy Glenn* is instructive. 6 FMSHRC 1583 (July 1984). In that case, several miners were instructed by their supervisor, Mr. Glenn, to weld a valve on an oxygen line in a mill building. To perform this welding, it was necessary to stand on an adjacent girder some distance above the floor. Rather than using a ladder to access the area, the miners climbed some stairs and walked along the girders without using safety lines to get to the work site. Glenn went to another area to check other valves and when he returned he saw one of the miners walking across the girder. He waived him down with a flashlight just as an MSHA inspector was entering the area.

The Commission reversed the administrative law judge and determined that Glenn did not knowingly violate the safety standard. The Commission determined that the judge's finding that Glenn had reason to know that miners "might" or "could" walk across the girders was insufficient to establish a knowing violation. *Id.* at 1588. A supervisor always has "reason to know" that miners "might" perform tasks in an unsafe manner. *Id.* This "degree of knowledge is too contingent and hypothetical to be legally sufficient" under the test set out in *Kenny Richardson*. *Id.* The Commission went on to state:

Before personal liability under section 110(c) can be imposed on an operator's agent for "knowingly" authorizing, ordering, or carrying out a violation, the Secretary's proof must rise above the mere assertion that, at the time of assignment, an assigned task could have been performed by miners in an unsafe manner. Adoption of this rationale could mean that ... an operator's agent could be held personally liable under section 110(c) for failing to anticipate the miner's unsafe actions and not giving specific instructions to each miner, at the time of the

assignment, to avoid all hazardous approaches to a task that could be followed.

*Id.*

In *Roy Glenn*, the Commission tailored its *Kenny Richardson* analysis to those situations where a “violation of a mandatory standard does not exist at the time of the corporate agent’s failure to act, but occurs subsequent to that failure.” *Id.* at 1586. The Commission held as follows:

[A] corporate agent in a position to protect employee safety and health has acted “knowingly,” in violation of section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act.

*Id.*

Although the present case has some similarities with *Roy Glenn*, there are some important differences. Mr. Glenn had specifically instructed the miners to bring their safety lines while Mr. Chismar did not mention or require protective clothing, except in the case of Mr. Whitman. The work that the miners were to perform for Mr. Glenn required safety lines. Mr. Chismar believed that Mr. Borquez did not need protective clothing to escort CTI’s trucks to and from the mine gate because he would not be required to walk down to the tailings pond.<sup>6</sup> In *Roy Glenn*, the hazard of falling was obvious while in the present case the hazard of being injured by the lime-raffinate mixture was not obvious.

In *Warren Steen*, Mr. Steen was held liable under section 110(c) even though he was not at the mine when a fatal accident occurred. 14 FMSHRC at 1131. In that case, however, he carried out the violation by ordering a stacker-conveyor to be moved to an area that he knew was within 10 feet of energized power lines. Thus, he knowingly authorized the violation.

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<sup>6</sup> At the hearing, the Secretary took the position that the miners should have been wearing protective goggles or face shields when they were on the road adjacent to the tailings pond to protect their eyes from blowing lime. This allegation is not contained in the citation. The citation relates solely to Sierrita’s failure to require Mr. Borquez to wear protective clothing when he was adjacent to the tailings pond. The CTI driver was not wearing goggles or a face shield and CTI did not receive any MSHA citations. Mr. Borquez was wearing safety glasses on the day of the accident. I reject the Secretary’s attempt to expand the citation beyond that written by the MSHA inspector.

Messrs. Chismar and Hernandez should not have relied on their understanding that Mr. Borquez and other Sierrita employees had worked at other copper mines with similar hazards. Apparently they believed that Mr. Borquez was fully aware of the hazard presented by the presence of lime in the tailings pond as a result of his work history. I credit Mr. Borquez's testimony that he did not realize that he could be severely burned if he got the tailings mixture on his skin. Mr. Borquez should have been given more explicit instructions as to the nature of the work he was to perform and the hazards present.<sup>7</sup> In addition, Mr. Chismar should have anticipated that something might go wrong as the lime was being unloaded and that Sierrita employees might be tempted to work next to the tailings pond to fix the problem. It is human nature for someone to take a shortcut in such situations to avoid driving two miles to get protective equipment.

Mr. Chismar is at least partially responsible for the violation. A finding that Mr. Chismar was negligent, however, is insufficient to establish a section 110(c) violation. *Freeman United* 108 F3d. at 364. The Secretary must establish that the violation was the result of Mr. Chismar's aggravated conduct. I find that Mr. Chismar's conduct did not amount to aggravated conduct with respect to this violation. He envisioned, incorrectly as it turned out, that Mr. Borquez and the other Sierrita employees would only be escorting CTI trucks to and from the tailings pond. He believed that they would only be driving company pickup trucks back and forth from the mine gate, not working down by the tailings pond. Chismar also thought that any assistance given the CTI truck drivers could be provided without leaving the road. He simply did not believe that protective clothing was necessary for the work assigned to Mr. Borquez. His belief was incorrect.

