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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MINERALS EXPLORATION COMPANY, APPLICANT	APPLICATION FOR REVIEW
	DOCKET NO. WEST 81-189-RM
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	107(a) Order of Withdrawal and Citation No. 577443
	MINE: Sweetwater Uranium Project
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING
	DOCKET NO. WEST 81-270-M
v.	A/C No. 48-01181-05030 H
MINERALS EXPLORATION COMPANY, RESPONDENT	MINE: Sweetwater Uranium Project

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Before: John A. Carlson, Judge

DECISION

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"), arose from an

inspection of applicant's (Minerals') surface uranium mine. On February 11, 1981, a mine inspector for the Secretary of Labor concluded his inspection of the C-1 pit of the Sweetwater Uranium Project with the issuance of a section 107(a) withdrawal order. He based this action upon his observation that areas of loose, unconsolidated and overhanging ground on one of the highwalls endangered miners working near the toe of the wall. The order charged a violation of a mandatory safety standard, 30 C.F.R. 55.3-5, which provides:

> Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded or posted.

Because a mandatory standard was involved, the inspector also issued a citation under section 104(a) of the Act, specifying that the violation was "significant and substantial."

PROCEDURAL HISTORY

This present proceeding commenced with Minerals' filing of an application for review of the imminent danger withdrawal order, which was first heard after an ordinary course of pleadings on April 15, 1981. At the conclusion of the two days allotted for trial, the Secretary had not completed his case in chief and the matter was continued to reconvene in June. The second segment of the hearing ultimately began on June 29, 1981, but only after some difficulties concerning whether officers of the Local Union of Progressive Mine Workers of America, Local 1979 B, as miners' representative, would be allowed to assert party status at the reconvened hearing. The judge initiated a June 22, 1981, telephone conference call, with counsel for both original parties and an officer of the union participating, in which arguments on the matter of party status for the union were entertained. Certain remarks made by Minerals' counsel were viewed by the union representative and the Secretary's counsel as an unlawful attempt to discourage or interfere with the Union's right of participation.

The hearing did reconvene on June 29, 1981, as scheduled, with the express approval of the union, which withdrew its motion for party status (Tr. 346). Again, however, the hearing did not proceed to completion. This time it halted because of government allegations and testimony that Minerals had "falsified" a number of exhibits. Counsel for the operator professed surprise, and was granted time to investigate this charge before proceeding further with his defense. Consequently, on the afternoon of June 30, 1981, trial was continued indefinitely. Before it could be reconvened, the first in a series of longer delays began. At the commencement of the hearing on June 29, 1981, counsel for the Secretary had filed personally with this judge a letter-motion asking for institution of disciplinary proceedings against counsel for Minerals because of his alleged threats to the union representatives in the June 22 telephone call.

On July 13, 1981 I referred the matter to the Commission without recommendation. The Commission found that a disciplinary proceeding was warranted, and by order of July 23, 1981 referred the matter to Chief Administrative Law Judge Merlin. Minerals, through counsel retained for the disciplinary proceeding, secured from the Commission a ninety day stay of the original review proceeding upon the merits.

Judge Merlin, on August 10, 1981, issued his decision holding, in essence, that while counsel's remarks were ill advised, no unlawful intent was present and that no disciplinary action beyond a cautioning was warranted.(FOOTNOTE 1)

This judge set a resumption of the hearing on the merits for November 2, 1981. In the meantime, a flurry of motion filings and responses ensued concerning various documents which have been subpoeaned by the government in connection with the charge of falsified exhibits. This phase of the case culminated in Minerals' filing of a sixty five page "Motion for Sanctions," asking for various types of relief based upon the Secretary's alleged misconduct in the case. Specifically, Minerals sought vacation of the 107(a) order, a declaratory order condemning actions of two mine inspectors, an order referring the conduct of the inspectors to the Inspector General of the Labor Department for disciplinary action, orders striking certain exhibits from the record and returning other documents to Minerals, an order reprimanding the Secretary's counsel for the manner in which they obtained personal diaries of certain of Minerals' employees, and the "consideration" of disciplinary action against the Secretary's counsel.

