

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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December 28, 2018

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2017-0096
Petitioner	:	A.C. No. 30-03460-434978
	:	
v.	:	
	:	
POLAND SAND & GRAVEL, LLC,	:	
Respondent	:	Mine: Poland Sand & Gravel

**SUMMARY DECISION**

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Poland Sand & Gravel pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of \$116.00 for an alleged violation of his mandatory safety standard regarding berm requirements on banks of roadways under certain conditions.

The Secretary filed a Motion for Summary Decision (“Sec’y Mot.”), a Memorandum of Law in Support of the Secretary’s Motion for Summary Judgment (“Sec’y Mem.”), and Parties’ Stipulations for Summary Judgment (“Jt. Stips.”) with attached exhibits (“Exs. A through C-3”), including photographs of the bench and water clarifier in question, and diagrams of the bench and the path and location of traveling vehicles. Poland Sand & Gravel, represented by managing member, Roger Rommel, filed a Motion for Summary Judgment (“Resp’t Mot.”) and a Memorandum of Support for the Respondent’s Motion for Summary Judgment (“Resp’t Mem.”).<sup>1</sup> The Secretary then filed the Secretary’s Memorandum of Law in Response to Respondent’s Motion for Summary Judgment (“Sec’y Reply”). Poland Sand & Gravel, in turn, filed Support for the Respondent’s Motion in Response to the Petitioner’s Request for Summary Judgment (“Resp’t Reply”). Subsequently, the parties jointly filed Supplemental Stipulations (“Jt. Stips.”) with attached exhibits (“Exs. D and E”).

Poland Sand & Gravel is not contesting the gravity or negligence ascribed to the violation but the fact of violation, which turns solely on whether the cited bench was a roadway. Indeed, the parties agree that if the bench constituted a roadway, there was a violation. The following

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<sup>1</sup> This Memorandum was mistitled “Support for the *Petitioner’s* Motion for Summary Judgment.”

are issues for resolution: (1) whether Poland Sand & Gravel violated 30 C.F.R. § 56.9300(a); and, if so, (2) the appropriate penalty for the violation.

Pursuant to Commission Procedural 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) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only “upon proper showings of the lack of a genuine, triable issue of material fact.” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that “the Supreme Court has stated that ‘we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Id.* at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Moreover, Commission Judges should not grant motions for summary decision “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

Based on the agreement of the parties to file cross motions for summary decision and the facts, as represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the citation, as issued, and assess a penalty of \$116.00 against Respondent.

## I. Joint Stipulations

The parties have stipulated as follows:<sup>2</sup>

1. Poland Sand & Gravel, LLC (“Respondent”) operates the Poland Sand & Gravel Mine (the “Mine”).
2. The Mine produces sand and gravel. It is located in Herkimer County, New York.
3. In 2016, Respondent worked a total of 15,066 hours.

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<sup>2</sup> The parties’ Joint Stipulations were misnumbered in the original document, and have been corrected for ease of reference in this Decision. The parties’ Supplemental Stipulations have been sequentially numbered 51 through 63.

