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SOL (MSHA) V. ST. RESOURCES  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. YORK 82-18-M  
A.C. No. 30-01185-05024

v.

Balmat Mine No. 4 and Mill

ST. JOE RESOURCES COMPANY,  
RESPONDENT

DECISION

Appearances: William M. Gonzalez, Esq., Office of the Solicitor,  
U.S. Department of Labor, New York, New York,  
for Petitioner;  
Sanders D. Heller, Esq., Gouverneur, New York,  
for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) seeking a civil penalty assessment in the amount of \$160 for an alleged violation of mandatory safety standard 30 C.F.R. 57.18-25, as noted in a section 104(a) Citation No. 201695, served on the respondent by an MSHA inspector on April 29, 1981. The respondent contested the proposed assessment and the case was heard in Watertown, New York. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issue presented in this proceeding is (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

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In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.
4. Mandatory safety standard 30 C.F.R. 57.18-25.

#### Discussion

The condition or practice cited as a violation in this case is as follows:

The Stope miner in the 2100 F-16 stope was allowed to perform work alone in an area on 4-27-81 where his cries for help could not be heard and he could not be seen by the employee assigned to check on him when a chunk of loose material fell from the back while scaling causing injury to employee at 8:30 a.m.

The cited mandatory safety standard, 30 C.F.R. 57.18-25 states as follows:

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

#### Stipulations

The parties stipulated that the respondent is in the business of mining zinc, and that at the time the citation issued its annual production was 454,080 tons, and its annual manhour production was 2,649,998. The parties also stipulated

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that for the period August 18, 1971 to approximately August 17, 1981, respondent was assessed for 50 citations which it paid. They also agreed that the proposed civil penalty of \$160 will not adversely affect the respondent's ability to continue in business, that the violation in question was rapidly abated by the respondent, and that the presiding Judge has jurisdiction to hear and decide the case (Tr. 5-6).

#### Petitioner's Testimony and Evidence

Earl S. Swem testified that he is employed by the respondent as a production miner, and he testified as to his experience and training. He confirmed that he worked at the mine in question on April 27, 1981, and he described the stope where he worked as 25 feet wide, 100 feet long, and that the roof height ranged from 40 to 60 feet (Tr. 16). He stated that on Friday, April 24, 1981, he had fired one shot consisting of six to nine holes, and that he did so to remove some hanging material. He next returned to work on Monday, April 27, 1981, and began scaling in the stope area so that he could determine where it was safe to begin work. He began scaling from the left side because "the hanging looked pretty good" (Tr. 19). He then proceeded scaling to the right side, and while moving back across the area he was struck on the head and his hard hat by a piece of rock. He continued scaling, but then "felt kind of wheezy," and he decided to go to an adjacent stope where two other miners were working to tell them what had happened. His neck began to bother him, and he was pale, and it was decided that he should leave the area. He was taken to the mine surface and subsequently went to a chiropractor who sent him to the hospital to have his neck x-rayed. The x-rays proved negative, and after some treatment by the doctor, he went home and returned to work the next day on April 28, 1981 (Tr. 20).

Mr. Swem stated that he was standing on the muck pile scaling when the rock struck him, and that he was approximately a foot to three feet from the roof. He did not see what struck him because he was struck from the rear, and he did not examine the area to determine what struck him because he was dizzy and didn't want to take the chance of something else hitting him. He confirmed that he examined the area before beginning the scaling work, and he described what the area looked like (Tr. 25). He also confirmed that prior to the incident, he had asked many times that a second person work with him in the area (Tr. 25). He stated that he has asked his boss or the checker for different helpers because "the hanging was in there, it wasn't the best to stay around by yourself, a lot of times" (Tr. 25).

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Mr. Swem explained that there are usually four or five miners working in the stope areas, and an additional miner works as a "roving checker" to look in on the miners who are working. If a miner asks for additional help, the checker will assist him if he is in the area. If not, the miner must work alone or wait for additional help (Tr. 26-27). Mr. Swem stated that he has worked alone in areas performing scaling work, and that he considered some areas safe and others not. He explained that if he has to spend one or two days scaling an area "that ain't a good place to be all by yourself" (Tr. 27).

Mr. Swem stated that when he returned to work the day after the incident, scaling began in the area where he was and the hanging material was scaled down and was on the floor. Later that day Federal inspectors came to the area to inquire as to what was going on, and the next day they came back with company and union representatives to check the area out, and tests were conducted by placing someone in another stope area to determine "if they can holler and scream and if they can hear anybody" (Tr. 29).