All of the original counsel withdrew during the pendency of the motion and were replaced by other counsel. On November 4, 1981, this judge recused himself from consideration of the motion upon notification by the movant that he might be called as a witness. Judge Jon D. Boltz heard evidence on the motion for four days commencing on November 9, 1981. Both parties filed extensive post-hearing briefs, and Judge Boltz took the matter under advisement. On April 7, 1982, he issued his written order on the motion for sanctions in which he denied all the requested sanctions.

On May 3, 1982, the Commission received Minerals' petition for discretionary review of Judge Boltz's determination. The Commission, by order issued May 11, 1982, denied discretionary review because the judge's determination was not "final" within the meaning of the Act. It therefore deemed the petition one for interlocutory review under Commission Rule 74, and stayed the proceedings on the merits. On May 25, 1982, it denied the petition for interlocutory review, dissolved the stay, and returned the files to this judge.

Meanwhile, on October 1, 1981 Minerals had filed a letter reflecting that the alleged hazard had been abated, and that the Secretary had therefore terminated the withdrawal order on September 9, 1981. A copy of the termination order was attached. The Secretary was therefore free to propose a civil penalty, which was duly contested by Minerals. That proceeding, docketed as WEST 81-270-M, was assigned to this judge and consolidated on November 18, 1981 with the earlier application of review of the withdrawal order.

On July 7, 1982 Minerals moved that I issue a decision on the merits upon the present record. On September 15, 1982, the Secretary and Minerals filed a joint motion requesting that I decide the consolidated case without further hearing and without briefs.

Denominated a "Joint Motion for Decision on the Present Record," the motion is actually somewhat broader than that. It provides that diary entries made by certain Minerals' employees are to be considered as evidence, though never introduced at trial. (In the proceeding before Judge Boltz, Minerals had unsuccessfully sought to have these diaries suppressed on grounds that they had come into the Secretary's possession through unlawful means. Thus, while the parties agree that I may consider the contents of the diary entries, Minerals reserves its right to review its plea for supression before the Commission at the appropriate time.)

The joint motion also specifies that if a violation is found the penalty is to be determined on the basis of the record made in the proceeding to review the withdrawal order. That record is supplemented by stipulation in the motion as to several routine facts relating to penalty considerations.

Finally, the parties stipulate that the decision should be made "without reference to" the separate record made before Judge Boltz.(FOOTNOTE 2)

On October 6, 1982, I granted the parties' motion to render this decision on the present record. That record contains the Secretary's case in chief, but was terminated shortly after the commencement of the operator's case. By making the motion Minerals saw fit to waive the completion of its case. By joining with Minerals, the Secretary waived his right to cross examination of Minerals' only witness and his right to present any rebuttal.

The Secretary's allegation in his penalty proposal in Docket WEST 81-270-M that Minerals operations affect commence was not contravened by Minerals. The jurisdiction of the Commission is not in issue in these proceedings.

REVIEW AND DISCUSSION OF THE EVIDENCE

The undisputed evidence shows that the C-1 pit is one of three pits at Minerals' Sweetwater Uranium Project near Rawlins, Wyoming. Stripping began in 1978 and the mining of ore in 1980. The focus of this case is on the east highwall of the C-1 pit, which was mined to a planned slope of about 3/4 to 1 (3 feet horizontal to 4 feet vertical). (Tr. 455.) Mining proceeded with blasting and excavation by power shovels equipped with 17 yard buckets.

The mining plan in force at the time of the inspection provided for mining in a series of 40 foot vertical working heights or intervals on the highwalls (Tr. 284, 455).

