FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 18 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2009-870-M
WEST ALABAMA SAND & GRAVEL, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves a single citation issued to West Alabama Sand and Gravel, Inc., ("West Alabama") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The citation alleges that a truck driver climbed on top of his truck without fall protection on West Alabama's mine property. The Administrative Law Judge affirmed the violation and its S&S designation, but ruled that it did not result from an unwarrantable failure to comply with the standard in question.[1] The Judge also reduced the penalty from the proposed assessment of $15,971 to $760. 34 FMSHRC 1651 (July 2012) (ALJ).

The Secretary of Labor filed a petition for discretionary review ("PDR"), which we granted. The Secretary asserts, *inter alia*, that the Judge abused his discretion by converting the operator's opposition to the Secretary's motion for summary decision into a cross-motion for summary decision, in deleting the unwarrantable failure designation and reducing the negligence level from "high" to "moderate" on the basis of summary decision, and in reducing the penalty by over 95%.

[1] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." The operator did not contest the Judge's finding of a significant and substantial violation. Therefore, that finding is not before us in this case.

For the reasons set forth below, we vacate the Judge's decision that the violation was not an unwarrantable failure, and his negligence findings, and remand this matter for further proceedings consistent with this decision.

I.

Factual and Procedural Background

This case involves a citation issued to West Alabama at its mine facility in Fayette, Alabama, pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). On July 1, 2009, an MSHA inspector issued Citation No. 6511548, alleging a violation of 30 C.F.R. § 56.15005.[2] The citation alleges that a driver climbed atop his vehicle without employing fall protection. Sec'y Pet. for Assessment of Civil Penalty. The citation was designated as significant and substantial ("S&S")[3] and attributed to West Alabama's high negligence and unwarrantable failure to comply with the standard. The Secretary proposed that a penalty of $15,971 be assessed.

Following discovery, the Secretary filed a motion for summary decision. In his motion, the Secretary stated there were no material facts in dispute and that the Secretary was entitled to judgment on the entire case, including the fact of the violation, the S&S and unwarrantable designations, and the penalty. West Alabama opposed the motion, arguing that material issues of fact existed both as to its negligence and whether it was given adequate notice that it could be held liable for the conduct of independent contractors. Although West Alabama acknowledged that a truck driver had violated the safety standard while on mine property, it argued that it should not held be liable for the truck driver's violative conduct because it could not control or direct the driver. West Alabama further maintained that the proposed penalty was excessive when compared to similar citations and that its history of compliance and lack of actual knowledge mitigated its negligence.

In response, the Secretary filed a memorandum of points and authorities rebutting West Alabama's contention that genuine issues of material fact remained in dispute and providing legal arguments in support of the Secretary's position. The Secretary further argued that he did not agree with West Alabama's assertion that it had a "good safety history" and provided the Judge with a list of all citations issued to the operator while the mine was in operation.

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[2] Section 56.15005 states that "[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

On February 28, 2011, the Judge held an off-the-record conference call with the parties to discuss the Secretary's motion for summary decision.[4] Because the call was not recorded, the Commission does not have the benefit of a transcript. It appears undisputed, however, that the Judge attempted to obtain a settlement. Failing that effort, he apparently suggested/stated the manner in which he would resolve the case if the operator filed some sort of stipulation with him.

On March 12, 2012, West Alabama filed stipulations, wherein it again admitted that a driver had been on mine property and had climbed onto his truck without a safety belt or harness. The Secretary filed a response to West Alabama's stipulations in which he argued that his motion for summary decision should be granted because West Alabama had admitted the violation and had failed to provide any facts that disputed the Secretary's S&S and unwarrantable failure designations.

On July 17, 2012, the Judge issued an order granting summary decision, in part, to the Secretary on the validity of the citation and the S&S designation. 34 FMSHRC at 1657. However, the Judge construed West Alabama's opposition as a cross-motion for summary decision on the unwarrantable failure issue, and granted summary decision to the operator. The Judge reasoned that the lack of a history of similar violations and West Alabama's asserted "reasonable and apparent good faith belief" that it was not responsible for a contractor's violative conduct "reduce[d] the degree of negligence under the threshold required for an unwarrantable failure." *Id.* at 1655. In addition, the Judge found that the reduction in the level of negligence and the small size of West Alabama's operations justified a reduction in penalty to $760, rather than the proposed amount of $15,971. *Id.* at 1656.

II.

