

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 28, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-660-M
Petitioner	:	A.C. No. 48-00167-141338
	:	
	:	
v.	:	
	:	
BLACK HILLS BENTONITE, LLC,	:	
Respondent	:	Mills Plant

DECISION

Appearances: Ronald Goldade, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, and Kristi L. Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
 Karen L. Johnston, Esq., and Dana M. Bartels, Esq. Jackson Kelly, PLLC, Denver, Colorado, for the Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”) against Black Hills Bentonite, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Casper, Wyoming and the parties introduced testimony and documentary evidence.

**I. DISCUSSION AND FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On August 7, 2007 Inspector Gene Scheibe issued Citation No. 6305591 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 56.12016, or in the alternative 30 C.F.R. § 56.14105, as follows:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. An employee was attempting to remove mud from the Briquetter Screw Conveyor when his hand was caught up in

the screw causing cuts and a crushing injury. The conveyor was not locked out or tagged out. The disconnect was located in the restroom approx 50 to 75 feet around the corner from the screw. Employees are trained in lockout tag out procedures.

Scheibe determined that an injury had occurred that would likely be permanently disabling. He determined that the violation was of a significant and substantial nature (S&S) and that the company's negligence was moderate. The Secretary proposes a penalty of \$45,000.00 for this citation.

The parties stipulated to the fact that a violation of 30 C.F.R. § 56.14105 occurred which was significant and substantial.¹ The Respondent has challenged the level of negligence imputed to Black Hills Bentonite, as well as the gravity of the violation, for the purposes of assessing the penalty. Section 56.14105 provides:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

Inspector Scheibe was at the Mills Plant operated by Black Hills Bentonite on official business unrelated to this case when Ken Lisco, a Safety Trainer employed by Black Hills Bentonite, told him that an accident had occurred at the mine that day. (Tr. 19, 59). The inspector immediately began an accident investigation and determined that Aaron O'Hearn, an employee of the mine, had sustained an injury to his hand while attempting to dislodge mud from the briquette screw conveyor machine while it was in motion. (Tr. 23-26). No witnesses were in the immediate vicinity at the time of the injury.

Lisco interviewed O'Hearn following the accident as part of his internal investigation. Lisco testified that O'Hearn stated he had failed to "lockout/tagout" the briquetter screw conveyor before opening the safety lid and attempting to remove mud from the machine while it was still operating. (Tr. 69). O'Hearn's hand was caught, cut, and crushed by moving components in the machine before he was able to dislodge it. (Tr. 69). O'Hearn underwent reconstructive surgery for his injury, and returned to work approximately four months after the accident. (Tr. 72). He no longer works for the company and lives in another state. This conveyor is shut down at least once a day to clean mud from the screws. (Tr. 118).

¹ Inspector Scheibe initially cited 30 C.F.R. § 56.12016 as the section that was violated, while making a note that 30 C.F.R. § 56.14105 may also have been violated. The parties eventually jointly stipulated to a violation of 30 C.F.R. § 56.14105. (Stip. ¶ 11). The Secretary has indicated that the citation has been modified to reflect this. (Tr. 137).

Inspector Scheibe testified that the safety standard requires the individual performing maintenance to deenergize the equipment by turning off the main disconnect, put his lock on it, and fill out a tag that includes his name, the time, and a description of the work being performed. (Tr. 24-25). Additionally, the individual must block the machinery against hazardous motion.

Scheibe initially determined that the level of negligence was “high”, but later adjusted it to “moderate” due to mitigating factors, including the existence of a lockout and tagout policy, the availability of locks and tags, and the employee training that was provided. (Tr. 28).

Lisco testified that new employees are required to read the Black Hills Bentonite Safety and Discipline Manual (“Manual”), and sign the last page, indicating their obligation to abide by the policies therein. (Tr. 64-65). O’Hearn signed his Manual on March 1, 2007. (Ex. R-1). The Manual includes the company’s “Safety Lockout and Tagout Procedure,” which is designed for compliance with 30 C.F.R. § 56.14105.² (Tr. 65). Lisco testified that Black Hills Bentonite utilizes various means to implement its safety policy and communicate the lockout and tagout procedure, including the Manual, on-site training during an employee’s introduction into the work environment³, equipment-specific training, annual refresher training courses, and posted signs and safety procedures. (Tr. 60-64). Additionally, Plant Manager Nathan Plume testified that he would have occasional one-on-one or group meetings where he discussed safety topics such as the lockout and tagout procedure. (Tr. 99-100).

Commission administrative law judges assess penalties de novo taking into consideration the six penalty criteria in section 110(i) of the Mine Act. Two of those factors are at issue: (1) negligence of the operator, and (2) the gravity of the violation.

A. Negligence

Black Hills Bentonite contends that the level of negligence was improperly assigned. The negligence of a rank-and-file miner cannot be directly attributed to the mine operator for purposes of penalty assessment. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Rather, when “a rank-and-file employee has violated the Act, *the operator’s* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Id.*

² The Manual’s “Safety Lockout and Tagout Procedure” cautions that any equipment is potentially dangerous even if it is “presumed to be shut down.” (Ex. R-1). It also states that accidents occurring due to improper lockout and tagout most often “cause amputations, serious fractures, or death.” *Id.* It also sets forth the procedures to be followed in detail.