When inspectors Merrill Wolford and Melville Jacobson viewed the C-1 pit on February 11, 1981, they observed a number of overhangs and an area of loose and unconsolidated ground clustered along the brow or lip of the 6540 foot bench. This bench (6540 feet above sea level) was at least 55 feet above the pit floor (Tr. 55). A shovel operator and an ore technician were working as close as 3 to 4 feet from the toe of the wall (Tr. 69, 85-86). Periodically, according to Wolford, four truck drivers were also close to the toe of the wall as their trucks were loaded. Had any of the overhanging or loose ground fallen from the lip of of bench, Wolford claimed, any of these six miners could have been killed or severely injured.

Consequently, Wolford issued his withdrawal order. In obedience to the order, Minerals "dangered off" the area of the pit floor below the overhangs by construction of a berm some 500 to 600 feet in length.

At the hearing Wolford and Jacobson's verbal descriptions of the condition of the bench lip were substantiated by other governmental officials. On February 17, 1981, the site was investigated by Gordon R. Lyda, a mining engineer with the Ground Support Division of the Denver Office of the Mine Safety and Health Administration. This witness described the soil structure in the overhangs and the loose soil area as sedimentary sandstones of varying degrees of cementation mixed with shales, siltstone and mudstone (Tr. 231, 242). The areas in question lacked "overall structural integrity," he testified, particularly since there were deep fractures in the surface of the 6540 foot bench immediately behind the overhangs. (Tr. 175, 184). From below, he saw "fractured, broken rock, [and] loose slabby material in the area of the overhangs" (Tr. 183-184).

Herman Fink, a Deputy State Mine Inspector for the State of Wyoming also viewed the wall on February 17, 1981. His observations agreed with those of Wolford and Lyda. He described "the whole highwall" as "full of loose rock" (Tr. 354-355).

The Secretary's witnesses also testified as to the cause of the overhangs: undermining of the crest of the 6540 bench. Lyda and Fink, in particular, asserted that shovel-teeth marks were plainly visible directly below the overhangs, an indication that the wall was improperly cut. The overhangs did not result, that is to say, from subsequent sloughage.

The brief testimony presented by Minerals' single witness, Lawrence G. Dykers, Project General Manager of the Sweetwater operation, did not directly rebut the testimony of the government witnesses. Mr. Dykers discussed a distinction between "irregularites" and "overhangs" in pit walls, explaining that irregularities are inevitable in the mining process. He did not go so far, however, as to deny that overhangs were present.

I conclude that the Secretary's evidence overwhelmingly establishes the existence of overhangs and an area of loose and unconsolidated ground. A host of color photographs, taken from various places and angles, confirm the words of the witnesses. The evidence also shows clearly that six miners were exposed at various times to the hazard presented by falling rock. The Secretary's evidence on this element of violation was never challenged.

To the extent that the operator attempted a defense in its abbreviated case, it was intended to center, I think, upon the existence of another safety bench below the 6540 bench. Had there been a broad bench below the 6540 bench, it would have served to catch much of any materials falling from the overhangs, and greatly reduced the possibility of injuries to miners working near the toe. Mr. Lyda testified that safety benches "are necessary to a proper mining operation," and conceded that they "would tend to reduce the hazard ... of people ... being struck by sliding or falling or airborne material" (Tr. 303-304). Even so, he was not certain that a bench would be adequate protection against the "major, significant overhangs" (Tr. 304).

As it turned out, however, there was simply no intervening bench - at least none of significance. Four government witnesses testified in detail about the lower bench. Their recitals were unanimous: a remnant of a lower bench was visible on the wall, but only a remnant. What width there was, was filled with sloughage. Thus, had overhanging or unconsolidated materials broken loose from the 6540 bench, nothing would have interrupted their fall to the pit floor (Tr. 25, 292-293, 356, 362, 539, 546).