Disposition

Summary decisions are governed by Commission Procedural Rule 67, which provides that:

> 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) That there is

[4] Since November 2010, the Commission's teleconferencing service has offered Judges the option of recording and then ordering written transcripts of telephone conferences. Commission Judges should make use of the transcript capacity in any situation where the contents of a telephone conference with the parties may become the subject of review in a subsequent appeal. This includes telephone conferences where summary decision is discussed, and also matters such as discovery disputes. However, this does not include telephone conferences where the subject matter remains limited to settlement discussions.

> no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that [] '[s]ummary decision is an extraordinary procedure,'" and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

Appellate review of summary judgment decisions issued pursuant to Federal Rule 56 is *de novo*, in that the reviewing court applies the same Rule 56(c) standard as the trial court. 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2716, at 273-74 (3d ed. 1998). 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 W. Mining Co.*, 17 FMSHRC 1313, 1316-19 (Aug. 1995); *Missouri Gravel*, 3 FMSHRC at 2473.

In considering a motion for summary decision, a Judge's role is limited to a determination of whether a case can be decided without the need to resolve any factual disputes. *See* 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.24 (3d ed. 2015). A Judge may not weigh the evidence nor shall he or she engage in fact-finding beyond the facts established by the record. *See, e.g., Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 527 (7th Cir. 2008).

Upon review of the record, we conclude that genuine issues of material fact preclude a granting of summary judgment on the issues of unwarrantable failure and negligence.

A. The Unwarrantable Failure and Negligence Findings

The Judge deleted the unwarrantable failure designation for the violation and reduced the negligence level to moderate, implicitly discerning from West Alabama's opposition to the Secretary's Motion for Summary Decision a motion for summary decision in favor of the operator on the unwarrantable failure question. 34 FMSHRC at 1653, 1655.

The Judge did not commit legal error in considering West Alabama's opposition as a motion for summary decision. Although we find no explicit authority to convert a response into a cross-motion for summary decision, as a general matter a Judge may grant summary decision *sua sponte* or in favor of a non-moving party pursuant to the Federal Rules of Civil Procedure and achieve the same effect. *See* Fed. R. Civ. P. 56(f) (amended in 2010 to explicitly allow for the consideration of summary decision on the motion of a Judge in accordance with long standing practice).

However, we have urged caution in considering such a drastic procedure as it can easily lead to arbitrary and erroneous decisions. *Missouri Gravel*, 3 FMSHRC at 2471 n.2. In the rare

circumstances where it is appropriate to entertain summary judgment *sua sponte* or in favor of a non-moving party, such discretion must invariably be tempered by the need to ensure that (1) discovery is sufficiently advanced so that parties have had a reasonable opportunity to ascertain the material facts, and that (2) the parties are given adequate notice to bring forward their evidence. *See Celotex*, 477 U.S. at 326.

The record here is not sufficient to support summary judgment on the issues of unwarrantable failure or negligence. In particular, the facts stipulated to or shown by competent record evidence do not conclusively establish the reasonableness of the operator's alleged good faith belief. A party's conclusory statement that it acted in good faith cannot be treated as a binding determination of material fact. As the Secretary correctly notes, the Judge's disposition of this question, at this stage, precluded the Secretary from having "an opportunity to challenge the sincerity of Junkin's asserted belief or any evidence in support of it."[5] PDR at 20. We also agree with the Secretary that there is no competent record evidence that would support the existence of the belief. *Id.*

In vacating the unwarrantable failure finding, the Judge viewed as dispositive West Alabama's asserted lack of awareness that it was responsible for the behavior of contract employees. He found that view to be a reasonable, good faith belief on the part of the operator. The Judge pointed to the absence of relevant previous citations as providing a "reasonable basis" for the operator's belief. 34 FMSHRC at 1655. However, the absence from the record of MSHA citations for an obviously dangerous practice does not mean that an operator could reasonably believe that permitting such practices to occur on its property is not dangerous. It is too late in the day for any owner/operator to assert that it is unaware of its responsibility for contractors' violations.[6]

Section 110(a)(1) of the Mine Act states that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary . . . ." 30 U.S.C.

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[5] Clay Junkin, West Alabama's Vice President, was present at the mine at the time that the truck driver was observed by the MSHA inspector. 34 FMSHRC at 1652.

[6] In footnote 1 of his decision, the Judge stated, "[w]hether Denbar Trucking [the employer of the driver who climbed on top of his truck without fall protection] was an independent contractor, or a customer of West Alabama, is not material to the disposition of this matter. For the purposes of this decision, Denbar will be considered an independent contractor." 34 FMSHRC at 1651-52 n.1. We follow the Judge in not distinguishing the status of the truck driver, and, like the Judge, refer to him as a "contract employee." *Id.* at 1655.

§ 820(a)(1). This statutory provision has been interpreted definitively as imposing responsibility on an owner/operator for a contractor's violations since 1977. *See, e.g., Bituminous Coal Operators' Ass'n v. Sec'y of Interior*, 547 F.2d 240 (4th Cir. 1977).

Moreover, as a result of the summary disposition, the Secretary was not afforded the opportunity to present evidence to show that there were genuine issues of material fact as to the operator's alleged good faith belief or other issues related to unwarrantable failure.

Additionally, it appears from the Judge's decision that he did not consider all the factors that bear upon an alleged unwarrantable failure. The Commission has emphasized that all relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). While a Judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Rather than a complete analysis of all relevant factors, and indicating how his consideration of those factors informed his decision, the Judge rested his conclusion on the single factor of the operator's awareness that greater efforts are necessary for compliance. After citing this factor – alone – as one the Commission has found "significant," the Judge reasoned that *"the dispositive issue* is whether Junkin's asserted lack of awareness that West Alabama was responsible for contract employees should be viewed as a mitigating circumstance with respect to the alleged unwarrantable failure." 34 FMSHRC at 1654-55 (emphasis added).

While mitigation that reduces an operator's negligence below the threshold of a "serious lack of reasonable care" may be enough to support a Judge's conclusion that the violation did not result from unwarrantable failure, the Judge here did not adequately support this conclusion or fully consider the other factors, several of which would seem relevant and perhaps aggravating or adverse to the operator's defense. The operator, in its responses to the Secretary's First Request for Admissions, admitted to knowledge that such violative behavior had occurred in the past, with West Alabama's knowledge. Admission Nos. 13, 20. This is relevant to the factors of duration and knowledge. The Secretary at least disputed the operator's general safety record, which might have relevance on the degree of care it applied to its duties under the Act and mandatory standards, generally. Finally, and most importantly, the Judge correctly held that it would be reasonably likely that allowing miners to work "on an uneven surface elevated ten feet above the ground will result in an accident involving a fall that is reasonably likely to result in serious injury." 34 FMSHRC at 1654. This at least raises the question of an obvious violation of a mandatory standard in a way that could seriously injure a miner. The Judge considered none of this in weighing the supposedly objective, good faith belief that an operator might permit such a practice at its mine.

As a result of the aforementioned, the Judge's negligence findings and his decision to delete the Secretary's unwarrantable failure designation are vacated. This proceeding is

remanded so that the Judge may conduct a hearing. Our review of the record and the parties' filings indicate that because facts remain in dispute, a hearing is necessary on these issues.

B. Penalty

We also note that the Judge may have improperly determined what he believed to be an appropriate penalty in this case and worked back from that conclusion to reach a result supporting it. Noting the operator's citation to other ALJ decisions for violations of the same standard, the Judge cited the specific penalty amounts in his decision. 34 FMSHRC at 1653-54. Although the Judge does correctly state the law governing penalty determinations, *id.* at 1656, the reduction in the penalty by more than 95% resulted in an assessment that is close to the assessments issued by other Judges in other cases.

Further, it appears from a pleading by the operator that it believed that during the February conference call, it received an assurance from the Judge that if it filed certain stipulations, the Judge would reduce the proposed penalty by approximately 98%.[7] The operator's pleading supports the inference that the Judge had reached a conclusion on the penalty before performing the analysis. Commission Judges must be very careful to avoid circumstances in which a party could reasonably believe that it had reached a unilateral agreement on the disposition of a case with the Judge without the consent or participation of the other party.

[7] Prior to the Judge's issuance of the summary decision, the operator filed a responsive pleading asserting that, "[a]t the time West Alabama agreed to enter the Stipulation of Facts, it was West Alabama's understanding [that] the fine in this case was to be reduced to $350.00." West Alabama's Reply to Pet'r's Resp. to Resp't's Stip. of Facts (July 12, 2012). Although it appears the Judge did not receive this pleading prior to issuing his summary decision, as set forth above, the pleading does essentially state that the operator believed a quid pro quo arrangement with the Judge had been reached.

III.

Conclusion

Based upon the foregoing discussion, we vacate the Judge's order granting summary decision in favor of West Alabama on the issue of an unwarrantable failure as well as the Judge's findings regarding negligence, and remand this case for further proceedings consistent with this decision.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen Jr., Commissioner

Patrick K. Nakamura, Commissioner

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