Mr. Swem described some of the roof area the day after the incident as "drummy," and he stated that he and another miner spent most of the first day and the second day scaling, and that the area was then pinned and screened. He estimated that six to eight tons of material was scaled down, but he was not sure (Tr. 30-31). He confirmed that on the day he was struck he had scaled for about an hour before the rock hit him (Tr. 34).

On cross-examination, Mr. Swem confirmed that sometime in January 1981, he left the stope area in question and went home because of the presence of hanging material. He informed several mine officials that he was leaving because some of the hanging material fell and that he was scared, and he lost pay for that part of the day (Tr. 35). He stated that he did not know that he could leave any work area which he believed was not safe, but that the company allowed him to leave and he was not criticized, suspended, or otherwise disciplined for doing so (Tr. 36).

Mr. Swem described the work he performed on the Monday after he had fired the shot, and he confirmed that the area was screened and pinned and that he had worked the stope for two months after the pinning and screening had taken place. He also confirmed that pinning and screening is a constant procedure, and he explained how this is done (Tr. 38-40). He also indicated that he used the muck pile to stand on so

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that he could reach the hanging material, and without the muck pile he could not reach the material. Once pinned, the muck is removed from the area. He confirmed that prior to being struck he was scaling from the muck pile and was also checking the roof to make sure it was safe. He tested the hanging roof area behind him and to his left, and was in the process of checking the area in front of him and to his right, and was testing it as he went in (Tr. 46). He stated that he was "comfortable" when he first went into the area to begin work, and he confirmed that what he was doing was the normal procedure for testing and making the area safe (Tr. 47). He believed that the rock which struck him had to have fallen from directly over his head and that his head was a foot to three feet from the hanging material when he was struck, and that he had tested the area (Tr. 48). He confirmed that during the drilling and scaling process, the hanging material will "work" and care must be taken to check all work areas (Tr. 49-50).

Mr. Swem stated that on the day he was struck, Mr. Cortland Bridge was serving as the "circulating miner," or "babysitter," and that he is supposed to periodically check on all miners working in the stopes and to help them scale as needed. He identified Mr. Bridge as the person who brought him out of the mine after he was struck. Mr. Swem stated that the next stope from where he was working was some 200 to 300 feet away. He described his own stope, and explained the work he had performed on the previous Friday (Tr. 52-55). When he returned to the area on Monday, he performed his usually routine safety checks, and since he was struck early in the shift, he stated that "I didn't get much time to really do a lot of checking and scaling" (Tr. 55). He confirmed that he had no pinning to do that morning, but that the men on stope did. He also described the hard hat he was wearing and stated that it was not damaged by the rock, but that it was scratched (Tr. 57).

Mr. Swem described the general condition of the stope roof areas before and after the rock struck him, and he also detailed how he goes about his pinning and safety checks, and how he scales the area to make it safe (Tr. 60-71).

David LaPlatney, testified that he was been employed by the respondent for 19 years. He was employed at the mine in question on April 28, 1981, and also served as president of the miner's union and chairman of the safety committee. He confirmed that when he learned of the accident concerning Mr. Swem, he requested that the company and the union go to the stope area in question to inspect it in order to determine what had happened, and they did so on the morning of April 28 (Tr. 79).

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Mr. LaPlatney testified as to his observations of the stope area on April 29, and he believed that it would have been difficult for anyone to safely scale down the materials which he observed. He testified as follows (Tr. 81-84):

JUDGE KOUTRAS: Yes, but the point is: did he scale down some hanging material that was loose?

THE WITNESS: I'm saying for anybody to get in a position, is what I felt, to get in a position to do any kind of decent scaling, he was on the verge of being in an area that he shouldn't be in.

It was a narrow-type area and it appeared to be so much loose stuff--

JUDGE KOUTRAS: Are you suggesting that he shouldn't have been where he was at when he was scaling the roof, to make it safe?

THE WITNESS: I'm saying it was very difficult, even to be close to being safe. Okay. When you first started into the area, beyond from where he fired, or before you get to where he fired, yes, it was pinned right there, but you start stepping out into the area where he had fired and he had apparently taken some out of the hanging. I don't know, three or four holes in the hanging, whatever it was.

JUDGE KOUTRAS: Are you suggesting that he put himself in a precarious position to do the scaling?

THE WITNESS: I'm saying anybody trying to.

JUDGE KOUTRAS: I'm talking about the gentleman who just testified, what he did to make the area safe for himself. Are you suggesting to me now that when you saw it on a Tuesday that he probably shouldn't have been where he was at when he was scaling.

