FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 11 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 2014-440-M
v.	:	WEST 2015-101-M
JOHN RICHARDS CONSTRUCTION	:	

Before: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to John Richards Construction ("JRC") for its refusal to permit an MSHA inspector entry to its mine in violation of section 103(a) of the Act, 30 U.S.C. § 813(a).[1] Another citation was issued pursuant to 30 U.S.C. § 814(a) after a different MSHA inspector determined that JRC's fire extinguishers had not been timely inspected as required by 30 C.F.R. § 56.4201(a)(2).[2] At issue in these cases is whether the Commission Administrative Law Judge erred in granting the Secretary's motions for summary decision.

For the reasons discussed below, we affirm the Judge's decision regarding the refusal of entry violation. We also vacate the Judge's grant of summary decision regarding the fire extinguisher citation and remand for further proceedings.

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[1] 30 U.S.C. § 813(a) provides:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in . . . mines each year for the purpose of . . . determining whether there is compliance with the mandatory health or safety standards. . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person. . . . For the purpose of making any inspection or investigation under this chapter, the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

[2] 30 C.F.R. § 56.4201(a)(2) states that : "Firefighting equipment shall be inspected . . . [a]t least once every twelve months. . . ."

I.

Summary Decision

Pursuant to Commission Rule 67(b), "[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) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). Material facts are those that may affect the outcome of the case under the governing law. The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

The Commission has long analogized summary decision to summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Fed R. Civ. P. 56. *See, e.g., Kenamerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016); *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). As with summary judgment under Rule 56, appellate review of summary decisions is *de novo*, in that the reviewing court applies the same standard as the trial court. *See, e.g., Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). When the Commission reviews a summary decision and determines that the record before the Judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-19 (Aug. 1995); *Missouri Gravel Co.*, 3 FMSHRC 2470, 2473 (Nov. 1981).

II.

Discussion

A. Citation No. 8762607 - Refusal of Entry

1. Factual and Procedural Background

The Richards Pit is a sand and gravel mine in Seeley Lake, Montana, owned and operated by JRC, which is owned by John Richards. On Friday, July 19, 2013, at 11:40 a.m., MSHA Inspector Peter Crites arrived at the Richards Pit to conduct a regular inspection. Upon arrival, Crites proceeded to the office building in front of the mine, where he notified JRC office personnel, Cindy Llewellyn and Kim Myre, that he was there to conduct an inspection and asked to speak to Richards. Llewellyn told Crites that Richards was in Missoula, Montana, on business, and that she could not let Crites enter the mine. Crites asked if there was anyone else on-site who could accompany him on an inspection, and Llewellyn responded that she "thought Kerry the mechanic was out there," but regardless, she could not let the inspector enter. S. Mot. for Sum. Dec., Ex. 1 at 2-3; Ex. 2 at 1; Exs. 9-10.

Llewellyn called Richards while Crites went outside to his vehicle to call his supervisor, Curtis Petty. Llewellyn then went out on the porch to let Crites know that Richards was on the phone, and that he had directed her to lock the gate to the vehicle entrance, which she then proceeded to do. Llewellyn also informed Crites that Richards had further instructed her and

Myre to prevent access by parking their vehicles in front of the gate.[3] Crites spoke with Richards on the phone, and Richards told the inspector that "[he] could not enter the premises without [Richards] being there to accompany him." Ex. 1 at 3; Ex. 2 at 2; Exs. 9-11; JRC's Opp. to Mot. for Sum. Dec. at 1; JRC's Mot. for Oral Arg. at 1; JRC Br. at 1. According to Crites, Richards "repeated this direction to not enter the mine site at least four (4) more times." Ex. 1 at 3. JRC has not disputed this claim.

Crites subsequently spoke to Richards again on the phone. Richards informed Crites that he would be returning sometime between 4:00 and 4:30 p.m., and reiterated that Crites should not enter the property until his arrival. Shortly after 12:00 noon, Llewellyn and Myre got into their cars and drove away. As she was leaving, Llewellyn told Crites that she would return to the mine.