4. Respondent is an “operator” as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Act”), 30 U.S.C. § 803(d).
5. Respondent and the Mine are subject to the jurisdiction of the Mine Act.
6. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Act.
7. True copies of the citation at issue in this proceeding were served on Respondent as required by the Act.
8. The proposed civil penalty will not affect Respondent’s ability to remain in business.
9. Citation No. 9310591 was issued on January 9, 2017 by MSHA Inspector Vincent F. D’Angelo. Mr. D’ Angelo is an authorized representative of the Mine Safety and Health Administration.
10. The parties stipulate that, should a violation be affirmed, the violation is not “significant and substantial.”
11. The parties stipulate that, should a violation be affirmed, the Respondent was moderately negligent.
12. The parties stipulate that if injury were to occur as a result of the alleged violation, such injury would result in injuries that were permanently disabling.
13. Citation No. 9310591 was issued with respect to a berm not being provided along an approximately 42 feet opening at the edge of a bench adjacent to a Clearwater 2000 water clarifier (the “water clarifier”).
14. The water clarifier is mounted on a chassis with wheels at the rear.
15. The bench was approximately 12 to 15 feet wide, as measured from the left side of the water clarifier to the edge of the drop-off.
16. The drop-off measured 6 to 8 feet from the bench surface to the ground below.
17. There was a pond approximately 16 feet away from the edge of the bench at the ground surface.
18. Attached hereto, as Exhibit A, is a true and accurate photograph, with extraneous markings, of the water clarifier where Respondent installed it. across from the approximately 42 foot unbermed area of the bench, with extraneous markings.
19. The area marked “1” on Exhibit A depicts the drop-off from the surface of the bench to the ground below.
20. The drop-off from the bench, marked “1” on Exhibit A, is 6 to 8 feet.
21. Attached hereto, as Exhibit B, is a true and correct photograph, with extraneous markings, of the water clarifier and the bench taken from the rear of the water clarifier.
22. The distance between the left side of the water clarifier and the edge of the bench drop-off is between 12 to 15 feet.
23. There was a block retaining wall erected to the right of the water clarifier, marked as such on Exhibit B.

24. The distance between the right side of the water clarifier and the block retaining wall on the bench is approximately 12 feet.
25. Attached hereto, as Exhibit C, is a true and correct bird's eye diagram of the bench, the water clarifier and the retaining wall, with extraneous markings.
26. The area marked "X" on Exhibit C is the space between the water clarifier and the edge of the bench immediately adjacent to the 6- to 8-foot drop-off.
27. The area marked "1" on Exhibit C is the drop-off adjacent to the bench, which is approximately 6 to 8 feet lower than the bench.
28. The area marked "X" on Exhibit C is approximately 12 to 15 feet wide, as measured from the left side of the water clarifier to the 6- to 8-foot drop-off, marked "1".
29. The area marked "Y" on Exhibit C is approximately 12 feet wide, as measured from the right side of the water clarifier to the retaining wall.
30. The area marked "Pond" on Exhibit C depicts the pond adjacent to the drop-off.
31. The Pond, as shown on Exhibit C, is approximately 16 feet from the edge of the drop-off, marked "1."
32. Between December 2, 2016 and December 4, 2016, Respondent constructed the bench using a Doosan DX340 excavator.
33. The DX340 excavator, likewise, filled the footing of the retaining wall adjacent to the bench during this same period.
34. Attached hereto, as Exhibit C-1, is a copy of Exhibit C modified to show the path of the DX340 excavator during the construction of the bench and the backfilling of the retaining wall footing.
35. The blue arrow on Exhibit C-1 depicts the approximate path and direction of the DX340 excavator as it constructed the bench and backfilled the retaining wall footing.
36. The area marked "X" on Exhibit C-1 is approximately 12 to 15 feet from the right of the DX340 excavator to the 6- to 8-foot drop-off marked as "1."
37. The area marked "Y" on Exhibit C-1 is approximately 12 feet from the left of the DX340 excavator to the retaining wall.
38. On or about December 4, 2016, Respondent placed the water clarifier on a tandem tow dolly and used the DX340 excavator and a Yanmar B5 mini excavator (the "B5 excavator") to transport the water clarifier from a nearby parking area to the bench.
39. The B5 excavator weighs approximately 5 tons.
40. The DX340 excavator weighs approximately 34 tons.
41. The B5 excavator pulled the dolly-mounted water clarifier from the front end up the bench, while the DX340 excavator pushed the water clarifier from the rear.
42. Attached hereto, as Exhibit C-2, is a modified diagram of Exhibit C that illustrates the transport and placement of the water clarifier.
43. The area marked "2" on Exhibit C-2 depicts the approximate location of the B5 excavator.

