FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004-1710

August 7, 2013

O-N MINERALS (CHEMSTONE) COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. VA 2013-205-RM
	:	Citation No. 8722931;01/28/2013
	:	
v.	:	Docket No. VA 2013-204-RM
	:	Order No. 8722926;01/08/2012
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID: 44-00044
ADMINISTRATION (MSHA),	:	Mine: Winchester Plant
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2013-288-M
Petitioner	:	A.C. No. 44-00044-316336
	:	
	:	Docket No. VA 2013-372-M
v.	:	A.C. No. 44-00044-321898
	:	
	:	
O-N MINERALS (CHEMSTONE) COMPANY,	:	Mine: Winchester Plant
Respondent	:	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Zielinski

These cases are before me upon Notices of Contest and Petitions for Assessment of Penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petitions allege that O-N Minerals (Chemstone) Company ("O-N Minerals") is liable for two violations of the Secretary's regulations covering Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines,[1] and propose the imposition of civil penalties in the total amount of $4,447.00. O-N Minerals has filed a motion for summary decision, and in the alternative, partial summary decision. The Secretary filed a response to the motion and O-N Minerals filed a reply to the Secretary's response. For the reasons that follow, I find that there is no genuine issue as to any material fact and that O-N Minerals is entitled to summary decision as a matter of law.

[1] 30 C.F.R. Part 46.

Summary Decision Standard

Pursuant to the Procedural Rules of the Federal Mine Safety and Health Review Commission ("FMSHRC"), "a motion for summary decision shall be granted only if the entire record . . . 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(b) (2004). The Commission has analogized summary decision to Rule 56, Summary Judgment, of the Federal Rules of Civil Procedure. *Lakeview Rock Products, Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). Summary judgment is only appropriate "upon proper showings of the lack of a genuine triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Material facts are those that may affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

An opposition to a motion for summary decision "shall . . . include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition." 29 C.F.R. § 2700.67(d). The inferences drawn from the facts should be "viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), *Jim Walter Resources, Inc.*, 33 FMSHRC at 2255.

Findings of Fact and Conclusions of Law

On January 8, 2013, two employees of a contractor, H&W Crane, Leo Barnes and John Singleton, were operating a mobile crane at O-N Minerals' Winchester Plant. Ex. R-5.[2] Both of the men had received site-specific hazard training during the previous year, Barnes on March 1, 2012 and Singleton on October 26, 2012. Ex. R-1, R-2, R-7. Bob Hudson, the employee responsible for training, did not give Barnes or Singleton renewal training on January 8, despite their request, because new hardhat stickers were not available. Ex. R-7, S-A. He was aware that both men had previously received training in 2012. Ex. R-7. In addition, Barnes and Singleton had worked at the mine between the time of their initial training and January 8, 2013. Ex. R-7.

On January 8, 2013, MSHA Inspector Derek Goossens conducted an E01 inspection of the Winchester Plant. Ex. S-A. During the inspection, he observed Singleton and Barnes using a mobile crane, and to his knowledge, without having been given site-specific hazard awareness training. Ex. S-A. As a result, he issued Order No. 8722926 pursuant to section 104(g)(1) of the Mine Act. It alleges a violation of 30 C.F.R. § 46.11(b)(5), which states, "[y]ou must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner . . . but is present at the mine site, including: . . . [c]onstruction workers or employees of independent contractors who are not miners . . . ." Ex. R-5. The operator withdrew Barnes and Singleton and provided site-specific hazard training. Ex. S-A. Goossens terminated the order once he received copies of the training certificates. Ex. S-A, S-D. The training given to Barnes and Singleton in

[2] Exhibits to Respondent's motion are designated "R-x," and exhibits to the Secretary's opposition are designated "S-x."

January 2013 was the same training that they had previously received. Ex. R-1, R-2, R-3, R-4, R-7.

In conjunction with the above order, Goossens issued Citation No. 8722931 pursuant to section 104(d)(1) of the Mine Act on January 28, 2013. It alleges a violation of 30 C.F.R. § 46.11(a), which states, "[y]ou must provide site-specific hazard awareness training before any person specified under this section is exposed to mine hazards." Ex. R-6.

There is no genuine issue as to any of these material facts.

Respondent argues that it is entitled to summary decision because Singleton and Barnes previously received adequate site-specific hazard training, section 46.11 does not contain a requirement for training on an annual basis, and there were no significant changes to the mine conditions between March 1, 2012, and January 8, 2013, that required it to provide refresher training to the contractors. Resp. Mot. at 7; Ex. R-7.

In response, the Secretary argues that the original orientation forms listed a quarry hazard of "overhead hazards are prominent throughout the quarry so be aware of your surroundings" and that the forms stated that the orientation was only valid for the calendar year.

Section 46.11 does not provide for specific intervals in which persons, or employees of independent contractors, are required to receive training. The only requirement is that training must be given to a person before he is exposed to hazards and "that the training be sufficient to alert persons to the hazards they will encounter at the mine." Ex. R-6 at 29. The regulation does not require additional or refresher training each calendar year. The fact that the orientation forms state that the training is only valid for the calendar year does not alter the requirements of the regulation.

As evidenced by the Secretary's compliance guidelines, the passage of time or absence from a mine site do not trigger a requirement for additional training under section 46.11. Rather, operators are advised that it "would be prudent" to provide refresher training in such circumstances.[3] Changes at the mine site presenting new or different hazards would create a training obligation. However, there were no such changes at O-N Minerals' mine site. The training given in January 2013 was the same training that had been given to the men months earlier, and was deemed sufficient to satisfy the training obligation and abate the violations.

In an effort to avoid summary decision, the Secretary argues that the contractors' "testimony at trial will establish how long they had been away from the mine, why they felt additional site-specific training was required, and what site-specific hazards were present at the mine[,]" and later reiterates that "there are issues as to material fact regarding site-specific hazards which may be resolved by the testimony of the contractor employees." Sec'y Rep. at 5,

[3] The Compliance Guide for MSHA's Part 46 Training Regulations states, ". . . if a person is away from the mine site for a period of time, it would be prudent to provide that person with refresher site-specific training." Ex. R-6 at 29.

9. However, a party opposing a properly supported motion for summary decision must do considerably more than suggest that it may be able to demonstrate some, as yet unknown, factual issue necessary for trial. It must come forward with evidence in the form of affidavits or verified documents demonstrating that there is a genuine issue as to a material fact. *Scott v. Harris*, 550 U.S. 372, 379 (2007); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Hanson Aggregates New York, Inc.* at 9. The Secretary's speculation as to trial testimony falls far short of satisfying that burden.

I find that Singleton and Barnes had received site-specific hazard awareness training as required by section 46.11 in March and October, 2012, respectively. Additional training on January 8, 2013 was not required.

WHEREFORE, Respondent's motion for summary decision is **GRANTED.**

It is **ORDERED** that Order No. 8722926 and Citation No. 8722931 are hereby **VACATED**.[4]

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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[4] While it was not necessary to address the issue of duplicative citations in this instance, it should be noted that the citation and order issued by Goossens could be construed as duplicative. The cited standards must impose separate and distinct legal duties on an operator. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 716 (Aug. 2008); *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 553 (Aug. 2006); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (Aug. 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). A charge of violating a specific standard is considered duplicative of a charge of violating a more general standard when identical evidence is used to support each charge. 19 FMSHRC at 1004 n.12. In the above cases, the same evidence is used by the Secretary to establish a violation of section 46.11(b)(5) as its more general standard, section 46.11(a).