At 12:15 p.m., Crites called his supervisor again, who instructed him to issue the citation and wait until 4:00 p.m. for Richards to arrive. Crites then issued a citation for JRC's refusal to allow MSHA to enter the mine in violation of section 103(a) of the Mine Act. On the face of the citation, Crites stated: "John Richards is well aware of this provision of the Mine Act, and has impeded past inspections." Ex. 1-A at 2. He waited until 4:15 p.m., at which time Richards had not arrived and Llewellyn had not returned. He left the citation on the front porch of the office at 4:15 p.m. and drove away at 4:20 p.m.

JRC contested the proposed penalty of $1,000. On June 10, 2015, the Secretary filed a Motion for Summary Decision asserting that there were no material facts in dispute. JRC opposed the motion and moved for oral argument on the Secretary's motion.[4]

2. The Judge's Decision

In an order issued on August 25, 2015, the Judge granted the Secretary's motion for summary decision, finding that after looking at the record in the light most favorable to JRC, there was no genuine issue as to any material fact, and that oral argument was unnecessary to resolve the matter at issue. 37 FMSHRC 1813, 1814 (Aug. 2015) (ALJ). Specifically, the Judge disagreed with JRC's assertion that it was disputed whether Llewelyn locked the gate, because based on written statements submitted by both Llewelyn and Myre, Llewelyn locked the gate following instructions from Richards. Ex. P-2 at 10-11. Additionally, Richards' own written notes expressly stated that he instructed Llewellyn to lock the gate and block access. The Judge found that the employee's act of locking the mine gate upon Richards' orders denied Inspector Crites entry. She also determined that Crites was denied access to the mine by Richards when, according to JRC in its opposition to the Secretary's motion, Richards stated that "I spoke to Mr. Crites on the telephone and stated that Inspector Crites could not enter the premises without me

[3] There is no indication in the record regarding whether Llewellyn and Myre actually moved their vehicles to the gate.

[4] JRC has been represented by the owner, Mr. Richards, who is not an attorney.

being there to accompany him."[5] 37 FMSHRC at 1815, 1817; Ex. P-2 at 9, 11; JRC's Reply to Pet. Mot. for Sum. Dec. at 1.

The Judge dismissed JRC's claim that Inspector Crites failed to follow proper procedures. She noted that while JRC quoted a number of requirements from MSHA's program policy manual ("PPM"), it failed to specify which requirement the inspector failed to follow or how the alleged failure would affect the outcome of the case.

The Judge further determined that the facts in dispute were not material to the disposition of the case. Specifically, she noted that the validity of JRC's allegation that Crites did not observe fresh gravel at the mine, contrary to the inspector's assertion, would have no bearing on the Secretary's right of entry under section 103(a). The Judge also concluded that resolution of whether Crites failed to give JRC personnel notice that it would be cited for refusing entry was unnecessary. She found that the Mine Act imposes no requirement that an inspector threaten or otherwise warn an operator of an impending citation in order to achieve compliance. The Judge concluded that based on the circumstances of the present case and JRC's history of interference with MSHA's authority to inspect its facility, a finding of high negligence and a penalty of $1,000 were appropriate. 37 FMSHRC at 1815-16, 1820-1821.

JRC filed a petition for discretionary review with the Commission challenging the Judge's order. We granted the petition.

3. Disposition

a. The Material Facts

The Supreme Court has recognized that section 103(a) of the Mine Act authorizes warrantless inspections by granting MSHA inspectors the right of entry to, upon, or through any mine, without advance notice, to determine if there is compliance with mandatory health and safety standards. If a mine operator refuses to allow section 103(a) inspection, the Secretary is authorized to institute a civil action to obtain injunctive or other appropriate relief. *Donovan v. Dewey,* 452 U.S. 594, 596-97 (1981); *see also U.S. Steel Corp.*, 6 FMSHRC 1423, 1430-31 (June 1984). Consistent with *Dewey*, the Commission has long held that a mine operator's refusal to