THE WITNESS: Well, apparently he got it so he shouldn't have been there, but--

JUDGE KOUTRAS: No, wait a minute. Are you suggesting that he was in an area where he shouldn't have been, when he was scaling, because it was unsafe?

THE WITNESS: No. I'm saying I felt, when I see it, what chunks I seen down and still on the sidewalls, and it's drummy, just a few feet beyond where he said he got hurt it was still drummy--in other words, you sounded it out and it was still a little bit drummy, where you had to pin or whatever.

JUDGE KOUTRAS: Could one conclude that, had the rock not fallen and struck him, that he would have gotten to that area and scaled it down and that's what was left when he was interrupted by the striking?

THE WITNESS: It's hard to determine because it was in such a way, the way the roof was arched--okay?--and then up near the top, the center of the arch, you had these slips that were going up out of it. Okay. You scale a chunk off the left side, say. That could very well and probably was what was holding this drummy area; see what I'm saying?

So it would be very difficult for anyone--in other words I'm saying it was an exceptional area, really, to try to scale it.

JUDGE KOUTRAS: What would be your suggestion, then? As to how to scale it and bring that unusual, exceptional roof area down?

THE WITNESS: I don't know. I figured that was probably up to management to--

JUDGE KOUTRAS: Well, no, you're the chairman of the safety committee. You go in there with a couple of safety people and I assume some people that were concerned; how would you--

THE WITNESS: Quite possibly--they had their scraper bucket there. Nobody has mentioned that. What they were doing is, at times after he had fired they would have to scrape the top of the muck pile out, in order to get it down low enough so that they could rock bolt.

Okay. So you had that problem, too, in that one section, one side. You know, the muck was too close to the hanging for them ever to put a rock bolt in. They had to strip it down a little bit to get the right distance.



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So you had--well, you just had what I considered a dangerous area to try and do anything in, really. In my experiences.

Mr. LaPlatney also described the condition of the room area away from the stope area where Mr. Swem had been working, and he stated that he observed some roof cracks and some hanging material (Tr. 102-106). Mr. LaPlatney stated that he was disturbed over the fact that the shift boss was making determinations as to whether or not a particular miner needed the helper without first examining or viewing the stope areas where they were working. He also alluded to the fact that the shift boss stated that the helper was not there to do the work of the miners, and that the helper was expected to make his rounds every hour (Tr. 107). Mr. LaPlatney was of the opinion that the area was unsafe because Mr. Swem was not within hearing distance of anyone, and that this was a hazardous situation (Tr. 107). Based on his observations, even if the rock had not struck Mr. Swem, Mr. LaPlatney would still be of the view that he probably should have had a second person present with him when he was working in the stope area in question (Tr. 127).

On cross-examination, Mr. LaPlatney asserted that his reasons for requesting an MSHA inspection was based on his opinion that the company should have provided a second helper to Mr. Swem, and had this been done there would have been no need for an MSHA inspection (Tr. 129). Mr. LaPlatney confirmed that under a provision in the union/management agreement, when an employee observes an unsafe condition he should immediately notify his foreman, and that the foreman will take corrective action, which may include assigning the employee to other work (Tr. 129). Mr. LaPlatney confirmed that no citations for loose, hazardous materials were issued by MSHA with regard to the stope in question (Tr. 145).

Raymond F. Drake, stated that he is an MSHA metal and nonmettalic mine safety inspector, and that he has been so employed for six years. He testified as to his mining background and experience, and he confirmed that he participated in the investigation of the incident concerning Mr. Swem on April 28, 1981 (Tr. 158). He confirmed that former Inspector Paro issued the citation in question in this case along with him, and he confirmed that Mr. Paro is no longer employed by MSHA (Tr. 160).

Mr. Drake confirmed that he and Mr. Paro were assigned the task of conducting an investigation into the incident concerning the rock striking Mr. Swem, and he confirmed that the investigation was prompted by Mr. LaPlatney's telephone call to MSHA (Tr. 162). Mr. Drake confirmed that he arrived at the mine on Tuesday, April 28, and went underground that afternoon with company and union representatives. He and

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the group stopped by the stope area adjacent to the area where Mr. Swem was working, and they then proceeded to the stope area where Mr. Swem had been working on the previous day, which he believed to be approximately 300 feet away. When he arrived at the stope, Mr. Swem was present, and Mr. Swem confirmed to Mr. Drake that the area was safe (Tr. 165). After speaking with Mr. Swem about the incident on the prior day, Mr. Drake stated that he observed the area, and he stated that "there was definitely questionable ground in the area" (Tr. 167).

