

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 20 2015

HUNTER SAND & GRAVEL, LLC,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 2014-391-RM
Citation No. 8728537; 2/25/2014

Docket No. KENT 2014-392-RM
Order No. 8728538; 2/25/2014

Docket No. KENT 2014-393-RM
Order No. 8728539; 2/25/2014

Docket No. KENT 2014-394-RM
Order No. 8728540; 2/25/2014

Docket No. KENT 2014-395-RM
Citation No. 8728541; 2/25/2014

Mine: Dredge IV
Mine ID: 15-17687

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

v.

HUNTER SAND & GRAVEL, LLC ,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2014-566-M
A.C. No. 15-17687-350333

Docket No. KENT 2015-75
A.C. No. 15-17687-362767

Mine: Dredge IV

**ORDER GRANTING IN PART & DENYING IN PART MOTION FOR PARTIAL
SUMMARY DECISION**

Before: Judge Barbour

These cases are before me upon notices of contest filed by Hunter Sand & Gravel, LLC, (“Hunter”) and civil penalty petitions filed by the Secretary of Labor (“Secretary”), acting on behalf of his Mine Safety and Health Administration (“MSHA”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §§ 815, 820. In the

two Civil Penalty dockets, the Secretary seeks a civil penalty in the amount of \$152,820.00 for four alleged violations of the Secretary's safety and health standards for the nation's surface metal and nonmetal mines and one alleged violation of the Secretary's training and retraining standards for miners engaged in shell dredging or employed at sand or gravel mines. All five violations relate to a fatal accident on December 10, 2013, when the Secretary alleges a dredge hand walked onto a snow and ice covered barge ("Barge MEM 611") at the company's Dredge IV mine and slipped and fell into the water.

On a conference call dated July 28, 2015, the parties informed the court that a dispute over MSHA's jurisdiction in this matter was impeding settlement efforts, and the parties requested that the court resolve the dispute through summary decision. The court agreed to the request provided that the parties could present the court with no genuine dispute over material facts, preferably by stipulating to all material facts. The court subsequently scheduled a December 8, 2015, hearing on this matter. On October 5, 2015, the Secretary filed a Motion for Partial Summary Decision with an accompanying Memorandum of Law in Support ("Sec'y Br.") and attached exhibits. In its motion, the Secretary asserted that MSHA had jurisdiction to issue the five citations and orders in this proceeding, and requested that the court affirm that Hunter violated 30 C.F.R. § 56.11016 in Citation No. 8728537 by failing to clear snow from the walkway of Barge MEM 611 on December 10, 2013, as soon as practicable. Sec'y Br. 1-2.

On October 15, 2015, Hunter responded with a Statement in Opposition to the Secretary's Motion for Partial Summary Decision and Memorandum of Law in Support ("Resp't Br."). In its Statement, the company withdrew its contest to what it deemed "the Secretary's relatively narrow exercise of jurisdiction over Dredge IV and Barge MEM 611 in this proceeding." Resp't Br. 2. However, Hunter opposed granting partial summary decision on Citation No. 8728537 on the basis that the record raises genuine issues of material fact. Resp't Br. 2. The Secretary subsequently filed a Reply Brief ("Sec'y Reply Br.") in further support of his position.

Commission Rule 67(b) provides that a "motion for summary decision shall be granted only if the entire record, including the pleading, 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(b). When considering a motion for summary decision, the court looks at the record "'in the light most favorable to . . . the party opposing the motion,' and . . . '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.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

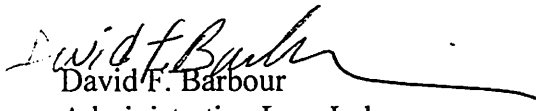
Here, the burden is on the Secretary, as the moving party, to establish his right to summary decision. On the issue of jurisdiction, I find no genuine dispute as to any material fact as neither party now contests that MSHA had jurisdiction to issue the five citations and orders in this proceeding. However, the Secretary has failed to meet his burden to establish his right to summary decision on Citation No. 8728537.

30 C.F.R. § 56.11016 establishes that, “[r]egularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.” The Secretary cites the Black’s Law Dictionary definition of “practicable” as “reasonably capable of being accomplished; feasible in a particular situation” and argues that it would have been “feasible for Hunter to clear the snow from the walkways before sending its miners out to walk on them.” Sec’y Br. 12. Hunter, in turn, states that the record “calls into question the presence of and extent of such alleged snow conditions on the Barge at the time of arrival, and suggests that such efforts may have been unwarranted at the time,” as well as “simultaneously fruitless and treacherous” due to darkness and unfavorable weather conditions. Resp’t Br. 8. The Secretary replies that “Hunter sent at least one miner out onto the walkways of Barge MEM 611 to obtain a draft reading before [the fatal accident occurred]” and thus the company’s claim that it was “unsafe to clean the snow from the barge’s walkways, but that, at the same time, it was safe to send miners out on to the barge MEM 611’s walkways in order to continue production evidences very little care for the health and safety of its miners.” Sec’y Reply Br. 4. Whether or not this is true, Hunter has raised genuine issues of material fact as to the practicability of clearing snow from the barge before the fatal accident occurred.

Furthermore, the company disputes whether Barge MEM 611 was a “regularly used” walkway or travelway, since moveable barges “arrive, are loaded and depart from Dredge IV within the short period of three to six hours.” Resp’t Br. 10. The Secretary however believes that the record is sufficient to establish regular use because the allegedly uncontroverted testimony of three miners shows that “(1) miners regularly traveled [other] barge walkways [at the mine] when they were covered with snow and (2) that miners traveled the walkways of Barge MEM 611 prior to the time that [a miner] fell overboard.” Sec’y Reply Br. 3. The court agrees with Hunter that in addition to issues of practicability this dispute raises genuine issues of regularity that also must be resolved through the hearing process.

ORDER

In accordance with the foregoing, the Secretary’s motion for partial summary decision is **GRANTED IN PART** on the issue of whether MSHA had jurisdiction to issue the five citations and orders in this proceeding. The Secretary’s motion is **DENIED IN PART** on the issue of whether Hunter violated 30 C.F.R. § 56.11016 in Citation No. 8728537. The hearing on these matters will proceed as scheduled on Tuesday, December 8, 2015, at 8:30 a.m. in Paducah, Kentucky.


David F. Barbour
Administrative Law Judge

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