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[5] The Judge characterized Richard's employees locking the mine gate as "indirect" denial of entry and held that Mr. Richards' verbal order not to enter the mine was a "direct" denial. MSHA's Program Policy Manual ("PPM") provides that "[d]irect denials are those in which an operator or the operator's agent informs an inspector that an inspection of the mine will not be permitted." MSHA PPM, Vol. I, p. 11 (Oct. 2010). It further states that "[i]ndirect denials are those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry. For example, access to the mine is blocked by a locked gate or other means of blockage. . . . [or] [w]ithdrawing mine personnel when the inspector arrives." MSHA PPM, Vol. I, p. 12-13 (Oct. 2010). We do not find it necessary to draw the distinction between the types of unlawful denials in deciding this case.

permit inspections is a violation of section 103(a). *Calvin Black Ent.*, 7 FMSHRC 1151, 1156 (Aug. 1985); *Waukesha Lime & Stone Co., Inc.*, 3 FMSHRC 1702, 1703-04 (July 1981); *U.S. Steel*, 6 FMSHRC at 1430-31.

There is no dispute regarding whether MSHA has jurisdiction over the Richards Pit or whether Inspector Crites was there for a lawful purpose, i.e., to perform an inspection of the mine pursuant to the Mine Act.[6] Therefore, the only remaining fact material to this case is whether MSHA Inspector Crites was denied entry to the Richards Pit on July 19, 2013.[7] JRC argues that Inspector Crites was not refused entry by Llewellyn or Richards, and that Richards only requested that he be given the opportunity to accompany Crites on the inspection.

After reviewing the written statements of JRC personnel, as well as the statement and notes of Inspector Crites, we conclude that there is clear and unequivocal proof that Crites was denied entry to the Richards Pit in violation of the Act.

According to Llewellyn's written statement, she said that "I told [Crites] John was in town at meetings all day and that I couldn't let him in. He asked if anyone else was outside to show him around and I told him I thought Kerry the mechanic was out there but that again couldn't let him in. . . . I told him I would have to call John."[8] Ex. 2 at 10. Richards also stated in his notes that "I told Pete I would be back at 4:30 or so and we could do inspection then." Ex. 2 at 11. In his reply to the Secretary's motion for summary decision, Richards admitted that "I spoke to Crites on the telephone and stated that Inspector Crites could not enter the premises without me being there to accompany him." JRC's Reply at 1.

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[6] JRC asserts that according to JRC's office staff, Crites indicated that he was at the mine because MSHA had received a complaint. This fact is immaterial because whether Crites was there to investigate an anonymous safety complaint or conduct a regular inspection. Both are authorized under the Act. *See* 30 U.S.C. §§ 813(a) and (g)(1).

[7] JRC asserts that MSHA needed Richards' permission to cross private land to reach the mine site. Contrary to JRC's assertion, the Mine Act broadly defines "mine" to include private ways and roads appurtenant to the area of land from which minerals are extracted. 30 U.S.C. § 802(h)(1). This provision has been read to extend MSHA's jurisdiction to private roads leading to mine facilities. *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009). Accordingly, MSHA's inspectors would not require permission to travel the private roadway providing access to the Richards Pit.

[8] JRC improperly attempts to put forth a new account of the facts in an affidavit from its employee Cindy Llewelyn, executed nearly a month after issuance of the Judge's order granting the Secretary summary decision. *See* PDR, Ex. 1. In the affidavit, Llewelyn completely contradicts her previous written statement introduced before the Judge. Nonetheless, because the affidavit together with a photo of the mine's gate and entry (PDR, Exs. 1, 3) are new evidence introduced for the first time on appeal, and not entered before the Judge for consideration, they will not be considered by the Commission. 30 U.S.C. § 823(d)(2)(C) ("For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based . . . No other material shall be considered by the Commission upon review.").

JRC further insists that Crites was not physically barred entry because the gate was never actually locked and, in any eventuality, Crites could easily step over the gate to access the mine.[9] Whether the gate was actually locked is not material to the disposition of this case. By expressly telling Crites that the gate would be locked and that he could not enter, JRC made clear that it would not permit Crites entry into the mine. Requiring more than such a clear expression of intent to show an inspector had been denied entry to a mine would risk forcing MSHA's inspectors into potentially dangerous confrontations with uncooperative operators. *See Calvin Black Ent.*, 7 FMSHRC at 1157 ("MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect.").

