FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 12 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. VA 2013-275-M
	:	VA 2013-276-M
	:	VA 2013-291-M
v.	:	
SUNBELT RENTALS, INC.; LVR, INC.; and ROANOKE CEMENT CO., LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman, Nakamura, and Althen, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act") and involve three citations issued to Sunbelt Rentals, Inc. ("Sunbelt"), LVR, Inc. ("LVR"), and Roanoke Cement Co., LLC ("Roanoke") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). All three citations allege a violation of 30 C.F.R. § 56.18002(a), which requires the operator's designated examiner to examine each working place at least once each shift for safety and health hazards.[1] Sunbelt, LVR, and Roanoke were each cited for failing to adequately examine a workplace.

The assigned Administrative Law Judge dismissed the three citations because he found that the Respondents[2] had met the requirements of section 56.18002(a). In this regard, the Judge found that the standard does not require an "adequate" workplace exam and that the Respondents, in any event, lacked notice of such an "adequacy" requirement. 35 FMSHRC 3208, 3214-15 (Sept. 2013) (ALJ).

[1] 30 C.F.R. § 56.18002(a) provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

[2] Sunbelt, LVR, and Roanoke are sometimes referred to collectively herein as the "Respondents."

The Secretary filed a petition for discretionary review of the Judge's decision, which we granted. LVR and Roanoke subsequently filed a motion to be dismissed from these proceedings.[3]

For the reasons that follow, we deny LVR and Roanoke's motion and vacate and remand the Judge's decision as to all three citations.

I.

Factual and Procedural Background

Roanoke operates a preheat[4] tower comprised of six vertically connected conical vessels ("cyclones") which process heated limestone material. LVR contracted with Roanoke to perform annual pre-heat tower maintenance. Sunbelt contracted with LVR to erect scaffolding within the tower so LVR could perform its annual maintenance.

The tower contains an exterior staircase, which can be used to access a small two-foot by two-foot door at the seventh level. By looking through this doorway, one can examine the seventh level. On January 8, 2013, Sunbelt, the subcontractor, was planning to erect scaffolding at the sixth level of the pre-heat tower. At the start of the shift, Kendrick Lavon Davis, who has supervised scaffold erection projects for Sunbelt for the prior seven years, examined the sixth level. While on the sixth level of the tower, Davis also visually inspected the seventh level. However, Davis did not climb the external staircase and look through the small doorway at the seventh level.

During the shift on January 8, 2013, unspecified falling material knocked a Sunbelt employee, Brian Tyler, unconscious while he was working in the pre-heat tower. Subsequently, MSHA Inspector David Nichols looked through the aforementioned two-foot doorway into the seventh level and observed a buildup of material which could have fallen through a six-foot long hole between the sixth and seventh levels, above where Tyler was working.

[3] In an order issued on January 13, 2014, the Commission stated that it would consider Roanoke and LVR's motion to drop at a later time, along with the issues raised in the Secretary's petition.

[4] Preheat is defined as "[t]o heat beforehand; as . . . to heat (metal) prior to a thermal or mechanical treatment." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 424 (2d ed. 1997).

Inspector Nichols issued three citations, one each to Sunbelt,[5] LVR,[6] and Roanoke.[7] The proposed penalty assessments were $51,900, $47,300 and $52,500 respectively. The inspector specified that each of the Respondents in question violated section 56.18002(a) due to its failure to "adequately" inspect the seventh level of the pre-heat tower, the area above where the employees were working.[8]

II.

The Judge's Decision

Before the hearing, the Secretary filed a motion for partial summary decision, Sunbelt filed a cross-motion for summary decision, and LVR and Roanoke filed a joint cross-motion for summary decision. 35 FMSHRC at 3209. Based on his findings, the Judge granted the Respondents' cross-motions for summary decision, and dismissed the proceedings.