Mr. Drake stated that when he observed the stope area where the rock struck Mr. Swem, he stood on the muck pile back away from the immediate location, but that he did observe "several cracks, slips, in the immediate area, you know, in front of us, where Mr. Swem had been roofing" (Tr. 169). Mr. Drake was not sure as to whether anyone else physically examined the area, and he confirmed that he simply "eyeballed it" (Tr. 171). He did confirm that when he arrived on the scene Mr. Swem and another miner had been scaling the accident area down for at least three to four hours (Tr. 173-174). Mr. Swem pointed out the material which had been mucked down (Tr. 185).

Mr. Drake confirmed that the inspection party conducted a "holler test" and took measurements, and he indicated that this was done by someone going to the adjacent stope and yelling as loud as they could to see whether they could be heard from the stope area where Mr. Swem was working at the time of the accident (Tr. 187). The shouts could not be heard (Tr. 187).

Mr. Drake confirmed that when he and the inspection party viewed the accident scene, scaling was taking place by two men and since the conditions were being taken care of, no citations could have been issued because of the presence of any hazardous materials (Tr. 197). Mr. Drake stated that he could not recall speaking to any mine management personnel to determine whether the stope where Mr. Swem was working at the time of the accident had been previously inspected. He also confirmed that he did not review any mine inspection records, but he did recall asking Mr. Swem, and that Mr. Swem informed him that no one had inspected the area (Tr. 209).

Mr. Drake confirmed that during the close out conference held after the inspection party left the stope area, he and Inspector Paro determined that the violation should be issued, and that he (Drake) believed that Mr. Swem had worked in a hazardous area, that his cries could not be heard, and that he could not be seen. Since these facts fit all of the criteria,

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he decided that a citation should issue (Tr. 213-214). His determination that the area where Mr. Swem had worked was hazardous, was based on the considerable scaling which had been done before he was struck, and the fact that "there was other loose in the immediate area" (Tr. 214-216). He also considered the fact that the area had been extensively pinned and scaled, and that led him to believe that "there's a problem there to begin with" (Tr. 216-220).

On cross-examination, Mr. Drake testified as to his MSHA and mining training (Tr. 253-257). He confirmed that his determination as to whether any mine area is "hazardous" is made by observation and testing (Tr. 259). He also confirmed that he believed that Mr. Swem was scaling material from about 7:45 a.m. to 8:30 a.m. (Tr. 261). He also confirmed that he took Mr. Swem's word for the fact that when he asked him whether the area where he was working was "safe," Mr. Swem responded that "he felt he wasn't in a hazardous area when he started scaling" (Tr. 263).

When asked whether the fact that the area where Mr. Swem was working had been previously pinned influenced his decision that it was hazardous, Mr. Drake replied "No, it didn't" (Tr. 264). He further explained as follows (Tr. 265-3266):

A. You can have a considerable amount of loose, but it could be flaky stuff, and everybody here knows what I'm talking about, about flaky stuff. But you can have a considerable amount of loose, pieces as big as this table, and that's a different situation.

Q. Now, you said there were big pieces barred down from the roof that you saw?

A. No, sir. I said they were two and half feet long.

Q. Those aren't big?

A. That's what I said. You asked me what I said.

Q. Two and a half feet long. They were barred down from the roof; is that right?

A. That's correct.

Q. Do you know if any of those followed the bar down to the miner's arm or hand?

A. No, I don't.

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Mr. Drake conceded that during the time a company person was assigned and in the stope area, the company would be in compliance with the standard in question (Tr. 270). He also conceded that the individual miner has to check out his own stope area, and he confirmed that there is no mandatory standard that requires mine management to inspect the workplace before a miner is allowed, required, or assigned to perform work there (Tr. 272-273). He also conceded that there was no reason for the respondent to prevent Mr. Swem from going to his stope work area at the beginning of his work shift (Tr. 273). He also conceded that within 30 hours after the accident, Mr. Swem told him that he did not believe the stope was hazardous when he went in the area to work on Monday morning (Tr. 274).

Mr. Drake confirmed that he did not sign the citation form issued in this case (Tr. 275), and he confirmed that he and Mr. Paro decided on Wednesday afternoon, April 29, that the violation of 57.18-25, had occurred on Tuesday, April 28 (Tr. 275). He also confirmed that Mr. Paro called his supervisor during the time they were discussing the citation, but Mr. Drake denied that they discussed the question as to whether a citation should be issued (Tr. 276). Mr. Drake also confirmed that his notes do not state that he actually made a determination as to the stope being a hazardous area (Tr. 279), and he conceded that a miner is free to make his own determination in this regard (Tr. 280-281).