Moreover, Richards' insistence that he accompany Crites on the inspection before he could enter the premises effectively amounts to a demand for prior notice of the inspector's visit. As correctly noted by the Judge, section 103(a) expressly requires that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a); 37 FMSHRC at 1818; *Calvin Black*, 7 FMSHRC at 1156. Delaying an MSHA inspection once it is known that an inspector has arrived can compromise the value of an inspection. Richards could have designated any one of the employees in the office that day or on the mine site to accompany Crites on the inspection, but he refused.

JRC refused to allow Crites entry into the Richards Pit and its agents prevented access to the mine. This violated MSHA's right of entry under section 103(a) of the Mine Act. The record before the Judge reveals no genuine issue of material fact in dispute and wholly supports her grant of the Secretary's motion for summary decision.

b. Degree of Negligence and the Penalty Amount

We also affirm the Judge's decision that JRC was highly negligent in its decision to refuse MSHA access to the mine, because the operator was well aware of MSHA's right to inspect, and yet acted intentionally in contravention of that right. The Commission has held "that an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (Apr. 1998) (quoting *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)).

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[9] The written statements of JRC's employees directly contradict JRC's assertion that the gate was never locked. Llewellyn states in her affidavit that "I told [Crites] per John [Richards] I was to go lock the gate at which time I did." Ex. 2 at 10. Kim Myre provides the same account, stating, "Cindy locked the gate per John's instructions." *Id.* at 9. These statements are further corroborated by the personal notes of Richards, who noted, "Cindy – instructed to lock gate and block access." Ex. 2 at 11; *see also* Ex. 2 at 1 ("John said to lock the gate as no one was working in the pit. . . . I went and closed the chain on the gate. Gate was only open for the ready mix driver.").

Finally, we affirm the Judge's penalty determination of $1,000. In discussing each of the statutory penalty criteria,[10] the Judge placed particular emphasis on JRC's history of similar behavior, which she found to be "particularly egregious." 37 FMSHRC at 1820. While JRC asserts that the proposed penalty would be devastating to the mine's continued operation, it proffered no evidence that would support its claim. *Id.* The Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sep. 1973)).

B. Citation No. 8762878 – Fire Extinguisher Inspection

1. Factual and Procedural Background

On July 29, 2014, MSHA Inspector David Small arrived at the Richards Pit to conduct a regular inspection. While there, Small examined the mine's fire extinguishers. JRC was unable to produce records demonstrating that the inspection had occurred. According to Small's inspection notes from that day, Richards told him that he was unaware that he needed to conduct yearly inspections, and asked Small for additional time to have the extinguishers examined. Small inferred from these facts that annual inspections had not been performed. Small issued Citation No. 8762878 for JRC's failure to conduct the annual inspection of its fire extinguishers, in violation of 30 C.F.R. § 56.4201(a)(2). Ex. P-1 at 1-2; Ex. P-4 at 1; S. Mot. for Sum. Dec. at 5; 37 FMSHRC 2490, 2491-92 (Oct. 2015). The citation states:

> *The yearly inspection of the fire extinguishers were* [sic] *not conducted* at the mine site. At least once every 12 months checks shall be conducted to determine the condition of the extinguishing agent, mechanical parts, hose, nozzle, and vessel to determine that the extinguisher will function properly. Based on continued mining operations a person could be injured if a fire were to occur and a fire extinguisher did not function properly.

S. Mot. for Sum. Dec., Ex. 2 (emphasis added).

Approximately one week later, on August 6, 2014, JRC had Missoula Fire Equipment ("MFE") perform the annual inspection of the extinguishers. JRC later provided Small with the invoice from MFE as proof of examination, and the citation was abated. S. Exs. 3, 5. The Secretary subsequently filed a petition for civil penalty, which was assigned to the same Judge as the previous docket. In JRC's answer to the Secretary's petition, the operator did not provide a

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[10] In assessing civil monetary penalties, section 110(i) of the Act, 30 U.S.C. § 820(i), requires that the Commission consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

reason for why it was unable to produce the inspection records at the time of the MSHA inspection. It stated: "Deny. Defendant has previously provided MSHA with reasons or Defendant is without knowledge to respond at this time." JRC Ans. to Pen. Pet. at 1.[11]