This brings us to the allegedly "falsified" exhibits. Early in his testimony, mine project manager Dykers testified concerning a survey of the east wall of the C-1 pit which was initiated on February 13, 1981 (Tr. 461). A large plan view (overhead view) of the approximately 600 foot long section of the C-1 pit was then placed before the witness who indicated that it was a product of the survey. Dykers testified that survey points had been established at 19 points along the area of the face covered by the plan view. At these points the survey crew had

physically measured the "most prominent and pronounced" irregularities on the face (Tr. 464-465). Shaded areas on the plan view, he said, represented slopes, and unshaded

areas flat surfaces, including safety benches (Tr. 467). This document, identified as exhibit A-2, was then offered and counsel for the Secretary was permitted voir dire.

After a few questions on voir dire, government counsel then suggested upon the record that the drawing was inadmissible because it was "falsified." Without objection from counsel for Minerals, counsel for the Secretary then read into the record a statement from one Brian K. Baird, the draftsman who had prepared the plan view. Baird's statement alleged that the original plan view and many of the original 19 cross sectional drawings had been altered before the hearing. The statement claimed that the original drawings had accurately reflected the survey notes and actual measurements.

Counsel for Minerals professed no knowledge of any alteration, agreed that the matter had to be resolved, and agreed to the issuance of subpoenas to government counsel to obtain the testimony of the appropriate company employees (Tr. 476-480). The hearing continued no further on June 29.

Testimony resumed the following afternoon with Brian K. Baird on the stand as the government's witness by agreement of the parties (Tr. 43). Baird confirmed that he was the draftsman who prepared the original plan view from the survey notes. He testified that he had computed coordinates from the notes and plotted them on his drawing in accordance with standard engineering practice. He then identified another drawing, marked as exhibit R-19, as his original and accurate plan view, and averred that various markings on the sheet were added by one Larry Snyder, whom he identified as the company's head of safety and environment (Tr. 491). Exhibit A-2, according to Baird, reflected the revisions ordered by Snyder which extended and widened the lower (6470) bench across the face of the C-1 pit (Tr. 492, 494). Baird asserted that the changes were freehand exercises by Snyder, based upon no new survey data (Tr. 495, 532, 573).

The witness then compared two separate sets of the cross-sectional drawings which were tied to reference points on the plan view. The first set, he testified, were prepared by him and a fellow draftsman. They were based upon measurements of the overhangs and the known elevations of the benches. The remaining features were drawn from observations of photographs and slides and were therefore not as precise. (Tr. 498, 499, 527, 528). Baird maintained that the second set of diagrams, which were intended for introduction at the hearing, contained a number of alterations made by persons unknown to him. Generally, according to Baird, the cross sections were added to and altered to show a wider bench in conformance with Snyder's changes on the plan view (Tr. 508). On the 4X cross section, for example, he pointed to a change which widened the bench about 2 1/2 feet (Tr. 551). Baird maintained that he had observed the lower bench remnant at the 6470 foot elevation, and that the first set of drawings accurately represented its dimensions, while the second set did not (Tr. 497, 569). Both sets of all the drawings were offered

by the Secretary and admitted without objection.

No more evidence was taken after Baird's testimony. On the basis of the record before me, I am not prepared to hold whether or not the second set of drawings were "falsified" as the Secretary contends. Such a holding is not necessary to reach a proper decision on the merits of this case. Perhaps some satisfactory explanation for the changes exists, and it would be presumptuous of me to conclude that outright misconduct occurred when it is likely that the evidence adduced before Judge Boltz dealt at greater length with the drawings.

I did find Baird an earnest and believable witness with no discernable motive for dissembling. At the very best, the process by which the final set of drawings came about betrays a subjectivity, a flexibility, which robs them of any weight favorable to Minerals. Beyond that, even if the modified drawings were accepted as accurate, they would not persuade me of the absence of violation. Various of the cross sections show substantial overhangs; and even the widest versions of the lower bench would not appear sufficient to keep a major materials fall from reaching the pit floor. The credible evidence proves violation.(FOOTNOTE 3)

We now consider whether the violative conditions constituted an imminent danger. Section 3(j) of the Act defines an imminent danger as:

> The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

Section 107(a) of the Act sets out the procedures for issuance of withdrawal orders when an inspector finds an imminent danger. It provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such re

> presentative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

In imminent danger cases the Secretary must establish a prima facie case. The ultimate burden of proof, however, is then borne by the applicant, who must show by a preponderance of the evidence that no imminent danger existed. Otherwise, the order of withdrawal must be affirmed. Lucas Coal Company, 1 IBMA 138 (1972).