#### Respondent's Testimony and Evidence

Cecil J. Howard, confirmed that he is employed in the respondent's safety department and that he investigated the incident concerning Mr. Swem. He described what he observed at 8:30 a.m. on Tuesday, April 28, 1981, during his visit to the stope area, and he was of the opinion that no hazardous conditions existed. In support of this conclusion, he testified as follows (Tr. 299-301):

A. I base that on the soundness of the hanging with the scaling bar. If it's good hanging and that chunk, I agree with you that it was way up because Earl had fired six ten-foot holes-- right? It was ten foot long. The chunk was partially in the hanging and in the face and you just couldn't get ahold of it and scale it down. Otherwise the hanging was all right.

Q. Was the chunk hazardous?

A. No, the chunk was no hazard because if Earl didn't have help he could have stayed away from the chunk, he could have worked on the lefthand side, and, as it was, the stope was about 15 foot wide and nine foot in the center and then it parts down and it was pinned and everything back there, and Earl was firing on the lefthand side.

He fired this shot ahead and then he was going to go back and fire the lefthand side through, so he could have come back and started drilling, or he could have went out, got on the phone which was in the area, called up Lance Richards and said, I believe I have a problem down here; would you come down and look at this stope; maybe I'll need some help.

Q. What about the cracks in the hanging and the seams?

A. Oh, you always have cracks and seams, especially in that area where you get layers upon layers of grounding, but once you sound them and you can't scale them down there is no hazard, as long as they're not drummy.

Q. Did you find anything that was drummy that day?

A. That one chunk, near the face.

Q. Other than that?

A. No, just a few small pieces I scaled down, which you can always get.

Q. And you had an opinion that day as to whether or not that area was hazardous?

A. That's right.

Q. And your opinion, which you have already stated--

A. I've already stated.

Q. --was that it was not hazardous?

A. I didn't say it was hazardous, no.

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Mr. Howard stated that on the morning and afternoon of April 28, he sounded and observed the stope in question and found that it was not hazardous. He confirmed that he was present when Inspector Paro questioned Mr. Swem about the rock falling. Mr. Howard estimated the distance between the stope where Mr. Swem was working, and the adjacent stope where John MacIntosh was working as "probably between two and three hundred feet" (Tr. 305).

On cross-examination, Mr. Howard confirmed that he made incident concerning Mr. Swem, and he made them available to MSHA's counsel for his examination (Tr. 305-306). He confirmed that he did not go to the stope the day of the accident, but went there the next morning. When he arrived, Mr. Swem and his helper Mr. Cortland Bridge were scaling (Tr. 308). Mr. Howard stated that after his arrival at the stope on Tuesday, after Mr. Bridge left, he (Howard) checked the stope area by scaling it and he indicated that "we took down a few small pieces but it was good" (Tr. 309).

Mr. Howard stated that the previous Friday, Mr. Swem had fired six ten foot holes and advanced the stope by some ten feet. A "chunk" of material left in a corner of the stope was then shot down after Mr. Howard sounded it and discussed it with Mr. Swem (Tr. 311-312). Mr. Howard indicated that anytime anyone cannot scale alone, they are free to seek help (Tr. 313). He denied any knowledge of any prior hazardous roof conditions in the stope, and he indicated that everytime he visited the stope it was being pinned in preparation for "taking bottom." He also indicated that Mr. Swem always controlled his stopes by scaling, pinning, and screening (Tr. 324). At no time on Tuesday did he believe the stope was hazardous (Tr. 325).

Lance Richards, testified that on April 27, 1981, he was the mine foreman, and was Mr. Swem's supervisor. He stated that on that day Mr. Cortland Bridge was assigned to check on three men working in stopes which were about 300 feet apart, and that Mr. Swem was one of them. After Mr. Swem was struck, he (Richards) did not go to the stope because he wanted to first contact Mr. Howard and the union representative (Tr. 325-327).

Mr. Richards stated that he visited the stope on Tuesday, April 28, with Mr. Howard and Mr. LaPlateny. They discussed some material that was "hanging" on the left side of the stope, and they also tried to determine what had fallen and struck Mr. Swem. Since precautions were being taken in the stope, no

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one believed that it was hazardous (Tr. 330). The loose muck pile material in the stopes served as an "elevated platform" for Mr. Swem to work from, and some of the stope area was screened (Tr. 333).