However, through subsequent submissions and conference calls with the Judge, Richards claimed that an inspection of the fire extinguishers had, in fact, been timely performed and that it was current at the time of Small's inspection. JRC provided a copy of the alleged record of timely inspection, along with an affidavit from JRC employee Mark Smith, who allegedly performed the timely inspection.[12] JRC Br. Opp. Sum. Dec., Exs. R-1, R-2. During one of four conference calls with the Judge, Richards stated that he did not have the record of inspection available at the time of Small's inspection. He did not know that it existed and needed to question the person who performs the fire extinguisher examinations. He then stated that he had part of the records at the time, but the other records were in a different file that he could not find. JRC PHR at 2; JRC Br. at 2; Exs. R-l, R-2; Aug. 14, 2015 Telec. Tr. 9-10; 37 FMSHRC at 2492.

The Secretary filed a motion for summary decision asserting that there were no material facts in dispute and that JRC was in violation of section 56.4201(a)(2) because it had failed to provide current annual inspection records for the fire extinguishers. JRC opposed the motion.

The Judge granted the Secretary's motion for summary decision. She acknowledged the discrepancy between Richards' alleged statements at the time of Small's inspection and Richards' later assertion of a timely inspection, but nonetheless found the dispute immaterial. The Judge determined that "its resolution does not affect 'the outcome of the suit under governing law,'" and that the issue before her was "not whether the annual inspections had been performed, but whether, at the time of inspection, the operator was able to demonstrate to the inspector compliance with the standard by producing adequate documentation of timely inspections." 37 FMSHRC at 2492, *quoting Anderson*, 411 U.S. at 248.

The Judge concluded that even when viewing the evidence in the light most favorable to the operator – that the extinguisher had been timely inspected, but the documentation was unavailable – the "standard is only enforceable if the operator demonstrates to the inspector, through records or tags, that the fire extinguishers have been properly inspected." *Id.* at 2493-94. Consequently, she concluded that JRC was in violation of the standard upon finding that it was undisputed that JRC had failed to provide the inspector with proof of a timely inspection. *Id.* at 2494, 2496. The Judge did not consider the evidence produced by JRC allegedly proving that the annual inspection had been performed in accordance with the regulation. Aug. 14, 2015

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[11] By order dated May 20, 2015, granting a motion of the Secretary, the Judge designated Docket WEST 2015-101-M, involving Citation No. 8762878, for Simplified Proceedings under Commission Rule 101. 29 C.F.R. § 2700.101. Richards opposed the motion and requested the opportunity to take depositions.

[12] According to Mark Smith's affidavit, he "performed the annual inspection of John Richards Construction fire extinguishers on July 1, 2014." PDR, Ex. 1.

Telec. Tr. 9-12. JRC filed a petition for discretionary review appealing the Judge's decision, which we granted.[13]

2. Disposition

We conclude that summary decision here was inappropriate because a genuine issue of material fact remains.

Section 56.4201(a)(2) requires that "[f]irefighting equipment shall be inspected . . . [a]t least once every twelve months." This language unequivocally requires an annual inspection of fire extinguishers. In the instant case, however, there remains a factual dispute as to whether the operator performed the necessary annual inspection.

According to Inspector Small, on July 29, 2014, Richards told Small that he was unaware of the annual inspection requirement, and then he asked Small for additional time to have the extinguishers inspected. S. Mot. for Sum. Dec., Exs. 1, 4. The citation was terminated on August 13, 2014, after JRC produced a record showing that MFE performed the inspection on August 6.

However, in its April 2015 pre-hearing report, JRC asserted that the fire extinguishers in fact had been timely inspected. Later, during a conference call, JRC told the Judge that the inspection records were not produced because Richards had not known they existed and did not know where they were. JRC provided a copy of the alleged record of timely inspection, along with an affidavit from JRC employee Mark Smith, who allegedly performed the timely inspection.[14] JRC Br. Opp. Sum. Dec., Exs. R-1, R-2. Nonetheless, the Judge found a violation of section 57.45201(a)(2) because the operator did not produce a record of an inspection at the time of the inspection.