The Judge found that the standard does not require that the workplace exam be "adequate." Instead, the Judge found that the competent person designated by the operator must simply conduct a workplace exam, although a failure to identify "numerous," "obvious," or "egregious" hazards would equate to a failure to conduct the exam. *Id.* at 3215 n.7. The Judge concluded that Davis had conducted the required workplace exam; that Sunbelt, LVR and Roanoke had designated Davis to examine the workplace; and that Davis was "competent" based on his experience and qualifications. *Id.* at 3215. However, the Judge speculated that Davis may have been negligent when conducting the workplace exam. *Id.*.

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[5] Citation No. 8723677 was issued to Sunbelt because it "did not do an adequate work place exam in the area [the workers] were working as there [was] hanging material overhead that had not been noted on the workplace exam. The area above [on the seventh level] was never checked" (emphasis added).

[6] Citation No. 8723676 was issued to LVR because it "did not do an adequate work place exam as [it] never inspected the area [on the seventh level] above where the employees were working where there was hanging material." (emphasis added). In the condition or practice section for Citation No. 8723676, the inspector mistakenly referred to Sunbelt rather than LVR. As noted in Citation No. 8723676-01, the inspector amended the citation to correct the error.

[7] Citation No. 8723675 was issued to Roanoke because it "[had] last done a workplace exam 7 days before the accident of the area the contractor was working in. The last workplace exam was done on 12/30/2012 and at that time the area [on the seventh level] above where the contractor was working was not checked for hazards before turning over the area to the contractor."

[8] Unlike the citations issued to Sunbelt and LVR, the citation issued to Roanoke did not expressly use the term "adequate."

The Judge dismissed LVR and Roanoke from these proceedings, rejecting "any . . . argument that [s]ection 56.18002[a] imposes a duty on multiple operators to perform multiple examinations of the same working place when the examination has already been done by a competent person." *Id.* at 3214. The Judge also found that all three Respondents lacked notice that the standard required "adequate" workplace exams. *Id.* at 3215.

The Judge briefly discussed whether the seventh level was a "working place" as the term is used in the standard but did not resolve that question. *Id.* at 3213-14.

III.

Post-Decisional Proceedings

The Secretary's Petition for Discretionary Review ("PDR") raised the following issues: (1) whether the Judge erred in ruling that 30 C.F.R. § 56.18002(a) does not require that workplace examinations be "adequate," (2) whether the Judge erred in ruling that Respondents lacked fair notice that the standard requires "adequate" workplace exams, and (3) whether, if the standard contains an "adequacy" requirement, the Judge erred in ruling that there was no issue as to any material fact and that Respondents were entitled to judgment as a matter of law. The PDR maintained that an "adequate" exam had not been conducted but did not define the term "adequate" in the context of workplace exams under the standard.

A. LVR and Roanoke's Motion

After the Commission issued its Direction for Review, LVR and Roanoke filed a motion requesting that the Commission dismiss them from these proceedings. *See* Motion To Drop Respondents Roanoke Cement and LVR For Misjoinder and Dismiss Docket Nos. VA 2013-276-M and VA 2013-275-M. LVR and Roanoke contend that they were not cited under a theory of strict liability for failing to ensure that Sunbelt had conducted an "adequate" workplace exam. Instead, they claim they were cited independently of Sunbelt's actions because allegedly they themselves did not conduct independent "adequate" workplace exams. They claim that the Judge, when discussing whether the standard imposes a duty on multiple operators to perform multiple exams of the same workplace, found a second independent workplace exam of the same area to be unnecessary even if the first workplace exam was so flawed that it violated the standard. Based upon these premises, they assert that the Secretary's PDR failed to appeal the ruling by the Judge regarding the duty to conduct multiple exams.

In response, the Secretary maintains that the Judge dismissed LVR and Roanoke from these proceedings because he found that Sunbelt's exam satisfied the standard's requirements as interpreted by the Judge. According to the Secretary, because the Judge's dismissal of the citations against LVR and Roanoke was premised upon no violation by Sunbelt, the vacation of the dismissals against them is necessarily implicated by the Secretary's challenge presented to the Commission. The Secretary asserts that if the standard requires "adequate" workplace exams, the Judge must reconsider his finding that Sunbelt's exam met the standard's requirements and, therefore, also must reconsider his dismissals of LVR and Roanoke.