44. The area marked “3” on Exhibit C-2 depicts the approximate location of the DX340 excavator.
45. The blue arrows depicted on C-2 depict the direction of travel of the DX 340 excavator, the B5 excavator, and the dolly-mounted water clarifier.
46. Once the water clarifier was in place, the B5 excavator traveled on the bench between the clarifier and the retaining wall, through the area marked “Y” on Exhibit C-2.
47. Once the water clarifier was in place, as depicted in Exhibit C, Respondent brought an Earthforce EF500 compact tractor backhoe (the “backhoe”) on the bench to the left side of the water clarifier in order to power the water clarifier’s hydraulics.
48. Attached hereto, as Exhibit C-3, is a copy of Exhibit C modified to show the path and location of the backhoe on the bench.
49. The blue arrow on Exhibit C-3 depicts the approximate path and location of travel of the backhoe on the bench.
50. The area marked “Z” on Exhibit C-3 depicts the approximate location where the backhoe came to a rest and was used to power the hydraulics of the clarifier.
51. A portion of the bench was intended to be permanent, and a portion of the bench was intended to be temporary.
52. The condition and dimensions of the bench as it existed on the date of the citation are reflected in Exhibits A through C, previously submitted.
53. Attached hereto, as Exhibits D and E, are photographs of the bench taken and annotated by Respondent on October 24, 2018.
54. Subsequent to the citation, Respondent removed a portion of the bench and intends to remove additional portions of the bench, circled in the photographs attached as Exhibits D and E, at some point in the future.
55. The water clarifier was permanently installed on the bench.
56. The water clarifier is permanently mounted on a chassis with wheels at the rear, as shown in Exhibit A and in Exhibit D.
57. Additionally, the front end of the water clarifier had been mounted on a tandem tow dolly on December 4, 2016, to allow Respondent to support the front of the water clarifier and steer the water clarifier on to the bench.
58. Once the water clarifier was positioned on the bench on December 4, 2016, the tandem tow dolly was removed, leaving the water clarifier on the chassis with the wheels in the back and supports in the front, as depicted in Exhibit A and Exhibit D.
59. Water clarifiers are not regularly moved at the Mine.
60. The B5 excavator, depicted as “2” in Exhibit C-2, traveled approximately 84 feet on the bench during placement of the water clarifier; specifically, the B5 excavator traveled approximately 42 feet onto the bench from the roadway, and then an additional 42 feet back down the bench toward the roadway.
61. The backhoe, depicted as “Z” in Exhibit C-3, traveled approximately 42 feet on the bench after placement of the water clarifier in order to power the water clarifier’s hydraulics for

purposes of positioning the water clarifier's supporting legs; specifically, the backhoe traveled approximately 21 feet up the bench from the roadway, and then an additional 21 feet back down the bench toward the roadway.

62. The tank, depicted in Exhibit B, is permanent.
63. The photographs in Exhibits A and B were not the photographs referenced in Inspector D'Angelo's citation, but rather were provided to MSHA by Respondent after issuance of the citation.

## II. Factual Background

Poland Sand & Gravel operates the Poland Sand & Gravel Mine, a surface sand and gravel operation, in Herkimer County, New York. Jt. Stips. 1, 2. Between December 2 and 4, 2016, Poland Sand & Gravel constructed a bench solely for permanent placement of a water clarifier to be used in the process of washing mined aggregate. Jt. Stips. 32, 55; Resp't Mem. at 1. The bench was 42 feet long and 24 to 27 feet wide, and was built 6 to 8 feet above ground. Jt. Stips. 16, 18, 28, 29; see Exs. A, C. At the back of the bench was a block retaining wall that held loose material. Jt. Stip. 24; see Ex. B. No berms had been built along the front edge of the bench, exposed to a 6- to 8-foot drop-off with a pond approximately 16 feet away at ground level. Jt. Stips. 17, 18, 20, 30, 31; see Exs. A, C.