We conclude that the Judge erred because the plain terms of the cited provision, section 57.45201(a), require a determination of whether an annual inspection was conducted. That section does not state a requirement for the immediate production of a record of the inspection. Consequently, in light of Richards' submission of evidence purporting to show compliance with the inspection requirement, a material fact is in dispute regarding whether JRC failed to conduct the annual inspection as alleged in the citation.

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[13] JRC also appealed the Judge's decision regarding Citation No. 8762879, but the Commission did not grant review of that citation.

[14] According to Mark Smith's affidavit, he "performed the annual inspection of John Richards Construction fire extinguishers on July 1, 2014." PDR, Ex. 1.

As noted, the Judge found JRC in violation of section 56.4201(a)(2) based on the operator's failure to provide proof of a timely inspection to Small at the time of the MSHA inspection. Although the failure to provide proof of a timely examination during an MSHA inspection suggests a violation of section 57.45201(b) of the regulations,[15] provision of a certification record at the time of inspection is not an element of the violation charged here – that is, a failure to perform an inspection as required by section 56.4201(a)(2).

Section 57.45201(a)(2) mandates the performance of an annual inspection whereas section 57.45201(b) requires the creation of the proof of inspection – each requiring the resolution of a different factual question. Therefore, while an operator's failure to produce a record of the certification required by subparagraph (b) provides sufficient grounds upon which to charge a violation of paragraph (a), it does not necessarily answer the ultimate factual question of whether JRC actually performed the section 56.4201(a)(2) inspection. *See LJ's Corp.*, 14 FMSHRC 1278, 1280 (Aug. 1992) ("the absence of certification of inspection and testing of [a] mine rescue apparatus . . . is sufficient to establish a prima facie case of a violation.").

Thus, an operator's inability to provide proof of an inspection at the time of inspection, standing alone, is not dispositive of a violation of paragraph (a). Indeed, the Commission has held that "upon a showing by the Secretary that the operator's records indicate the required certification was not made, the violation is established unless the operator can show that such inspection actually occurred within the relevant time period." *Id.* at 1280,[16] *citing Southern Ohio Coal Co.*, 14 FMSHRC 1, 13 (Jan. 1992); *Mid-Continent Res.*, 11 FMSHRC 505, 509 (April 1989). We reasoned that there may be instances where the operator may have performed the required inspection, but, for some reason, failed to make a record of it. Under these circumstances, the operator may present evidence that the required inspection was performed. *LJ's Corp.*, 14 FMSHRC at 1280.

In the instant case, the Judge did not consider the alleged proof of inspection record and Smith affidavit presented by JRC on the ground that the evidence had not been produced at the time of the inspection. However, in accordance with the precedent established in *LJ's Corp.*, JRC is allowed to rebut the Secretary's prima facie case by providing credible evidence that the extinguisher was inspected in accordance with paragraph (a) requirements. On remand, the Judge must consider and weigh JRC's rebuttal evidence against other evidence in the record.

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[15] 30 C.F.R. § 57.45201(b) requires:

> At the completion of each inspection or test required by this standard, the person making the inspection or test shall certify that the inspection or test has been made and the date on which it was made. Certifications of hydrostatic testing shall be retained until the fire extinguisher is retested or permanently removed from service. Other certifications shall be retained for one year.

[16] In *LJ's Corp.*, a mine operator was cited for failure to test a rescue apparatus within the 30-day period prescribed by 30 C.F.R. § 49.6(b) when it could not produce records evidencing that the required tests had been done. 14 FMSHRC at 1278.

Accordingly, we vacate the Judge's grant of summary decision on this citation and remand to the Judge for further discovery and a full hearing on the merits. On remand, the Judge must make the necessary finding of fact and credibility determinations as stated in this decision.[17]

III.

Conclusion

For the reasons set forth above, the Judge's order granting the Secretary's motion for summary decision regarding Citation No. 8762607 is affirmed. We also vacate the Judge's grant of summary decision regarding Citation No. 8762878 and remand for further proceedings consistent with this decision.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[17] Due to the issues involved and our order of remand, simplified proceedings are hereby discontinued here and this case shall proceed under the Commission's conventional rules.

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