Mr. Chismar did not take a "see-no-evil" approach, however. When Mr. Whitman was required to walk down to the pond to attach the hose to the culvert, Chismar told him to wear his protective clothing. When he observed Mr. Martinez down near the tailings pond, he told Martinez to get away. I find that if Mr. Chismar had been present when Mr. Borquez approached the tailings pond, Chismar would have told him to get away as well. In his mistaken belief that the employees were aware of the hazard, Chismar did not provide sufficient instruction or training to Mr. Borquez, but this failure does not rise to the level of aggravated conduct. As stated above, Chismar heard Hernandez warn Borquez about the hazard 45 minutes before the accident. Accordingly, the \$500 civil penalty proposed against Mr. Chismar for an alleged knowing violation of section 56.15006 in Citation No. 4718158 is **VACATED**.

**B. Failure to Have Water or Neutralizing Agents Available, § 56.15001**

Sierrita did not make any provision for water or neutralizing agents in the immediate area of the tailings pond where lime was being deposited. The closest water supply was a tank, referred to as the "reclaim tank," that was somewhere between 75 and 200 yards away. This tank

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<sup>7</sup> I reject Chismar's argument that Mr. Borquez was working as a relief supervisor on this project after Mr. Chismar left the area.

contained a mixture of reclaimed water from the tailings dam and well water. The record reveals that this water would have been of sufficient purity for Mr. Borquez to use to wash his legs, but Mr. Borquez was not familiar with the tank, he did not know what was stored in it, and he did not know where any valves or hoses were that he could use to wash himself. After he used all of the water in his Igloo cooler, he got back in his pickup truck and drove to the mine to shower. His refusal to use the reclaim tank and his decision to proceed to the showers is entirely reasonable.

Mr. Chismar argues that the Secretary failed to prove that Sierrita violated the safety standard. He contends that the standard is too vague to be enforceable for a number of reasons including the fact that it does not set forth how much water is required, at what distance it must be placed, and how pure the water must be. Sierrita admitted a violation of the standard, for purposes of the Mine Act, when it settled the case brought against it.

I reject the arguments raised by Mr. Chismar concerning the vagueness of the standard under the facts presented in this case. I find that under any reasonable interpretation of the standard, water or a neutralizing agent was not available at the tailings pond. The water in the Igloo cooler was clearly not sufficient. The water in the reclaim tank was not available because it was located some distance away and it was not designated for such use. The tank was not there for the purpose of providing first-aid for chemical burns. The area was surrounded by weeds, employees had not been advised to use it for first-aid, and they had not been given instruction as to how to use it for the purpose washing off chemicals or other harmful substances. It was a spur-of-the-moment suggestion by Mr. Chismar.

Whether water or neutralizing agents were required at the tailings pond when the CTI trucks were delivering lime is separate question. Mr. Chismar contends that since the liming project did not entail handling “corrosive chemicals or other harmful substances,” water was not required. He maintains that Sierrita’s employees were assigned to escort CTI trucks to the tailings pond. I reject Mr. Chismar’s arguments. It is clear that Chismar knew that Mr. Whitman would be working around the tailings pond. Mr. Chismar told him to get his protective clothing before working near the pond. Sierrita had knowledge that at least one employee could be exposed to the chemical reaction in the tailings pond. For purposes of this decision, I find that the Secretary established that Sierrita violated section 56.15001.

I find, however, that the Secretary did not establish that Mr. Chismar knowingly violated the safety standard. The analysis set forth above with respect to section 56.15006 is also applicable here. With the exception of Mr. Whitman, Mr. Chismar did not expect anyone to work down along the tailings pond. Although he should have anticipated that water might be needed for first-aid purposes, his failure to have water at the tailings pond does not rise to the level of aggravated conduct. Once the liming project was started and the floater was placed into the pond, Chismar did not believe that anyone would be exposed to chemicals or other harmful substances. Thus, he believed, with some reason, that water was not necessary. Indeed, Chismar and Hernandez testified that providing water for first-aid purposes did not occur to them because of the nature of the work to be performed.

The principal chemical hazard in the SXEW area is acid. Sierrita provides washing stations at several locations in the SXEW area as required by the safety standard. Thus, Mr. Chismar is familiar with the safety standard and its requirements. He believed that the work to be performed at the tailings pond did not require water or neutralizing agents because his employees would not be handling the lime or working alongside the tailings pond. Although I determined that the standard was applicable here, Mr. Chismar's failure to require that water be available does not demonstrate aggravated conduct. Accordingly, the \$500 civil penalty proposed against Mr. Chismar for an alleged knowing violation of section 56.150016 in Order No. 4718159 is **VACATED**.

### **III. ORDER**

The civil penalties brought against Fred Chismar for alleged knowing violations of sections 56.15006 (Citation No. 4718158) and 56.15001 (Order No. 4718159 ) are **VACATED** and this proceeding is **DISMISSED**.

Richard W. Manning  
Administrative Law Judge

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