Poland Sand & Gravel permanently installed its water clarifier in the middle of the bench, leaving approximately 12 to 15 feet between the clarifier and the front edge, and about 12 feet between it and the back retaining wall. Jt. Stips. 29, 37, 42, 55; see Exs. C, C-1. The water clarifier is a large piece of equipment permanently mounted on a chassis with wheels in the rear and supports in the front. Jt. Stips. 56, 58. To move the water clarifier into position on the bench, on December 4, Poland Sand & Gravel pulled the clarifier, mounted on a tandem tow dolly for support of the front and steering, from the roadway with a five-ton mini excavator, while pushing it with a larger 34-ton excavator. Jt. Stips. 38, 39, 40, 57. The front mini excavator was driven from the roadway approximately 42 feet along the bench to install the water clarifier, then traveling around the it, the excavator was driven another 42 feet back down the bench to the roadway. Jt. Stip. 60; see Ex. C-2. The back excavator did not travel onto the bench. Jt. Stip. 60. Once the water clarifier was positioned, the tandem tow dolly was removed, and the operator drove a backhoe onto the bench to power the water clarifier's hydraulic system, which leveled its supporting legs. Jt. Stips. 47, 48, 50, 58, 61; see Ex. C, C-3. The operator drove the backhoe between the water clarifier and the exposed edge of the bench for approximately 21 feet, and then another 21 feet back down to the roadway. Jt. Stips. 49, 61; see Ex. C-3; Resp't Reply at 2.

Subsequent to issuance of the citation, Poland Sand & Gravel cut back the width of the bench between the edge and the water clarifier, and according to its installation plan, it had intended to remove additional portions. Resp't Mem. at 1; Jt. Stips. 51, 54; see Exs. D, E. In any case, however, the operator had intended to maintain the 12-foot area between the water clarifier and the back retaining wall in order for the equipment to be accessed for service.<sup>3</sup> Resp't Mem. at 1.

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<sup>3</sup> Respondent did not clarify how the water clarifier would be serviced in the future.

On January 9, 2017, Inspector Vincent D'Angelo conducted a regular inspection of the mine. After examining the bench, water clarifier, and drop-off, he determined that the bench had been used as a travelway and issued a citation.

### III. Findings of Fact and Conclusions of Law

#### A. Fact of Violation

Inspector D'Angelo issued 104(a) Citation No. 931059, alleging a violation of section 56.9300(a) that was "unlikely" to cause an injury, and was due to Poland Sand & Gravel's "moderate negligence."<sup>4</sup> The "Condition or Practice" is described as follows:

A 15 foot section (as measured with a tape measure) of travel way located on a bench beside a trailer of water classifiers [clarifier] past the scale house was not provided with a berm on the bank where an estimated 10 foot drop off exist to cause a vehicle to overturn or endanger persons in equipment. The travel way was used to locate the trailer and there was no tracks observed beside the berm. A miner would be exposed to back, neck, head, and other permanently disabling injuries from over travel of a berm.

Pen. Pet. at 5.<sup>5</sup> The citation was terminated on January 10, 2017, after Poland Sand & Gravel restricted entry to the bench by placement of a perpendicular berm. Pen. Pet. at 5.

To establish a violation of section 56.9300(a), the Secretary must show: (1) that there was a roadway, (2) that a sufficient drop-off existed to cause a vehicle to overturn or endanger persons in equipment, and (3) that no berms or guardrails were in place for protection at the edge. *Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011).

In the instant case, the parties agree that there were no berms along the edge of the bench during installation of the water clarifier, and Poland Sand & Gravel does not challenge the Secretary's contention that the drop-off is of sufficient height for a vehicle to overturn.<sup>6</sup>

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<sup>4</sup> 30 C.F.R. § 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

<sup>5</sup> Although the description of the violation may be confusing, the parties stipulated that the exposed edge of the bench did not have berms. Jt. Stip. 18.

<sup>6</sup> Commission ALJs have consistently found drop-offs of 6 feet and less sufficient to cause vehicular overturning or endangering persons in equipment. *See, e.g., Morris Sand & Gravel*, 39 FMSHRC 1609, 1616-17 (Aug. 2017) (ALJ) (a 3- to 4-foot drop-off); *Meyer Aggregate LLC*, 38 FMSHRC 2596, 2607 (Oct. 2016) (ALJ) (a 6-foot drop-off); *Palmer Coking Coal Co.*, 34 FMSHRC 620, 634-35 (Marc. 2012) (ALJ) (between 3- and 8-foot drop-off); *Pappy's Sand & Gravel*, 20 FMSHRC 647, 648, 651 (Jun. 1998) (ALJ) (a 6-foot drop-off).