Mr. Richards stated that Mr. Bridge was assigned to assist the three stope men, and that his assistance to them filled both a safety need and sometimes made their work go faster (Tr. 336). Mr. Bridge was not given specific instructions, and Mr. Richards indicated that he likes to give him a little freedom in dealing with the stope men (Tr. 336). Mr. Richards identified exhibit R-1 as the accident report that he prepared concerning Mr. Swem's injury (Tr. 337).

Mr. Richards was of the opinion that "the hanging" he observed in the stope on Tuesday and Wednesday after the accident was not hazardous (Tr. 340). In support of this opinion, he cited the fact that the hanging was within reach and could be controlled (Tr. 342).

On cross-examination, Mr. Richards confirmed that he did not know how Mr. Swem was scaling the stope prior to the accident, but he had no reason to believe that Mr. Swem was doing anything incorrectly. However, if Mr. Swem knowingly worked under loose material, then that would be a hazard (Tr. 346). When asked about the "loose" he observed, Mr. Richards testified as follows (Tr. 349-351):

Q. When you looked at that stope, did you determine that that stope was hazardous, that that chunk was hazardous?

A. That chunk?

Q. Yes.

A. If you were standing underneath it and it fell on you, it would be hazardous.

Q. You recognized that it was hazardous, based on your observations?

A. He didn't have to be in that particular section of that stope. We knew it was hazardous and we--we knew it was loose and we've taken care of the problem.

Q. Okay. Would you describe it for me? What did the loose look like?

A. It's a piece of loose rock, unconsolidated rock. When you hit it with the scaling bar, the

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sound waves, when they travel through the rock, are broken, and it gives a dull sound.

Q. Is that what you used to determine it was hazardous, that chunk?

A. That the chunk was loose.

Q. Just that, the sound of it?

A. The sound, yes. That's how you do it. You use a scaling bar.

Q. Okay. Now, you didn't go into the area on the--on Monday the 27th; is that correct?

A. No, I didn't go there.

Q. The first time you went into the area was on Tuesday morning the 28th?

A. Right.

\* \* \* \*

Q. What did you see Cortland Bridge and Earl Swem do?

A. What did I see them do?

Q. Yes, if anything.

A. I didn't see them doing anything. Like I said, when I got up there, I talked to John and then John showed me that one chunk and Cortland and I both tried it.

Q. Right.

A. I wanted to see for myself if two bars would bring it down. Of course, they wouldn't.

In response to further questions, Mr. Richards stated that when miners ask for a second man to be present in situations where hazardous conditions may be encountered, a second man is provided (Tr. 360). He did not believe that the stope was unsafe for Mr. Swem to be working alone on either Monday or Tuesday (Tr. 368).



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Larry Streeter, assistant mine superintendent at the time of Mr. Swem's injury, confirmed that he first visited the stope in question on Tuesday afternoon, the day after the accident, and that he was with the inspection party at that time (Tr. 370). Mr. Streeter stated that he observed "routine scaling" that was to be done that day, and that the distance between Mr. Swem's stope and Mr. MacIntosh's stope was a minute and ten seconds by walking (Tr. 371). He and Mr. Bridge went to the adjacent stopes as part of a "holler test," and he stated that "apparently it wasn't heard" (Tr. 371).

Mr. Streeter stated that he heard Mr. Swem tell one of the inspectors that he was not working under loose ground and that "he thought he had it secured above his head" (Tr. 371). He also testified that he heard Mr. Swem state that prior to the accident, he was scaling on the right side of the stope and continued to scale out into the stope in front of the pinned area at the time he was hit (Tr. 372).

On cross-examination, Mr. Streeter reiterated that he did not believe the stope area was hazardous when he was there on Tuesday following the accident, and he was of the opinion that Mr. Swem had the opportunity to do his job safely because a portion of the stope was pinned and screened, and he could sound the roof and advance and scale from under the pinned area, sounding as he went (Tr. 380).

Mr. Streeter indicated that if a miner complained about an unsafe condition and there was no other person available to be assigned to help him, the miner would be assigned other work (Tr. 388).

#### Arguments Presented by the Parties

In his arguments made during the course of the hearing, petitioner's counsel recognized the fact that the incident prompting the issuance of the violation in question took place over three years ago. However, counsel relies on the testimony of the inspector and Mr. Swem to support his arguments that he has established that the cited area was in fact hazardous (Tr. 293).