³ Lisco testified that the on-site introductory training included two videos which demonstrate the consequences of not following the lockout and tagout procedures. (Tr. 74-75).

I find that Black Hills Bentonite's negligence was quite low. O'Hearn was a classic rank-and-file miner, an hourly employee and relatively new hire, having been employed by Black Hills Bentonite for approximately 22 weeks. (Tr. 26, 103).

Plant Manager Plume testified that he was O'Hearn's direct supervisor, and spent approximately 90% of his work day walking the floor observing and talking with the miners regarding production, safety, and training issues. (Tr. 98, 123)

Safety Trainer Lisco provided some additional supervision and conducted mandatory training sessions that covered the lockout and tagout procedure. O'Hearn's signature on the Manual is evidence of his knowledge of, and obligation to abide by, the lockout and tagout procedure of Black Hills Bentonite. The New Miner Training Records indicate that O'Hearn received training on March 14, 2007 regarding how to correctly operate the briquetter screw conveyor. (Ex. R-4). This training included the lockout and tagout procedure specific to the briquetter screw conveyor. (Tr. 76-77). O'Hearn's training was current and he had read the safety procedure included in the Manual less than six months prior. Inspector Scheibe's Field Notes indicate that the correct lockout and tagout procedures were posted throughout the facility. (Ex. G-4). In spite of his training, O'Hearn failed to utilize the locks and tags that were readily available. There is no evidence that O'Hearn had violated any safety procedures, or failed to initiate the lockout and tagout procedure, at any time prior to the accident in question. Therefore, there was no reason for Black Hills Bentonite to believe that he would do so in this instance.

While Inspector Scheibe testified that he was not aware of any discipline policy for failure to follow safety regulations, both Lisco and Plume testified that Black Hills Bentonite does have a progressive discipline policy. (Tr. 37, 38, 90, 100-101). Plume testified that there is a disciplinary protocol which requires either a verbal or written reprimand for the first offense, and more severe penalties for subsequent violations of the safety policy. (Tr. 100-101). Two of the more severe disciplinary actions are suspension without pay and employment termination. (Tr. 101).

Given the level of supervision and training provided by the operator, the record does not support a moderate level of negligence on Black Hills Bentonite's part. Black Hills Bentonite's management clearly understood the importance of lockout and tagout procedures and communicated this information to its employees. I credit the company's evidence on this issue. In addition, the lockout and tagout stations at the plant were clearly marked and well maintained. (Ex. R-7 pp. 2, 6-10). As a consequence, I find that the negligence was very low.

B. Gravity

Black Hills Bentonite asserts that the Secretary improperly assigned the gravity of the violation, specifically the severity of the injury. Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard

which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

I find the gravity of this violation to be high. The parties agree that the violation was S&S. (Stip. ¶ 13). While the citation listed the severity of the injury as reasonably expected to be permanently disabling, O'Hearn, nevertheless, returned to work four months later. The safety standard seeks to protect miners from being injured while repairing or performing maintenance on machinery or equipment. The regulation is of high importance given the dangerous nature of servicing large powerful equipment while it is in motion. There is no dispute that O'Hearn suffered a severe injury to his hand as a result of failing to follow the operator's lockout and tagout procedure with respect to the briquetter screw conveyor. While Black Hills Bentonite provided ample training to prevent such a circumstance, the severity of injury in this case, which potentially could have been much worse if O'Hearn had not been able to dislodge his hand, lends itself to a finding of high gravity.

II. APPROPRIATE CIVIL PENALTIES

The penalty proposed by the Secretary was specially assessed and is too high for this violation, especially since I have reduced the level of negligence attributable to the operator. Although the gravity was high, the operator took all reasonable steps to prevent this type of injury. Section 110(a) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. Black Hills Bentonite was issued 15 citations at the Mills Plant in the 24 months prior to August 8, 2007. (Ex. G-9). In 2007 there were 75,772 hours worked at the Mills Plant, and somewhere between 200,000 and 300,000 hours worked at all Black Hills Bentonite facilities.⁴ (Stip. ¶ 9, Ex. G-8). My findings with respect to negligence and gravity are set forth above. The penalty assessed in this decision will not affect Black Hills Bentonite's ability to continue in business. Respondent demonstrated good faith abating the cited condition. (Stip. ¶ 7, 8). Based on the penalty criteria, I find that the penalty set forth below is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties.

<u>Citation No.</u>	<u>30.C.F.R. §</u>	<u>Penalty</u>
6305591	56.14105	\$900.00

⁴ The number of hours worked in 2007 for all Black Hills Bentonite operations was determined by taking the penalty points from "Controller Size" designation on the Proposed Assessment Form and then cross referencing that with the corresponding annual hours worked on Table IV-Size of Controlling Entity-Metal/Nonmetal Mine at 30 CFR § 100.3(b).

For the reasons set forth above Black Hills Bentonite, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$900.00 within 30 days of the date of this decision.⁵

Richard W. Manning
Administrative Law Judge

Distribution:

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⁵ Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390