Jt. Stip. 16. Consequently, the only remaining question is whether, during the permanent installation of the water clarifier, the nature and usage of the bench constituted a roadway for purposes of section 56.9300(a).

While the term “roadway” is not defined in the Secretary’s regulations, the Commission has looked to the “common usage” and “a common-sense application of the standard to the facts” to determine whether a roadway exists. *See Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982) (interpreting former section 56.9-22, which is identical to current section 77.1605(k)).<sup>7</sup> Further, the Commission has stated that, “[an] ‘[e]levated roadway’ is a general descriptive term that encompasses a variety of more specific applications.” *Id.* (upholding the ALJ’s determination that an elevated ramp used by a front-end loader for dumping was an “elevated roadway”). More recently, in considering the issue under section 77.1605(k), the surface coal mine standard analogous to the surface metal/nonmetal standard at issue herein, the Commission stated that, “an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1735 (Aug. 2012) (citing its previous holdings regarding elevated roadways in *Capitol Aggregates*, 4 FMSHRC at 847; *Burgess Mining & Constr. Corp.*, 3 FMSHRC 296 (Feb. 1981); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981)). Even temporary and infrequently used roadways may be covered under this standard. *Id.* at 1738-42 (a temporary roadway constructed solely for moving a drill rig within a few days was covered by the standard).

The Secretary contends that he is entitled to summary decision because the bench was used for vehicular travel, rendering it a roadway for purposes of section 56.9300(a). Sec’y Mem. at 6. To support this contention, the Secretary cites several cases, Commission and ALJ, in which benches were found to be elevated roadways. Sec’y Mem. at 6-7 (citing *Black Beauty*, 34 FMSHRC at 1735; *El Paso Rock Quarries, Inc.*, 3 FMSHRC at 36; *Foundation Coal W., Inc.*, 34 FMSHRC 2911, 2929 (Nov. 2012) (ALJ); *Arch of Wyo., LLC*, 32 FMSHRC 568, 575-76, (May 2010) (ALJ); *S. & M. Constr., Inc.*, 19 FMSHRC 566, 576-77 (Mar. 1997) (ALJ); *Peabody Coal Co.*, 12 FMSHRC 109, 114-16 (Jan. 1990) (ALJ)). The Secretary takes the position that the Commission’s roadway analysis does not rest on frequency of travel, and that infrequency does not negate the risk of vehicles overturning.<sup>8</sup> Sec’y Mem. at 7-8 (citing *Black Beauty*, 34 FMSHRC at 1744; *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 417-18 (Mar. 1996) (ALJ); *Arch of Wyo.*, 32 FMSHRC at 576 (ALJ); *Manalapan Mining Co.*, 16 FMSHRC 1727, 1733 (Aug. 1994) (ALJ)). The Secretary urges application of the Commission’s “common usage” of an area and “common-sense application of the standard to the facts” to decide whether an elevated area is a roadway. Sec’y Mem. at 7 (citing *Capitol Aggregates*, 4 FMSHRC at 846-47). As such, the Secretary asserts that because the bench was an elevated roadway, berms were required. Sec’y Mem. at 6, 10.

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<sup>7</sup> 30 C.F.R. § 77.1605(k) provides that “[b]erms or guards shall be provided on the outer bank of elevated roadways.”

<sup>8</sup> By the Secretary’s reasoning, frequency of travel is appropriately considered when assessing the penalty.