In its post-hearing brief, petitioner submits that the factual record in this case has established, by a preponderance of the evidence, respondent's violation of section 57.18-25. Petitioner maintains that the testimony describing the stope area where Mr. Swem was struck supports a conclusion that a hazardous condition existed, and that Mr. Swem was working alone in the stope where he could not be seen nor heard.

Petitioner maintains that Mr. Swem's failure, if any, to recognize the hazardous conditions in the stope does not relieve the respondent of its obligation to comply with the requirements of section 57.18-25. In support of this argument, the petitioner asserts that the Act establishes a standard of strict liability for violations of mandatory safety standards, without regard to fault or negligence, and that the legislative history of the Act reflects that Congress was particularly concerned over the high number of mining injuries and fatalities resulting from inadequate supervision and hazardous workplace conditions reasonably within the power of management to prevent.

During the course of the hearing, respondent's counsel argued that unless MSHA establishes that the cited stope area in question was hazardous, it may not insist that another person be at or near the stope so as to hear or see him (Tr. 289). Counsel pointed out that in this case Mr. Swem told the inspector that he did not believe that the stope area where he was working was hazardous (Tr. 290), and that the inspector's testimony concerning the amount of material which he claims was scaled down should be given little weight because the scaled material resulted from the work of two miners well after the rock fall incident in question (Tr. 291). In short, respondent's counsel is of the view that MSHA has failed to establish that the cited area was hazardous, and until that is established MSHA cannot require the presence of another person pursuant to the cited standard (Tr. 291).

Respondent's counsel conceded that the incident concerning the rock which fell and struck Mr. Swem on his hard hat may be classified as an "accident." Notwithstanding the fact that the incident was not the type of accident which had to formally reported to MSHA, counsel asserted that the fact that it happened does not per se establish that the area where Mr. Swem was working was "hazardous." Given the fact that Inspector DRake conceded that had the incident not occurred, no citation would have been issued, counsel maintains that the asserted violation may not be sustained simply because Mr. Swem was struck by some falling material. Counsel concludes that the occurrence of such an incident does not establish that the respondent knew that a hazardous condition existed, and decided to assign Mr. Swem there anyway (Tr. 292).

In its post-hearing brief, respondent points to the fact that Mr. Swem told Inspector Drake that he knew he was responsible for his own safety, and that respondent's safety representative, the mine foreman, and the assistant mine superintendent, all experienced miners, testified that in their opinion, the stope area where Mr. Swem was working was not hazardous.

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The respondent emphasizes the fact that the day following the accident, Mr. Swem and a co-worker scaled the same stope before Mr. LaPlatney, the mine superintendent, and Inspector Drake appeared on the scene, and that no one except Mr. Swem had an opportunity to observe the conditions that existed at the time that the rock fell and struck his hard hat. At this condition of the stope had changed, both by time and by the work done in the immediate area, and the fact materials had been scaled down is not indicative of any hazardous condition.

The respondent further points out that the scaling work conducted by Mr. Swem and the checker assigned to that area on the morning following the incident in question was for the purpose of "making the stope safe," and that they were following their first job requirement to check and secure their work area in order to "make it safe" before any further work is done. When Inspector Drake arrived on the scene, he accepted Mr. Swem's statement that the stope area was safe to work in, yet he did not accept Mr. Swem's prior decision the day before that the area was not hazardous.

Respondent maintains that the one person who was in the best position to testify as to the amount of scaling done in the stope at the time of the accident was Mr. Swem, and that his testimony indicated that he did not think that the area was hazardous. Further, although Mr. Swem conceded that he could have asked for additional help while he was in the stope prior to the time he was struck if he thought the area was hazardous, he did not do so.

Respondent points out that normal mining practice calls for the scaling and barring down of materials after a shot is fired, and miners are instructed to find a safe way in, a safe place to stand, and to start scaling to make additional areas safe. On the facts of this case, respondent asserts that when Mr. Swem went to his stope work area on Monday, April 27, 1981, after having last fired his shot on his previous work shift on Friday, April 24, 1981, he determined that he had a safe way in, that he had a safe place to stand, and then began to scale. In short, since he was the miner on the scene, he made the determination that it was safe to attend to his work.

Respondent argues that it had no reasonable opportunity to inspect the stope prior to the time Mr. Swem started his work in the stope on Monday, April 27, 1981. Even so, respondent maintains that its supervisory officials would not have made any prior determination any differently than that made by Mr. Swem on the scene, and that they would have relied on his determination that he had a safe place to work.