Old Ben Coal Corporation v. Interior Board of Mine Operation's Appeals, 523 F. 2d 25, 32 (7th Cir. 1975) approved this test for imminent danger:

> [W]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

The Secretary presented strong evidence as to the immediacy of the danger presented by the soil conditions on the lip of the 6540 bench. Inspector Wolford, whose many years experience as a miner and inspector in open pit operations was supplemented by thirty hours of specialized training in ground control (Tr. 23), believed the overhangs "could come down at any time" (Tr. 44). Mr. Lyda, who specializes in ground control matters found "a very good potential for a fall of ground" (Tr. 175), though no one could say when it would come down (Tr. 198). He was certain that either isolated or massive falls - as much as 300 to 400 tons - would eventually occur (Tr. 176-177), and that mining operations should not be permitted "within close proximity" (Tr. 272). Supervisory inspector Jacobson believed that a fall could have occurred at "any second" (Tr. 410). Wyoming inspector Fink did not issue a Wyoming "closure order" because the federal authorities had already acted. He stated, however, that he concurred with the opinions of Lyda and Wolford as to the presence of loose materials and overhangs which "could come down at any time" (Tr. 349-351).

This unanimous body of opinion was essentially unrebutted by Minerals. I do note that none of the inspecting group witnessed any sloughage or falls of rock from the unstable areas during the time of the inspection. This fact alone does not detract in any significant way from the array of

objective indications of instability observed by all the inspecting personnel who testified. No one suggests that large falls are always proceeded by small ones; and it is axiomatic that moments before any highwall falls, it stands. A determination of imminent danger is necessarily judgmental in nature. I must conclude that the judgments of the inspectors were sound: that the condition of the wall posed a likelihood - though not a certainty - that a large fall of rock could occur at any moment, imperiling the lives of the miners working near the toe of the wall. The facts warranted the issuance of a withdrawal order.

Similarly, Inspector Wolford properly designated the violation of the standard as "significant and substantial." Such violations are defined in section 104(d) of the Act as those which "... could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard." The definition has been further construed by the Commission to mean those violations where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). This same case also makes it clear that a significant and substantial violation may properly be charged in a 104(a) citation.

Since the facts before me indicate that the more stringent test of an imminent danger has been met, there can be no doubt that the violation of 30 C.F.R. 55.3-5 was significant and substantial. There was a reasonable likelihood that a collapse of the unstable area of the highwall would cause injuries of a "reasonably serious nature" to any or all of the six miners working in the pit floor near the wall.

Before moving to the question of an appropriate penalty, several dismissal motions made early in the hearing must be disposed of. Ruling was reserved at the time they were made.

First, Minerals argues that the withdrawal order lacked the specificity demanded by section 107(c) of the Act wherein it requires a "detailed description" of the conditions which constitute the imminent danger as well as a "description" of the area from which miners are to be withdrawn. The thrust of the argument appears to be that this is an absolute due process requirement which is unaffected by the actual knowledge of the operator. The argument lacks merit. The statutory provision does no more than require that an operator have reasonable notice of the identity of the hazard and the part of the mine affected. The citation speaks in terms of overhanging banks and loose ground on the east wall of the C-1 pit and identifies the miners endangered. It thus meets any specificity requirements of the Act.

Beyond that, had Minerals entertained any genuine doubts as to any particulars of the order, it could easily have availed itself of any of the discovery techniques available under the

Commission Rules to resolve those doubts. Cf Evansville Materials, Inc., 3 FMSHRC 704 (1981). Actually, it

was apparent as the hearing progressed that Minerals at no time had any significant questions as to the particulars of the government's allegations.

