FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 26, 2010

ORICA USA, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. YORK 2007-74-RM
v.	:	Citation No. 6046560; 06/04/2007
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 30-00025 4QM
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2008-59-M
Petitioner	:	A.C. No.30-00025-125567
	:	
v.	:	
	:	
ORICA USA, INC.,	:	
Respondent	:	Mine: Pattersonville Plant #61

ORDER DENYING MOTION TO DISMISS OR FOR SUMMARY DECISION

Before: Judge Lesnick

Background and Procedural History

This case arises out of an accident causing injury that occurred on May 4, 2007, and the citation issued as a result of the accident. In the civil penalty case, the Secretary of Labor ("Secretary") is petitioning to assess Orica USA, Inc. ("Orica") a civil penalty of $8,209 for an alleged violation of 30 C.F.R. §56.6306(f)(3), a mandatory safety standard requiring that access routes to a blast area be guarded or barricaded.[1] The alleged violation is set forth in Citation No. 6046560, which was issued on June 4, 2007, and contested by Orica. In addition to alleging the violation, the Secretary also alleges the violation was a significant and substantial ("S&S") contribution to a mine safety hazard and was the result of Orica's high negligence.

[1] 30 C.F.R. §56.6306(f) : before firing a blast --

(3) All access routes to the blast area shall be guarded or barricaded to prevent the passage of persons or vehicles.

Citation No. 6046560 states, in part, as follows:

> On May 4, 2007, the blasting contractor set off a production shot in the quarry that resulted in flyrock traveling approximately 526 feet onto the New York State Thruway I-90, striking three vehicles and resulting in two injuries. The section of I-90 adjacent to the blast site was within the "blast area" and was not guarded or barricaded to prevent the passage of persons or vehicles. The blaster in charge of the shot engaged in aggravated conduct constituting more than ordinary negligence. He knew or had reason to know that conditions including loose rock and minimal stemming in drill holes at the blast site created a significant hazard or flyrock throughout the blast area. However, he did not correct these conditions, stop traffic from passing through the blast area, or modify the blast design to reduce the hazard.

According to MSHA's Investigation Report, Callanan Industries, Inc. ("Callanan") owns the Pattersonville Plant #61, which is a surface crushed stone operation located in Pattersonville, New York. Callanan contracted with Orica to design, load, and detonate the blast. On May 4, 2007, the shot was laid out by Orica and drilled by Archibald Drilling. Flyrock from the blast traveled approximately 526 feet onto the New York State Thruway, I-90, striking three separate vehicles. A charter bus traveling west was struck by a rock measuring approximately 16-inches by 12-inches and weighing approximately 100 pounds. The flyrock passed through the roof of the bus and struck a teenage passenger. A passenger car traveling east was struck in the driver's side windshield, striking the operator in the abdomen. A third vehicle received a broken windshield and dents to the hood.

On June 16, 2009, counsel for Orica filed a Motion to Dismiss or for Summary Decision. The Secretary filed her Opposition on October 2, 2009, and Orica thereafter filed its Reply to the Secretary's opposition on October 23, 2009.[2]

Discussion

Dismissal is proper under FED.R.CIV.P. 12(b)(6) if the pleadings fail "to state a claim upon which relief can be granted."[3] Under Commission Rule 67(b), 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 fact; and (2) that the moving party is entitled to summary decision as a matter of law.

[2] By letter dated October 7, 2009, counsel for Orica notified the Chief Judge that it conferred with counsel for the Secretary of Labor and was authorized to represent that the Secretary consented to Orica filling a response to the Secretary's opposition by October 23, 2009.

[3] "On any procedural question not regulated by [the Commission's] Procedural Rules...the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure ..." 29 C.F.R. §2700.1(b).

Regarding the Secretary, if a non-moving party fails to establish sufficient evidence of an essential element to its claim, on which it bears the burden of proof, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, summary judgment should not be granted unless it is clearly shown that a trial is unnecessary. *Id*. The court is required, in reviewing all of the evidence on the record, to draw all reasonable inferences from the underlying facts in the light most favorable to the non-moving party. *Reves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000).

Based on my reasons outlined below, I conclude that the case is not entitled to dismissal and Orica is not entitled to summary decision as a matter of law.

Orica contends that MSHA does not have jurisdiction to issue the citation at issue because the New York State Thruway, on which the accident occurred, is not a "mine" as defined within the Federal Mine Safety and Health Act of 1977 ("Mine Act"). Orica argues that MSHA has no authority to issue a citation because the access route in question, the New York State Thruway, is "public" and not "private" in that it is owned in the name of the State of New York, and it is unlawful for a private person to shut down the Thruway. *See* Orica USA Inc.'s Motion to Dismiss or for Summary Decision ("Motion to Dismiss"), at 8. Orica also claims that the New York State Thruway is not "appurtenant" to the mine because it is not dedicated exclusively to the mine's use, it lacks the property interest relationship, and it is neither annexed to nor legally belongs to the mine. *See* Motion to Dismiss at 9. Additionally, Orica argues that it did not receive "fair notice required by the Due Process Clause of the Fifth Amendment to the Constitution that it would be expected to guard or barricade the New York State Thruway." *See* Motion to Dismiss at 10.

The Secretary responds that MSHA's authority to issue the citation does not stem from the fact that the flyrock struck several vehicles on a "private way[] [or] road appurtenant to" the "area of land from which minerals are extracted," but, rather, from the fact that Orica controlled the extent and contours of the "blast area" where flyrock from the blast would land. *See* Secretary of Labor's Opposition to Respondent's Motion to Dismiss or for Summary Decision ("Secretary's Opposition"), at 2. Orica's failure to take appropriate actions to prevent persons or vehicles from entering the area used as a mine while flyrock was present constituted a violation of the Mine Act. *See* Secretary's Opposition at 3. The Secretary further responds that Orica did receive fair notice based on the fact that the Mine Act is sufficiently clear on its face. *See* Secretary's Opposition at 11.

The Mine Act provides, in pertinent part, that a mine "means...an area of land from which minerals are extracted in nonliquid form...[and] private ways and roads appurtenant to such area ..." 30 U.S.C. §802(h)(1) (2008). Additionally, "[b]efore firing a blast...[a]ll access routes to the blast area shall be guarded or barricaded to prevent the passage of person or vehicles." 30 C.F.R. §56.6306(f)(3). The term "blast area" is defined as "the area in which...flying material...may cause injury to persons" and is determined by considering various factors. *See* 30 C.F.R. §56.2.

Orica relies on *Secretary of Labor v. Natl. Cement Co. of California, Inc.*, 494 F.3d 1066 (2007), to interpret the meaning of "mine" with respect to roadways, and, ultimately, MSHA's authority to issue the citation in this case. However, in that case, the mine was cited for failing to install berms or guardrails on an access road. *Id*. at 1071. The citation stemmed from the company's failure to keep the mine in compliance with appropriate regulations regarding the access roadway conditions. *Id*. at 1066. The parties disagreed as to whether the road was a "mine" subject to MSHA's jurisdiction. In the case at hand, Orica was cited for failure to keep the mine conditions in compliance with appropriate regulations regarding blasting. The reason for the citation stems from the conditions at the blast site, which was at the mine, and not from the property ownership or conditions at the site of injury where the flyrock landed. The land at the blast site was being used in the work of extracting minerals from their natural deposits and therefore, a mine within the definition as set forth in the Mine Act. *See* 30 U.S.C. §802(h)(1)(c) (2008). Because the blast site is a "mine," MSHA jurisdiction is appropriate.

I agree with the Secretary's reasonable interpretation that Orica is not absolved of its duty to protect people in the blast area from injury merely because the blast area extended beyond the legal property line of the Pattersonville mine. To only include flyrock injuries on roadways that are "private" and/or "appurtenant to" a mine would allow blasting operators to escape liability for violations of section 56.6306 that result in injuries simply because the injuries occur off of the mine property. Accordingly, I find that MSHA's authority and jurisdiction are proper in this case.

I further find that Orica did receive fair notice as required by Due Process because, as discussed above, it is undisputed that the land at the blast site was being used to extract minerals and is a "mine" as defined in the Mine Act. Therefore, Orica could reasonably expect that MSHA would have jurisdiction over the activities, specifically, blasting, that occur at the mine. The language of section 56.6306 is clear and therefore, Orica had notice of the regulation's blasting requirements.

For all the foregoing reasons, I find that Orica is not entitled to summary decision as a matter of law. Accordingly, the Motion to Dismiss is denied. Moreover, because all of the material facts pertaining to the factors considered in determining the boundaries of the blasting area and whether Orica considered and employed these factors have not been deemed admitted, nor discussed, there are genuine factual issues left to be resolved.

ORDER

Therefore, Orica's Motion to Dismiss or for Summary Decision is **DENIED**.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Suzanne Demitrio, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick Street, Room 983, New York, New York, 10014

James A. Lastowka, Esq. & Arthur G. Sapper, Esq., McDermott Will & Emery LLP, 600 13th Street, N.W., Washington, DC 20005-3096

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