B. The Meaning of the Term "Adequate" as Applied to the Standard

The Secretary did not define the term "adequate" before the Judge or in his PDR. During oral argument before the Commission, the Secretary sought to rectify this omission and stated that a workplace exam under the standard is "adequate" "if it is reasonably likely to identify conditions which may adversely affect safety and health." Oral Arg. Tr. 9-10. After oral argument in this case, the Secretary requested an opportunity to file a supplemental brief, whereupon the Commission ordered Sunbelt and the Secretary to file supplemental briefs. In his supplemental brief, the Secretary asserted that a workplace exam is "adequate" if the "operator's examiner [identifies] all of the conditions that a reasonably prudent examiner would identify that may adversely affect safety and health." S. Supp. Br. at 5-6.

Sunbelt responded that we should reject the Secretary's interpretation of the term "adequate" because it was provided unfairly for the first time on appeal during oral argument and that, in any event, it is not entitled to deference. Sunbelt further contends that it did not receive fair notice of the proffered definition. Furthermore, an independently sufficient basis supports affirmance of the Judge's decision.

IV.

Disposition

A. LVR and Roanoke's Motion to Dismiss[9]

We deny LVR and Roanoke's motion to dismiss. It is well established that MSHA has discretion to cite production-operators for violations of mandatory safety standards committed by their independent contractors on the mine site. *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 314 (4th Cir. 2008) (the Secretary has discretionary authority to cite the operator, the independent contractor, or both for an independent contractor's violations); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 157-58 (D.C. Cir. 2006) (the Secretary has unreviewable discretion to cite production-operator, the independent contractor, or both, for contractor violations); *see also Bituminous Coal Operators' Ass'n v. Sec'y of Interior*, 547 F.2d 240 (4th Cir. 1977) (finding that under the Coal Act of 1969, the Secretary may hold a mining company liable for violation committed by its construction company).

Moreover, we have no doubt that the inspector knew that Sunbelt was the entity responsible for the examination but found that a violation by Sunbelt also implicated LVR and Roanoke.[10] It is not reasonable to think that the inspector in this case would have cited LVR and

[9] Commissioners Young and Cohen do not join this section of the opinion.

[10] We do not demand that inspectors write citations with the legal precision of attorneys sitting in comfortable offices. We read the citations as reflecting the inspector's knowledge that, if a contractor does not comply with an examination obligation, he may also cite the production-operator.

Roanoke if Sunbelt's examination complied with the examination standard. It simply is not plausible for us to believe, or for LVR or Roanoke to contend, that had the inspector been present during the inspection and found the examination to be adequate, the inspector would have cited LVR and Roanoke for failing to conduct simultaneous inspections.[11] Such a claim is not the gravamen of the citation.[12]

Because the Judge decided the case upon summary judgment, there is no hearing record supporting theories of liability or defense. However, in reviewing the Judge's decision, it appears that the Judge's dismissal of LVR and Roanoke was based upon his finding that Sunbelt had not violated the standard. Specifically, the Judge rejected "any . . . argument that [s]ection 56.18002[a] imposes a duty on multiple operators to perform multiple examinations of the same working place when the exam has already been done by a competent person."[13] 35 FMSHRC at 3214 (emphasis added).

Thus, the Judge expressly linked his dismissal of LVR and Roanoke to his finding that Sunbelt complied with the mandatory safety standard. In effect, the Judge recognized that the validity of the citations against LVR and Roanoke was inextricably intertwined with the citation to Sunbelt. That being the case, our review of the Sunbelt citation necessarily is relevant to the dismissals of LVR and Roanoke.[14]

We deny LVR and Roanoke's motion to dismiss.[15]

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[11] We are unaware of any instance in which MSHA has asserted that a production-operator has a duty to conduct a duplicative examination of a working place that is under the exclusive control of an independent contractor that has inspected the area satisfactorily. We reject the suggestion that the Judge interpreted the issue with respect to LVR and Roanoke as whether they had a separate duty to perform duplicative examinations of the same workplace even if Sunbelt conducted a compliant examination.