Poland Sand & Gravel asserts, on the other hand, that it is entitled to summary decision because the bench was not used regularly for travel, and usage of the bench did not rise to the level required for a roadway. Resp't Mem. at 1-2; Resp't Reply at 2-3. First, the operator contends that the principal purpose of the bench was for placement of the water clarifier, rather than vehicular travel. Resp't Mem. at 2; Resp't Reply at 2 (citing *Knife River Corp.*, 34 FMSHRC 1109, 1128 (May 2012) (ALJ)). Second, it emphasizes that the bench is a dead-end that could not be used for travel to another area of the mine. *Id.* Finally, the operator contends that vehicular travel on the bench was infrequent, and that frequency of travel was essential to the Commission's roadway analysis. Resp't Reply at 1-3 (citing Commissioner Duffy's dissent in *Black Beauty*, 34 FMSHRC at 1754).

It is noted that the parties argue about whether berms were required during the initial construction of the bench. Sec'y Mem. at 3, 7; Resp't Mem. at 1-2; see Jt. Stips. 33-35 (the 34-ton excavator was used to fill the footing of the back retaining wall in addition to constructing the bench). This argument is off-point, however, because it expands the narrow question before me of whether the bench was a roadway during *installation* of the water clarifier.

Although the Secretary cites a number of cases in which the Commission has found benches to constitute roadways, his assertion that frequency of travel is not a determinative factor in the analysis is not consistent with Commission rulings. Sec'y Mem. at 6-7; *see, e.g., Black Beauty*, 34 FMSHRC at 1735 ("an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining *routine*." (emphasis added)); *Capitol Aggregates*, 4 FMSHRC at 846-47 (an elevated ramp, which was *regularly* used by a front-end loader for dumping, was found to be an elevated roadway) (emphasis added); *Burgess Mining & Constr. Corp.*, 3 FMSHRC at 296 (a bridge, used during the normal mining *routine*, was found to be an elevated roadway) (emphasis added); *El Paso Rock Quarries, Inc.*, 3 FMSHRC at 35-36 (a *routinely* used haulage road was found to be an elevated roadway) (emphasis added). In these cases, not only did the Commission consider frequency of travel, but also the common usage of the areas, and it took a common sense approach to applying the standard to the facts in deciding whether roadways existed. As the Secretary contends, however, travel infrequency does not negate the presence of the hazard. *Black Beauty*, 34 FMSHRC at 1741-42.

Poland Sand & Gravel's reliance on the dissent in *Black Beauty* and the ALJ's ruling in *Knife River* is misplaced. In *Black Beauty*, the majority explained that "the *presence* of a rubber-tired vehicle on the bench, by itself, did not mean that the bench was a 'roadway,'" but left open the possibility that its presence may be an indicium of whether a roadway existed. *Black Beauty*, 34 FMSHRC at 1735. The dissent pointed out that the *traveling* of a rubber-tired vehicle did not transform the bench into a roadway. *Id.* at 1754. Here, *multiple* mobile vehicles - - the water clarifier, itself, on a wheeled chassis and a wheeled tow dolly, an excavator, and a backhoe - - traveled on the bench to install the clarifier. Clearly, in this case, the analysis involves consideration of several vehicles, operating together over the course of three days, to accomplish a single one-time task. Ultimately, as the majority in *Black Beauty* has instructed, frequency is but one factor to consider, and how the area was used looms large. *Id.* at 1735.

Similarly, *Knife River*, finding that portable truck scales did not constitute a roadway, was decided on its own set of facts that are not similar to the facts at hand. *Knife River*, 34 FMSHRC at 1128, 1134.<sup>9</sup> Furthermore, *Knife River* predates the Commission's decision in *Black Beauty* by a few months, and does not employ the Commission's standard.

To recap, in *Black Beauty*, the Commission reiterated its definition of a roadway, set forth in earlier decisions, that "an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine." *Black Beauty*, 34 FMSHRC at 1735. In that case, the operator received a citation during a dragline move.<sup>10</sup> Dragline moves occurred every seven to ten days at that mine, and it was routine for a rubber-tired backhoe to accompany the dragline. *Id.* at 1736. For that specific move, the operator closed a haulage road so that the dragline could be moved on that road to another area of the mine. *Id.* To prepare for the move, the operator removed the berms along the haulage road and closed the area to traffic. *Id.* at 1734, 36. During the move, however, the dragline had an electrical malfunction and a service truck was driven along the bench in order to service it. *Id.* at 1734. Finding that it was common for service trucks to attend to draglines when issues arose during moves, the Commission concluded that "the service truck's use of the bench in this instance illustrates that the character of the bench was unchanged. Therefore, the evidence demonstrates that the bench remained a 'roadway' during the dragline move." *Id.* at 1736. The Seventh Circuit affirmed the Commission's determination that the bench was a roadway, and that usage is at the heart of the roadway analysis. *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 615 (7th Cir. 2014).<sup>11</sup>