Second, Minerals argues that the standard itself is impermissibly vague because it contains "no guidelines to establish the conduct of the inspector with regard to what is and what is not dangerous." This argument, too, lacks merit. Standards must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corporation, 3 FMSHRC 2496 (1981). Terms such as "unsafe" or "dangerous" appear frequently in mandatory standards. Thus, in Alabama By-Products Corporation, 4 FMSHRC 2128 (1982), Docket No. BARB 76-153, the Commission declared:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

See also Ryder Truck Lines, Inc., v. Brennan, 497 F. 2d 230 (5th Cir. 1974), United States Steel Corporation, 5 FMSHRC 3 (1983), Docket No. KENT 81-136, January 27, 1983. The standard cited in the present case meets constitutional requirements.

Minerals also attempted to exclude all evidence gathered by the Secretary after the issuance of the withdrawal order. Such evidence, Minerals claims, cannot be considered in determining whether the elements of an imminent danger were present at the time the inspector made the order. Specifically, the operator is concerned about observations made by the Secretary's personnel on February 17, 1981. The photographs of the east wall introduced by the Secretary were made on that day, as were the observation of cracks on the surface of the 6540 bench.

Minerals is correct, of course, that after-acquired evidence must be examined closely to determine whether it is truly relevant to conditions as they existed at the time of the order. Here the photograph was unquestionably relevant since witnesses who were present on the date of the original inspection testified without contradiction that the dangerous features on the highwall had not changed. As to the cracks on the surface of the 6540 bench (the inspection party did not climb to the top of the bench until the subsequent visit on February 17), Mr. Lyda testified with certitude that the fractures behind the overhangs, although they may have enlarged "microscopically" between February 11 and 17, were such that

they could not have been newly formed since the date of the order (Tr. 186-187, 250-251, 289-290).(FOOTNOTE 4) The thrust of his testimony was that unstable ground formations such as he observed, once in existence, invariably move slowly and deteriorate until a failure or fall occurs, but that no one can predict the precise time of such a collapse. The evidence gathered on the surface of the 6540 bench on February 17, 1981 was therefore relevant to conditions on February 11.

PENALTY

After Minerals removed the overhangs and the Secretary terminated the withdrawal order in September 1981, the Secretary proposed a civil penalty of $1,250.00 for the alleged violation.(FOOTNOTE 5)

At the outset of the hearing, the parties stipulated that the mine employed 280 persons and mined 60 tons of materials daily. In the stipulations which were a part of the agreement to submit the case for decision upon the present record, the parties represented that Minerals is a large uranium mine operator; that assessment of a penalty will not affect its ability to continue in business; and that an appended computer printout furnished by the Secretary shows the violations alleged against Minerals during the two years prior to the February 1981 withdrawal order, and whether the proposed penalties were paid or contested. The data show that 154 violations were assessed and 104 were paid, for a total amount of $14,330.00.

On the record before me, few of the statutory penalty criteria tend to favor Minerals. Its size is large, and the assessment of a significant penalty will not jeopardize its ability to continue in business. The gravity of the violation was high in that the lives of several miners were clearly endangered. The operator's negligence was also high; the hazardous lip of 6540 bench was visible to anyone inclined to look. Even for a large mine, Minerals' history of prior violations and penalties is far from positive. As to good faith, the evidence does indicate that Minerals responded quickly in building a berm on the pit floor to isolate miners from falling rock after the federal inspector issued his withdrawal order.

Minerals should not be penalized for delaying further abatement by exercising its statutory right to secure review of the validity of the withdrawal order.

I conclude that the facts warrant imposition of a civil penalty of $1,250.00.

FINDINGS OF FACT

Upon the entire record, and in conformity with the findings embodied in the narrative part of this decision, the following findings of material fact are entered:

(1) Minerals operates an open pit uranium mine near Rawlins, Wyoming.