[12] *See Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 930 (7th Cir. 1986) (holding that it is well-established that administrative pleadings are to be liberally construed, that this is particularly true for citations issued under the Occupational Safety and Health Act of 1970, because the citations are drafted by non-legal personnel who must act quickly and that to hold inflexibly the Secretary of Labor to a narrow construction of the language of a citation would unduly cripple enforcement of the Act).

[13] The phrase "competent person" refers to a requirement of the standard, that a "competent person" designated by the operator conduct the workplace exam. 30 C.F.R. § 56.18002(a).

[14] Thus, we find that the Secretary's Petition for Review, challenging the Judge's finding of no violation of the examination standard, raised the issue of LVR and Roanoke's liability.

[15] As discussed below, we remand the Judge's decision for a determination of whether Sunbelt's examination complied with the requirements of section 56.18002(a) as set forth in this decision. If the Judge finds that Davis' inspection did not meet the requirements of section

B. Interpretation of 30 C.F.R. § 56.18002(a)

The principal issue before the Commission is the extent to which section 56.18002(a) creates substantive requirements for the conduct of an examination pursuant to that section. The Judge found the section does not require that the workplace examination be "adequate." Instead, the Judge held merely that an examiner's failure to identify "numerous," "obvious," or "egregious" hazards might equate to "failure to perform the requisite exam." *Id.* at 3215 n.7. The Judge's holding that the examination need not be adequate was erroneous. Accordingly, we vacate his decision.

We do not agree that the operator must only examine the workplace to a standard of care slightly surpassing not conducting the examination at all. Section 56.18002(a) consists of only two sentences. The first sentence requires that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." 30 C.F.R. § 56.18002(a). The requirement that the operator designate a "competent person" to conduct the examination must mean that there will be substance to the examination. Many miners could detect "obvious" or "egregious" hazards. The requirement that a competent person examine the working place certainly raises the substantive requirement for the examination to the level of a meaningful examination.

The second sentence of section 56.18002(a) mandates that, "[t]he operator shall promptly initiate appropriate actions to correct such conditions." *Id.* Therefore, this sentence requires the correction of the conditions referred to in the preceding sentence – "conditions that may adversely affect safety or health." By doing so, it sets forth the substantive requirement for the examination. The examination is to identify "conditions that may affect safety or health."[16] *Id.*

56.18002(a), he will have to make a negligence determination for each Respondent. Negligence determinations necessarily require analysis of whether each Respondent met its particular duty of care considering the actions a reasonably prudent operator in its position would have taken under the same or similar circumstances. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). For example, in *Jim Walter*, the Commission affirmed a finding that the production-operator was not negligent when one of its contractors failed to require use of fall protection in violation of 30 CFR 77.1710(g). *Id.* at 1975-76. Factors used by the Commission in assessing the production-operator's liability include whether the record demonstrates the production-operator was negligent in hiring the contractor, the contractor was appropriately aware of MSHA's regulations, the contractor had provided its employees required training, and whether there is any indication of negligence by the production-operator with respect to the specific violation. *Id.* at 1976-77.

[16] This construction of section 56.18002(a) is consistent with Commission case law construing regulations to further the protective purposes of the Mine Act. *See, e.g., Sedgman*, 28 FMSHRC 322, 330 (Jun. 2006). The requirement set forth in this opinion accords with our avoidance of absurd interpretations of regulations. *See Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998), *aff'd* 170 F.3d 148, 161 (2d Cir. 1999).

Having determined that under the standard, the examination must be adequate, we must articulate the appropriate test for such an examination. We conclude that the application of the "reasonably prudent" miner test is appropriate here. *U.S. Steel Mining Co., LLC*, 27 FMSHRC 435, 439 (May 2005). Before the Judge and in his PDR, the Secretary argued that workplace exams must be "adequate" but failed to define that term. In his supplemental brief on appeal, the Secretary argued that to be "adequate" the workplace examination "must identify all of the conditions that a reasonably prudent examiner would identify that may adversely affect safety and health." S. Supp. Br. at 5-6. He asserted that compliance with 30 C.F.R. § 56.18002(a) must be judged according to a reasonably prudent person test just like compliance with any other generally worded standard. *Id.* at 14.

The Commission has consistently applied the reasonably prudent person test to broadly worded standards. *See U.S. Steel Mining Co.*, 27 FMSHRC at 439.[17] The reasonably prudent person test provides that an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting correction within the purview of the applicable standard. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

In *Spartan Mining,* for example, the standard at issue required that equipment be maintained in safe operating condition. We held that under this standard, "the alleged violative condition is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." 30 FMSHRC at 711. We concluded that "a reasonably prudent foreman would have recognized that the damaged cable at issue constituted a hazard warranting corrective action." *Id.* at 713.

In *FMC Wyoming Corporation,* 11 FMSHRC 1622, 1629 (Sept. 1989), the Commission found that 30 C.F.R. § 57.18002(a), was "drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine." This standard, which governs workplace exams for underground metal and non-metal mines, contains language identical to section 56.18002(a). It follows that section 56.18002(a), also must be "broadly adaptable" and, therefore, is appropriate for application of the reasonably prudent person standard.[18]

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[17] Accordingly, although the definition of "adequate" was articulated by the Secretary for the first time, in this case, at oral argument, it is certainly not a novel theory of regulatory interpretation. Rather, it is a consistent concept in Commission common law, and has been repeatedly applied to broadly worded mandatory safety standards. *See infra.*

[18] At issue in *FMC Wyoming* was the competence of the examiner, rather than the quality of the examination. The Commission applied the reasonably prudent person test to the requirement under section 57.18002(a) that a competent person designated by the operator periodically conduct workplace examinations. We held that the term "competent person" must

Therefore, we hold that an examination of working places, to comply with 30 C.F.R. § 56.18002(a), must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize.

C. Notice

As noted *supra,* Sunbelt contends that any standard of adequacy adopted by the Commission in this case should not be applied to it because the Secretary failed to provide fair notice to Sunbelt of the new regulatory interpretation. Sunbelt Supp. Br. at 9-11.

The Commission has historically applied the reasonably prudent person standard, described above, as an objective standard to resolve issues of notice. *See, e.g., Otis Elevator Co.*, 11 FMSHRC 1896, 1906-07 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Alabama By-Products Corp.*, 4 FMSHRC at 2129. In the notice context, the Commission has expressed this test as 'whether 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). When addressing issues of fair notice, we have previously considered whether the operator would have been aware of the requirement of the standard because of past case precedent. *See Island Creek Co.*, 20 FMSHRC 14, 25 (Jan. 1998).

In light of the protective purposes of the Act and our extensive case-law regarding the reasonably prudent person test, we hold that the Respondents should have been aware that broadly-worded standards requiring examinations by competent persons must meet a standard of adequacy under the reasonably prudent person test. Respondents cannot claim to be surprised that the examination required under section 56.18002(a) must be adequate to uncover workplace hazards. This is, obviously, the purpose of the examination. Nothing about our adoption of this standard should cause an operator to act differently in conducting an examination.[19] Thus, Respondents had fair notice of the requirement of adequacy in section 56.18002(a).

V.

Conclusion

We deny LVR and Roanoke's motion to dismiss. We vacate the Judge's decision that Sunbelt, LVR, and Roanoke did not violate 30 C.F.R. § 56.18002(a) and further find that the

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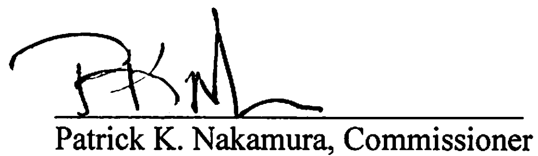
contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry. 11 FMSHRC at 1629.

[19] Moreover, Sunbelt is not prejudiced in the presentation of a defense. This case was decided by the Judge on cross-motions for summary decision. Since we are remanding the case for an evidentiary hearing, Sunbelt will be able to put on evidence and cross-examine the Secretary's witnesses regarding the adequacy of the examination.

Respondents were provided fair notice of the standard's requirements, as set forth in this decision.

We remand for further proceedings as to whether the workplace examination conducted by Davis met the requirements of the standard. On remand, the Judge should consider both whether the seventh level of the pre-heat tower was a "working place," and whether Davis' workplace examination was adequately conducted, as defined by this decision.

Mary Lu Jordan, Chairman



Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioners Young and Cohen, concurring in part and dissenting in part:

We join the majority decision in this case, except for Disposition Section A, the denial of the motion to dismiss filed by LVR, Inc. ("LVR") and Roanoke Cement Co., LLC ("Roanoke"). Slip op. at 5-6. In our view, LVR and Roanoke should be released from these cases.

Fundamental to due process is the principle that a person or other entity charged with a violation be given notice of the charges against it. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957)(the federal pleading rules require the complaint to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007); *Carmichael v. Jim Walter Res., Inc.*, 20 FMSHRC 479, 484 n.9 (May 1998) ("the complaint to the Commission, much like a complaint in a court proceeding, is a basic pleading that serves to frame the issues to be tried"). In this case, our colleagues would include LVR and Roanoke in the remand based on a theory that these entities can be held responsible for Sunbelt's allegedly inadequate examination. However, LVR and Roanoke were never charged with liability based on anything other than their own alleged failures to perform an examination of the working place under 30 C.F.R. § 56.18002(a). A review of the procedural facts of the case makes this clear.

On January 10, 2013, Citation No. 8723676 was issued against LVR, charging this contractor with a violation of section 56.18002(a) as follows: "When checked it was found that the contractor Sunbelt Rentals did not do an adequate work place exam as they never inspected the area above where the employees were working where there was hanging material. A work place exam is to be done by the operator at least once each shift for conditions which may adversely affect safety or health. . . ." The negligence was listed as "high." Four days later, the inspector modified the citation because the "wrong contractor name was used in the body of the citation," *i.e.*, it "should have been LVR instead of Sunbelt Rentals."

On January 10, 2013, Citation No. 8723675 was issued against Roanoke, charging this operator with a violation of section 56.18002(a) as follows: "It was found that Roanoke Cement had last done a work place exam 7 days before the accident of the area the contractor was working on. The last workplace exam was done on 12/30/2012 and at that time the area above where the contractor was working was not checked for hazards before turning over the area to the contractor. A work place exam is to be done by the operator at least once each shift for conditions which may adversely affect safety or health . . . ." As with LVR, the negligence was listed as "high."

Subsequently, MSHA issued "special assessments" against both LVR and Roanoke pursuant to 30 C.F.R. § 100.5. The civil penalties proposed were $47,300 against LVR and $52,500 against Roanoke. On May 1, 2013, after the proposed penalties were contested, the Secretary, by an attorney from the Solicitor's Office of the Department of Labor, issued a Petition for Assessment of Civil Penalty against LVR and Roanoke based on these citations and special assessments. The attorney did not amend the citations to allege that LVR and Roanoke failed to ensure that the exam was performed.

On August 7, 2013, the Secretary filed a Motion for Partial Summary Decision against Sunbelt, LVR, and Roanoke in which he alleged that work place examinations under section 56.18002(a) must be adequate, and that operators have a duty either to perform a proper work place examination or to ensure that a contractor performs such an examination. The motion failed to recognize that LVR and Roanoke had not actually been charged with failure to ensure that a proper examination had been done.

Roanoke and LVR then filed a Joint Opposition to the Secretary's Motion and Cross-Motion for Summary Decision. In this pleading, Roanoke and LVR alleged that each entity had been cited for failing to perform its own examination, and not for a failure to ensure that an examination had been performed. They argued that they did not have a duty to perform separate, multiple examinations of the same work place, and that they had relied on Sunbelt to perform the necessary examination.

The Secretary then filed a Response to Roanoke and LVR's Motion for Summary Decision and Reply to Roanoke and LVR's Response to the Secretary's Motion for Partial Summary Decision. In the portion of the pleading responding to the Roanoke/LVR motion for summary decision, the Secretary again argued that an adequate examination had not been performed. The Secretary further alleged that Roanoke and LVR did not designate Sunbelt's examiner, Von Davis, to perform an examination on their behalf.

In the portion of the pleading supporting his own Motion for Partial Summary Judgment, the Secretary reiterated his argument that Roanoke and LVR had a duty either to perform an adequate examination or to ensure that one was performed. The Secretary then quoted the two citations, arguing that they alleged a failure to have a valid workplace exam performed.

In effect, this pleading was saying (1) that the Secretary based his argument that Roanoke and LVR failed to ensure that a proper examination was performed on the allegation that they had not designated Sunbelt to perform it, and (2) that the Secretary relied on the language of the citations as sufficient to charge both that Roanoke and LVR had failed to perform a proper examination, and that they had failed to ensure that a proper examination was performed.

In his decision, the Judge erroneously rejected the Secretary's fundamental position that section 56.18002(a) contains a requirement of adequacy, which was a sufficient basis for him to dismiss all three Respondents. But the Judge also rejected the Secretary's allegation that Roanoke and LVR had not designated Davis to perform the examination for all three entities. 35 FMSHRC at 3214.

In its PDR, the Secretary alleged that: (1) the Judge erred in ruling that section 56.18002(a) does not require work place examinations to be adequate; (2) the Judge erred in ruling that the three Respondents lacked fair notice; and (3) there is a genuine issue of material fact relating to the adequacy of Davis' examination which precludes summary decision for the Respondents. The PDR did not allege any issues relating to the liability of LVR and Roanoke separate from the liability of Sunbelt.

In view of this record, we conclude that although it was error to issue a summary decision in favor of Sunbelt, there is no basis at this point for keeping LVR and Roanoke in the case. The citations alleged that LVR and Roanoke themselves did not perform an examination. The citation against LVR first alleged that Sunbelt did not perform an adequate examination, but then was modified to say that "LVR did not do an adequate work place exam as they never inspected the area above where the employees were working where there was hanging material." The citation against Roanoke alleged that it "had last done a work place exam 7 days before the accident . . . The last workplace exam was done on 12/30/12 and at that time the area above where the contractor was working was not checked for hazards before turning over the area to the contractor."

Manifestly, these citations did not allege a failure to *ensure* that an adequate examination was performed. Rather, they charge that LVR and Roanoke did not, themselves, perform an adequate examination.

The purpose of a citation is to give the operator notice of the conduct or actions which the Secretary contends violated the Mine Act. Section 104(a) of the Act imposes specific responsibilities on the Secretary's representatives. The law commands the inspector to issue a citation to the operator when (s)he believes that an operator has violated the Act. The law further requires that "[e]ach citation shall be in writing and shall describe with particularity the nature of the violation." 30 U.S.C. § 814(a). The operator is entitled to construct a defense to the charges alleged.

Commission law is clear that leave to amend citations is freely given in the interests of justice. *Cyprus Empire Corp.,* 12 FMSHRC 911, 916 (May 1990) (citing Rule 15(a) of the Federal Rules of Civil Procedure). Hence, at virtually any point while this case was before the Judge, the Secretary could have amended the citations so as to allege that LVR and Roanoke failed to ensure an adequate examination. The Secretary simply chose not to do so.

The Secretary's argument for partial summary decision as to LVR and Roanoke was legalistic – first, that he has the enforcement discretion to cite a production-operator, an independent contractor, or both, for violations of the Mine Act committed by the independent contractor, and second, that operators have a duty to either perform a proper workplace examination or to ensure that the contractor performs an adequate examination. Neither of these principles is in dispute, but neither principle addresses the actual citations given to LVR and Roanoke and the facts relating to those citations.

In their Joint Opposition to the Secretary's Motion and Cross-Motion for Summary Decision, LVR and Roanoke made their position clear: they did not have to perform separate examinations because it was sufficient that they had relied on Sunbelt's examiner. Certainly, at this point the Secretary could have moved to amend the citations to address the defense raised by LVR and Roanoke.

Instead, however, in his Response to the cross-motions, the Secretary doubled down, setting forth the text of the citations and contending that they were sufficient to bear the weight of the Secretary's legal argument. Indeed, the Secretary confused the matter by arguing that

LVR and Roanoke had not, in fact, designated Sunbelt's examiner to perform the examination on their behalf.

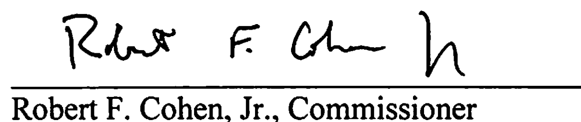
In Commission procedure, notice of the charges which an operator must defend against is set forth in the citation or the citation as amended. It is not sufficient that the Secretary set forth his theory of the operator's liability as an abstract legal principle in a motion for summary decision or a response to the operator's motion for summary decision. *Torres v. City of Madera*, 655 F. Supp. 2d 1109, 1128 (E.D. Cal. 2009), *rev'd and remanded on other grounds*, 648 F.3d 1119 (9th Cir. 2011) ("If the complaint focuses on one theory of liability, the plaintiff cannot turn around and surprise the defendant at the summary judgment stage with a new theory of liability."); *Silverman v. Motorola, Inc.*, 772 F. Supp. 2d 923, 936 (N.D. Ill. 2011) ("Plaintiffs cannot raise a new theory of liability in opposition to a motion for summary judgment.") (citations omitted); *Casseus v. Verizon New York, Inc.*, 722 F.Supp.2d 326, 344 (E.D.N.Y. 2010) ("As a threshold matter, courts generally do not consider claims or completely new theories of liability asserted for the first time in opposition to summary judgment.").

We have no doubt that the Secretary could have charged LVR and Roanoke with a failure to ensure that Sunbelt performed an adequate examination. If the Secretary had done so, we would have no trouble including LVR and Roanoke in the remand. The Secretary's failure, however, to clearly allege in the citation or an amended citation that the liability of LVR and Roanoke was predicated on their failure to ensure that an adequate examination was performed should result in the dismissal of the citations against these entities.

Finally, we recognize and completely agree with the majority's footnote 10: "We do not demand that inspectors write citations with the legal precision of attorneys sitting in comfortable offices." There's an inherent irony in the majority's application of that sound doctrine to this case. Thus, the majority defends the Secretary's failure here by relying on the lassitude afforded to administrative pleadings. *See* Slip op. at 6, n.12, ("[A]dministrative pleadings are to be liberally construed" because they are drafted by non-legal personnel who must act quickly) (citing *Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 930 (7th Cir. 1986)). At the same time, though, the majority also reminds us that the determination of which operator to charge is an exercise of *prosecutorial discretion*. *Twentymile Coal Co.*, 456 F.3d 151, 154-55 (D.C. Cir. 2006). To assert simultaneously that this decision may not be disturbed because it represents a sacrosanct professional legal opinion while being simultaneously entitled to the kind of lassitude one affords a pro se litigant or lay inspector is clearly illogical.

The fault here is not on the part of the inspector. Rather, the citations were reviewed on numerous occasions by the Secretary's attorneys – "sitting in comfortable offices" – who at each opportunity failed to ensure that a governmental agency seeking to impose liability upon a private citizen complied with its duty, under the Constitution and section 104(a) of the Act, to communicate the nature of the violation alleged. It is error to not recognize this failure for what it is and to require LVR and Roanoke to continue to defend against a charge that has yet to be articulated properly.[1]

Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

[1] Concerning the nature of the violation, we note that these citations were specially assessed, alleging high negligence against both LVR and Roanoke. Not a single fact has been produced, or even a cogent allegation made, showing that either party was negligent. Indeed, before us the agency appears to believe that these parties should be held vicariously liable, a theory wholly inconsistent with the assertion of negligence in the citations.

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