The parties stipulated that water clarifiers are not regularly moved at this mine. Jt. Stip. 59. Although this case does not involve travel regularity as in *Black Beauty*, these fairly unique facts sufficiently indicate that the elevated bench was used as a roadway for the three days required to install the water clarifier. Two substantial vehicles, the mini excavator and the mobile water clarifier, traveled onto the bench to situate the water clarifier and, once it was in position, a backhoe was driven onto the bench to finalize its installation. This vehicular travel, on the 6-8 foot elevated span without berms, exposed miners to a drop-off sufficient to result in overturning and serious to fatal injuries.

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<sup>9</sup> Judge McCarthy identified the unique facts and circumstances present in the case, such as the purpose for using the scales, the controlled environment when trucks drove onto the scales, the limited access to the area, and the speed at which the trucks traveled on the portable truck scales.

<sup>10</sup> A dragline is "[a] type of excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket towards itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile." American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 167 (2d ed. 1997).

<sup>11</sup> Black Beauty Coal Company changed its name to Peabody Midwest Mining, LLC, before the 7<sup>th</sup> Circuit considered the appeal of the Commission's *Black Beauty* decision.

Moreover, a broad reading of section 56.9300(a) is consistent with the protective goals of the Mine Act and Commission precedent. To find that this elevated bench was not a roadway during installation of the water clarifier would render the miners performing the excavator/tow dolly/backhoe installation totally unprotected, since no other standard adequately addresses the safety hazard. As such, a common-sense application of the standard to the facts leads to a finding that this elevated bench was used as a roadway for the purpose of installing the water clarifier.

Having found that the bench was a roadway during installation, I also find that there was a sufficient drop-off for a vehicle to overturn, and that there were no protective berms along the edge of the bench when the installation took place to protect the miners from death or serious injury. Accordingly, I find that Poland Sand & Gravel violated section 56.9300(a), and that the Secretary is entitled to summary decision as a matter of law.

## **B. Penalty**

While the Secretary has proposed a civil penalty of \$116.00 by application of his Part 100 penalty regulations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). These criteria are: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in achieving rapid compliance after notification of the violation. 30 U.S.C. § 820(i).

Applying the *Sellersburg* criteria, and based upon a review of MSHA's online records, I find that Poland Sand & Gravel is a small operator, with no prior violations of section 56.9300(a), and an overall violation history that is not an aggravating factor in assessing an appropriate penalty. Jt. Stip. 3. As stipulated, the proposed civil penalty will not affect Poland Sand & Gravel's ability to continue in business. Jt. Stip. 8. I also find that Poland Sand & Gravel demonstrated good faith in achieving rapid compliance after notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Poland Sand & Gravel's negligence in committing it. This is a serious violation, although limited in duration, given the lack of overturn protection for the heavy mobile equipment used to install the water clarifier, and I find, based on the obviousness of needed protection from the drop-off and exposure to the nearby pond at ground level, that Poland Sand & Gravel was moderately negligent in committing it. Therefore, I find that a penalty of \$116.00, as proposed by the Secretary, is appropriate.

**ORDER**

**ACCORDINGLY**, the Secretary's Cross-Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED**, and it is **ORDERED** that Poland Sand & Gravel, LLC, **PAY** a civil penalty of \$116.00 within 30 days of the date of this Decision.<sup>12</sup>



Jacqueline R. Bulluck  
Administrative Law Judge

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Roger S. Rommel, Poland Sand & Gravel, LLC, P.O. Box 83, Poland, NY 13431

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<sup>12</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket number and AC number.