(2) On February 11, 1981, six miners were working on the floor of the C-1 pit as close as two feet from the toe of the east highwall.

(3) Far above these miners several areas of overhanging rock and a single area of loose and unconsolidated rock were located on the lip of the 6540 foot safety bench.

(4) The wall below the 6540 lip lay at a slope of approximately 3/4 to 1. On the date of inspection there was no safety bench, or remnant of any former safety bench, of sufficient width to catch or interrupt the fall of rock should it break loose from the upper bench.

(5) Had any significant part of the loose or overhanging rock fallen, it would likely have killed or severely injured one or more of the miners working below it.

(6) The loose and overhanging rock was unstable and likely to fall at any moment, without warning, and before the hazard could be abated.

(7) Minerals is a large mine operator.

(8) Imposition of a significant civil penalty would not impair Minerals' ability to continue in business.

(9) The loose and overhanging rock on the lip of the 6540 bench was readily apparent, and Minerals knew or should have known of its existence and the hazard it presented.

(10) Minerals acted with dispatch in building a berm on the floor of the C-1 pit to keep miners out of the danger area when the Secretary's inspector issued his imminent danger withdrawal order on February 11, 1981.

CONCLUSIONS OF LAW

Pursuant to the findings in this matter, it is concluded that:

(1) The Commission has jurisdiction to decide this matter.

(2) The conditions on the lip of the 6540 foot bench above the area where miners were working violated the mandatory standard published at 30 C.F.R. 55.3-5.

(3) The violation was "significant and substantial" as that term is used in section 104(d) of the Act.

(4) The violation constituted an "imminent danger" as that term is defined in section 3(j) of the Act and used in section 107(a) of the Act.

(5) The Secretary's issuance of a withdrawal order under section 107(a) of the Act was warranted.

(6) The violation warrants the imposition of a civil penalty against Minerals in the amount of $1,250.00.

ORDER

Accordingly, it is ORDERED that:

(1) Minerals' application for review of the withdrawal order issued February 11, 1981 is dismissed, and that order is affirmed.

(2) The citation issued under section 104(a) of the Act contemporaneously with the withdrawal order is affirmed.

(3) Minerals shall pay to the Secretary, within 30 days of the date of this present order, a civil penalty of $1,250.00.

John A. Carlson
Administrative Law Judge

FOOTNOTES START HERE-

1 See Disciplinary Proceeding (Minerals Exploration Company), Docket No. D 81-1, August 10, 1981.

2 It could scarcely be otherwise since I neither heard the testimony nor observed the demeanor of the witnesses in the sanctions hearing. To the extent, then, that evidence adduced at that hearing may have relevance to the validity of the withdrawal order or the issues in the penalty proceeding, it is simply not considered in this decision.

3 One of the stipulated exhibits in the agreement for a decision on the present record appears to give further credence

to Baird's testimony. The diary of Chris Hill, identified as Baird's immediate supervisor, contains this entry for June 3, 1981:

> Larry Snyder redesigned our survey of 5-29-81 in Pit 1 6470 bench. He told Brain [sic] the draftsman to draw in bench that is not there.

I note, however, that my determinations as to the worth of the survey drawings were predicated upon Baird's unrebutted testimony and would have been the same without the diary evidence.

I also note that another diary entry relating to the mining out of a bench on the east wall did not influence my decision as to the existence or non-existence of a lower safety bench. This entry, standing alone, did not identify the bench with sufficient clarity.

4 The record contains considerable testimony about whether the fractures were "gas cracks" originating at the time the area below the 6540 bench was blasted during the mining process, or whether they were "tension cracks" created by natural pressures owing to structural weakness. The question need not be decided since the evidence shows that Mr. Lyda made his evaluation of significant instability on the assumption that they were tension cracks, which are usually somewhat less serious than gas cracks (Tr. 287-289).

5 Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance.