FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 23, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	: : : : : : : : : : :	CIVIL PENALTY PROCEEDING Docket No. SE 2023-0121 A.C. No. 31-00368-571444 Mine: Boone Quarry

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 Vulcan Construction Materials, LLC ("Vulcan"), 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 $143.00 for an alleged violation of one of her mandatory safety standards requiring that water or neutralizing agents be made available where corrosive chemicals or other harmful substances are stored, handled, or used.

The Secretary filed a Motion for Summary Decision and Determination of Penalty ("Secretary's Motion"), with attached Exhibits A through D. In response, Vulcan filed a Request to Deny Secretary's Motion for Summary Decision and Determination of Penalty ("Vulcan's Response"), with attached Exhibits R-1 through R-5. The issues for resolution in this case are whether Vulcan violated 30 C.F.R. § 56.15001 and, if so, the gravity and negligence of the violation, and the appropriate penalty.

Based on a thorough review of the documents filed by the parties, I find that there is no genuine issue of 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, and assess a penalty of $143.00 against Vulcan.

I. Legal Standard

Pursuant to Commission Rule 67(b), "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) 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 Aggs. 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 Broad. 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)); *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).

II. Factual Background

On December 29, 2022, Inspector Steaven Caudill conducted a regular E01 inspection of Vulcan's Boone Quarry. Sec'y Mot., Ex. A. During the inspection, Caudill observed that the eyewash station in the maintenance shop was inoperable because the cold outside temperatures had frozen its water supply, and no additional water source or neutralizing agent was present at the eyewash station. Sec'y Mot., Ex. A. A Vulcan manager, James Bear, informed Caudill that there were bottles of water stored in the office shop adjacent to the maintenance shop, and asked if those bottles were sufficient for eye rinsing. Sec'y Mot., Ex. A. Thereafter, Caudill issued a 104(a) citation alleging a violation of section 56.15001. Sec'y Mot., Ex. C.

III. Secretary's Statement of Undisputed Facts

The Secretary contends that the following facts are not in dispute:

1. Respondent Vulcan Materials ("Vulcan") is engaged in mining at Boone Quarry (the "Mine"). The Mine identification number is 31-00368. The mine is located in Watauga County, Boone, NC.
2. Respondent is subject to the jurisdiction of the Commission.
3. True copies of the citation at issue in this proceeding were served on Vulcan, as required by the Mine Act.
4. On December 28, 2022, MSHA Inspector Steaven Caudill conducted a regular E01 safety and health inspection.
5. During the inspection, Casey McMaham, Supervisor for Respondent, turned on the faucet to the eyewash station. Despite turning the station on, no water flowed from the faucet head. The water system supplying water to the maintenance shop eyewash station was frozen due to cold temperatures. The lack of water supply to the shop eyewash station made the station inoperable.
6. When Inspector Caudill indicated that the eyewash station was not operable, Respondent's representative, Manager James Bear, asked if bottled water was sufficient for eye rinsing. He then directed the Inspector's attention to bottles of water, wrapped in plastic, located in the office shop area approximately 50 to 75 feet from the eyewash station.
7. The Inspector found that the shop employees came into contact with hazardous chemicals such as oil for diesel and fluid pumps, battery acid in charging batteries (which are stored, used, and charged on an "as needed" basis), and aerosol chemicals for cleaning equipment. These chemicals require flushing the eyes with water or neutralizing agent for 15 minutes, if contacted. Rinsing with water or neutralizing agent is necessary to prevent burns and/or blindness.
8. On December 28, 2022, the water supply to Respondent's eyewash station was frozen.
9. Respondent's maintenance shop employees were present and working on December 28, 2022, to do housekeeping due to the cold temperatures outside.
10. Based on the inspection, Inspector Caudill issued Citation No. 8313773 to Respondent, pursuant to § 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 56.15001.
11. Inspector Caudill assessed the gravity of the violation as "unlikely" to result in injury with a not "significant and substantial" designation. Inspector Caudill found the negligence level as "low."
12. To terminate the violation, the operator placed two large bottles of eyewash at the station until the water supply system could be repaired.
13. MSHA assessed the statutory minimum penalty of $143.00 for a § 56.15001 violation.

Sec'y Mot. at 2-4.

Vulcan expressly asserts that it does not dispute Facts 1 through 5 and 7 through 12. Vulcan Resp. at 2-3. Regarding Fact 6, Vulcan's comments not only indicate that there is no genuine dispute, but add that, in addition to bottles of water, there were also bottles of eyewash located in vehicles elsewhere throughout the plant and storage areas. Vulcan Resp. at 2. Also, Vulcan challenges that the refrigerated water in the office shop was 75 feet away because the

maintenance shop is only 50 by 60 feet. Vulcan Resp. at 2. This rough estimate, however, is consistent with the Secretary's contention that the water bottles were approximately 50 to 75 feet away from the eyewash station. Therefore, I find that there is no genuine issue as to any material fact.

IV. Findings of Fact and Conclusions of Law

Inspector Caudill issued 104(a) Citation No. 8313773, alleging a violation of 30 C.F.R. § 56.15001 that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was due to Vulcan's "low" negligence. The "Condition or Practice" is described as follows:

> No water supply or neutralizing agent was being provided at the maintenance shop eyewash station where corrosive chemicals and other harmful substances are stored and used. The water system suppling [sic] water to the eyewash station was froze off due to cold temperatures last week. The shop employees use hazardous chemicals daily which requires flushing the eyes for 15 minutes, if contacted (according to the MSDS). Batteries are stored, used, and charged in the shop on an "as needed" bases [sic]. Water or a neutralizing agent is necessary to rinse the eyes to prevent burns and/or blindness.

Sec'y Mot., Ex. C. Caudill terminated the Citation the same day after Vulcan brought in two large bottles of eyewash from a Conex storage container outside the maintenance shop, and placed them at the eyewash station. Sec'y Mot., Ex. C.

A. Fact of Violation

The Secretary contends that she is entitled to summary decision because the eyewash station was inoperable, and no other water or neutralizing agent was present and ready for use as first aid, in the event of chemical accidents. Sec'y Mot. at 7. On the other hand, Vulcan takes the position that bottles of water and eyewash solution located near the maintenance shop were available, within the meaning of section 56.15001. Vulcan Resp. at 2. 30 C.F.R. § 56.15001 prescribes that:

> Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

30 C.F.R § 56.15001.

The meaning of the term "available," as used in section 56.15001, has been interpreted by Commission Judges. *See Taft Prod. Co.*, 35 FMSHRC 965 (Apr. 2013) (ALJ); *see also Fred Chismar*, 22 FMSHRC 81 (Jan. 2000) (ALJ). In *Taft,* I found that the operator violated section 56.15001 because no water or neutralizing agent was easily accessible under emergency conditions in which eye flushing is critical. 35 FMSHRC at 969. Access to the eyewash station in that case was obstructed by metal rods and a water cooler, and the nearest alternative water

source was in a bathroom outside the maintenance shop. *Id.* at 970. I found that the eyewash station was not "available," within the term's ordinary meaning of "present and ready for use" and that, consistent with the protective purposes of the Mine Act, a miner should have immediate and unobstructed access to flushing liquids. *Id*. In the throes of an emergency, I reasoned, a miner should not have to scrounge around, visually impaired and in pain, to find readily available first aid. *Id.*

In *Chismar*, the operator claimed that water was available to treat a miner's chemical burn, where a water reclamation tank was 75 to 200 yards away from the site of the incident. 22 FMSHRC at 91. However, the Judge rejected the operator's argument because the water tank was not in the immediate proximity of where the injured miner was working and the operator had not designated the tank as a first-aid source, leaving the injured miner unaware of where to find first aid. *Id.* at 92.

Vulcan does not contest that the eyewash station was inoperable, but argues that alternative sources of water or neutralizing agent were sufficiently available in other locations. Vulcan Resp. at 3. Vulcan provided photographs, one showing an opened case of bottled drinking water, wrapped in plastic, in the office shop's refrigerator, and another showing three filled 5-gallon water cooler jugs, situated next to the refrigerator. Vulcan Resp., Exs. R-1 and R-2. Vulcan claims that these sources double as available first aid for chemical injuries. Vulcan Resp. at 2. Additionally, a third photograph depicts small bottles of eyewash solution stored on vehicles that, during the inspection, were parked outside the maintenance shop. Vulcan Resp., Ex. R-3.

I find unavailing Vulcan's contentions that alternative sources of water and eyewash solution were available. The word "available" is defined as "present and ready for use." *The American Heritage Dictionary* (5th ed. 2022). With the eyewash station inoperable, there was no other first-aid eye-flushing source inside the maintenance shop. A miner, whose eyes were exposed to harmful chemicals, after accessing the nonfunctional eyewash station, would have to grope around locations outside the maintenance shop for flushing liquid, possibly in a state of panic, delaying relief from pain and likely increasing the probability of burn injuries.

Even more untenable is the contention that a miner, seeking relief from chemical exposure, should reasonably be required to locate and uncap refrigerated bottled water or lift and invert a 5-gallon water cooler jug from another room, as well as locate eyewash agent stored among other materials on vehicles parked outside the maintenance shop. This is precisely why the eyewash station is situated in the maintenance shop to meet the requirements of the standard and, in a nonfunctional state, it provides no safety protection related to chemical accidents.

Accordingly, with no alternative source of water or neutralizing agent readily available to miners working in the maintenance shop, I find that Vulcan violated section 56.15001.

B. Gravity and Negligence

The Secretary assessed the gravity of the violation as "unlikely" and "permanently disabling." Sec'y Mot., Ex. C. Caudill determined that an injury was unlikely to occur because

Vulcan's policy requires miners to wear eye protection at all times while on-site, and that the injury would be permanently disabling because of the potential for chemical exposure to cause blindness or permanent eye damage, if not immediately addressed. Sec'y Mot., Ex. A. Given the undisputed facts, I sustain the Secretary's gravity designations.

The Secretary also assessed the negligence of the violation as "low." Sec'y Mot., Ex. C. I find no indication that Vulcan was aware that the water line was frozen, because the only running water in the maintenance shop was at the eyewash station and, fortunately, it is not needed on a frequent basis. See Sec'y Mot., Ex. A. Therefore, I sustain the Secretary's negligence designation.

V. Penalty

While the Secretary has proposed a civil penalty of $143.00, 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* 136 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Vulcan is a large operator, with no prior violations of section 56.15001, and an overall violation history that is a mitigating factor in assessing an appropriate penalty. I also find that the proposed penalty will not affect Vulcan's ability to continue in business, and that Vulcan demonstrated good faith in achieving rapid compliance after notification of the violation. See Sec'y Mot. at 9-10. The remaining criteria involve consideration of the gravity and negligence of the violation. I have found that the violation was unlikely to result in permanently disabling injuries, and that Vulcan's negligence in committing it was low. Accordingly, I find that a penalty of $143.00, as proposed by the Secretary, is appropriate.

VI. Order

ACCORDINGLY, the Secretary's Motion for Summary Decision and Determination of Penalty is **GRANTED**, and it is **ORDERED** that Vulcan Construction Materials, LLC **PAY** a civil penalty of $143.00 within 30 days of the date of this Decision.[1]

Jacqueline R. Bulluck
Administrative Law Judge

[1] Payment should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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