

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 25, 2013

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

Petitioner,

v.

CHEMICAL LIME CO. OF ALABAMA,
LLC,

Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2010-1107-M
A.C. No. 01-00003-227258

Mine: O'Neal Quarry and Mill

ORDER

Carmen L. Alexander, Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Charles H. Morgan, Alexandra Garrison Barnett, Alston & Bird LLP, 1201 West Peachtree Street, Atlanta, GA 30309-3424

Before: Priscilla M. Rae, Administrative Law Judge

Overview

This matter is before me on Respondent's Motion for Partial Summary Decision relating to a 104(a) Citation, Citation No. 8545847, issued by Mine Safety and Health Administration ("MSHA") Inspector Timothy Schmidt ("Inspector Schmidt") on April 22, 2010 at the O'Neal Plant based upon his investigation of an accident that occurred at the mine site on March 5, 2010, in violation of 30 C.F.R. § 56.15006.¹ The violation was assessed as posing a reasonable likelihood of causing a permanently disabling injury to a miner and was deemed significant and substantial ("S&S"). A high degree of negligence was assessed. The penalty was proposed at \$1,304.00. (Schmidt Dep.) For the reasons set forth below, Respondent Motion for Partial Summary Decision is DENIED.

Factual Background

¹ Section 56.15006 provides that "[s]pecial protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment."

Respondent Chemical Lime produces high calcium limestone that is used in water treatment processes and numerous products including plastics, metals, and steel. (Hunter Dep. at 17:9-20.) Respondent's O'Neal Plant contains a baghouse that is used to collect dust created from limestone traveling through the kiln. (Hunter Dep. at 22:10-14.) The baghouse is a structure consisting of multiple compartments where dust from the kiln is trapped in bags that act as filters. (Baker Dep. at 13:10-13; Hunter Dep. at 21:21-23, 22:5-9.)

In April 2010, Schmidt and another MSHA Inspector, Michael Evans, were assigned to conduct an investigation of an accident that occurred at the baghouse. (Evans Dep. at 23:1-10, 27:7-12; Schmidt Dep. at 22:6-23.) Schmidt relied on the facts gathered from the interviews he conducted, documents contained in the investigation file, and MSHA standards and references, in issuing the citation. (Schmidt Dep. at 12:14-18, 112:13, 113:18.)

The citation alleges as follows:

Adequate special protective clothing and equipment was not used and maintained in reliable condition during work in and near the baghouse. A miner working at the baghouse on 3/5/10 was injured due to lime dust inhalation and subsequently hospitalized. Other miners working in the area received chemical burns on the arms, face and neck. On several occasions miners had to flush their eyes out due to contact with lime dust. The operator did not ensure that personal protective equipment used at the mine was adequate and being used properly. (Schmidt Dep. at 12:8-18 & Ex. 5)

Respondent is seeking to have a portion of the citation vacated, as a matter of law. Respondent argues that insofar as the citation is based on the alleged failure to provide respirators or to ensure that they were being used properly, partial summary judgment on this allegation should be granted on the grounds that the Secretary of Labor (the "Secretary") cannot establish (1) that the cited standard applies to respirators; (2) that hazardous conditions requiring the use of respirators existed; or (3) that the respirators were not, in fact, properly worn.

Legal Framework

According to 29 C.F.R. § 2700.67(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 facts; and (2) that the moving party is entitled to summary decision as a matter of law.

The Commission has "has long recognized that summary decision is an extraordinary procedure," and has analogized its rule on summary decision 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 showing of the lack of a genuine, triable issue of material fact." *Energy West 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)). A material fact is a fact that is significant or essential to the issue or matter at hand. Black's Law Dictionary (9th ed. 2009). A genuine issue of material fact exists when the non-moving party produces evidence that would allow a reasonable fact-finder to return a verdict in its favor. *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258 (11th Cir. 2007). The "court must evaluate the evidence ' in the light most favorable to ... the party opposing the motion." *Secretary of Labor v. Lewis-Goetz and Co., Inc.*, No. WEVA 2012-1821, 2013 WL 4648484, at *2 (FMSHRC July 22, 2013) (ALJ). Factual disputes that are material under the substantive law governing the case will preclude entry of summary judgment. *Lofton v. Secretary of the Department of Children and Family Services*, 358 F.3d 804, 809 (11th Cir. 2004).

Analysis

Partial summary decision is inappropriate here because there are material issues of fact in dispute.

First, Respondent contends that there is a "fatal paucity" of "credible evidence" of a hazardous condition that existed on March 10, 2010 or at any time when minors were allegedly burned or otherwise injured while working at the baghouse. (Resp. Motion). Therefore the cited standard does not apply. It relies upon the fact that no silica dust or calcium oxide exposure levels were taken at the time of the injuries. It is therefore impossible to determine that the levels were sufficiently dangerous to require the use of special protective equipment. This contention is the very crux of the Secretary's case and is in dispute. The Secretary alleges that the evidence will show that lime dust or calcium oxide is a chemical hazard to which miners were exposed while changing out bags at the baghouse or otherwise working in and around the baghouse. (Schmidt Dep., 54:4-7; Exhs. 5 and 7.) He will also present evidence that miners were burned on or about the eyes, face, neck and arms and suffered respiratory injuries evidencing a per se hazardous condition.

Respondent argues in the alternative that, assuming there is evidence of a hazardous condition, there is no "credible evidence" that a respirator was required and not worn. Both the Respondent and the Secretary in their motions have made conflicting statements as to whether respirators and/or masks were made available to the miners. (Resp. Stmt of Facts 7, 8, 10; Sec. Memo. Footnote 2 at pg. 5.) There is also conflicting evidence in the form of witness statements as to whether masks and/or respirators were in fact available at all times and properly used. Respondent contends that proper equipment was available and used while the Secretary alleges in part that the fact that several miners suffered exposure-type injuries is a clear indication that this could not be the case.²

² It is noted that Respondent has failed to state in its Statement of Undisputed Facts that it agrees that miners suffered injuries to eyes, face, neck, arms and lungs as a result of exposure to silica or lime dust on or about March 2010. The Respondent's lack of acknowledgement of these alleged facts also must lead to a finding that summary decision is not appropriate here as they are

The Respondent's opinion that the evidence is not sufficiently credible or not in sufficient quantity to meet the requisite burden of proof to establish the elements of the cited standard in no way equates to there being no undisputed material facts. As the trier of fact, it is my job to assess the credibility and weight of the evidence once presented at hearing. It is not my job at this juncture, however, to do so. Rather, I must view the evidence in the light most favorable to the non-moving party. In so doing, it would be reasonable to find that a hazardous condition did exist while the miners were working in and around the baghouse and that respirators were not provided or not properly used to prevent the injuries allegedly sustained.³

Conclusion

For the reasons set forth above, summary decision is improper in this matter. Respondent's focus on the Secretary's lack of "credible evidence" merely underscores the fact that the facts are in dispute and cannot be resolved without a hearing on the matter.

WHEREFORE, Respondent's Motion for Partial Summary Decision is **DENIED**.

/s/ Priscilla M. Rae

Priscilla M. Rae
Administrative Law Judge

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directly relevant to establishing that a hazardous condition existed when working in and around the baghouse.

³ Respondent has also moved for partial summary decision on the legal argument that the cited standard does not include respirators as the type of special protective equipment mandated for use based upon the language of the MSHA Program Policy Manual interpretation of this standard. I decline to address that issue while the factual issues discussed herein remain in dispute. The applicability of the cited standard to the facts once determined at hearing may be addressed in post-hearing briefs.