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With regard to union representative LaPlatney's testimony, respondent asserts that his motivation in reporting the incident concerning Mr. Swem to MSHA, was an attempt to force the respondent to provide two men for each job performed in the stope. Respondent maintains that Mr. LaPlatney's testimony reflects that had the respondent provided a second man for each stope miner, or agreed to future discussions in this regard, he would not have notified MSHA. Respondent concludes that MSHA was responding to a union attempt to increase the working force, and not to a safety hazard.

Respondent further points out that Mr. LaPlatney could not affirmatively state that the stope area was hazardous, and that he admittedly failed to follow the agreed upon labor-management procedure requiring the union to call the respondent's attention to any alleged hazardous condition.

#### Findings and Conclusions

In this case the respondent is charged with permitting Mr. Swem to work alone in a hazardous area where he could not be the event of an emergency situation jeopardizing his safety. Since the petitioner has the burden of proof, it must establish that the stope area where Mr. Swem was assigned to work was hazardous, and that notwithstanding this fact, it nonetheless permitted him to work there, thereby exposing him to the hazard of being struck by falling material. In my view, the critical issue whether or not the respondent could reasonably be expected to know that the stope area in question was in fact hazardous, and whether or not it took reasonable steps to preclude the type of "accident" which occurred in this case. The condition precedent to any finding of a violation lies in the clear language of the standard which requires an initial showing that hazardous conditions existed at the time a miner is "assigned, or allowed, or required to perform work alone."

There is no dispute here that Mr. Swem was working alone at the time he was struck on Monday, April 27, 1981. Further, there is no dispute that the tests conducted during the investigation of this incident established that anyone working in the stope could not be seen or heard by other miners working in the adjacent stopes in the event he cried out for help.

Petitioner relies on the testimony of Mr. Swem to support its conclusions that the stope area where he was working on Monday, April 27, 1981, was hazardous, and that since his cries could not be heard, a second miner should have been assigned to work with him. Notwithstanding the fact that

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Mr. Swem readily conceded that he believed he was safe and did not consider his immediate work area to be hazardous, petitioner relies on his testimony that the roof area where he was struck was in a "bad condition" and had some "cracks and slips" in it. Petitioner also cites Mr. Swem's testimony that following the accident, and beginning on Tuesday, April 28, 1981, Mr. Swem and miner helper Bridge continued to scale the stope area in order to "make the stope safe," and that Mr. Swem observed that the roof area contained some "hanging" material that sounded "drummy."

There is a conflict in the testimony and evidence as to whether or not the stope area where Mr. Swem was working on Monday, April 27, 1981 was hazardous. Mr. Swem, the miner who was struck by a rock or other falling material, testified that he believed the area where he was working in was safe, and he indicated that after testing the roof areas and following his normal scaling procedures in order to make his work area safe, he felt comfortable in the stope.

The record in this case establishes that the stope area in question was fired during the last shift worked by Mr. Swem on Friday, April 24, 1981, before he next returned to work on Monday, April 27, 1981. Since he was the first miner on the scene and would necessarily be more closely concerned with his own safety, his candid admission that he believed the area was safe to work in is, in the circumstances, the best evidence as to whether or not the stope conditions were hazardous. This is particularly true here where the alleged violation occurred over three years ago. In the circumstances, I have accorded substantial weight to Mr. Swem's testimony in this regard.

Respondent's un rebutted testimony is that it had assigned Mr. Cortland Bridge as an extra helper to assist the three stope miners who were working on Monday, April 27, 1981, and Mr. Swem conceded that Mr. Bridge was serving as a "circulating miner" and was available to check out the stope miners and to help them scale as needed. Further, three company officials, all of whom are experienced miners, visited the stope area in question the day following the accident and testified that they believed the area was not hazardous. The union representative who also visited the same area that same day with the inspection party could not state with any degree of certainty whether or not the area was hazardous. Mr. Swem, who had been scaling the area with Mr. Bridge during that day, told the inspector that the area was then safe and not hazardous. Faced with all of these facts, Inspector Drake chose to believe Mr. Swem's evaluation that the area was then safe and

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not hazardous, but apparently chose not to believe his candid admissions that the conditions the day before were not hazardous and that he felt admissions that "comfortable" and safe working in the stope. More suprisingly, petitioner relies on the scaling work done by Mr. Swem and Mr. Bridge the day after the incident in question to support a theory that the existence of this material prior to its being scaled down establishes that the area was hazardous the day before. I find petitioner's position in support of its case to be contradictory.

Petitioner also relies on Inspector Drake's after-the-fact evaluation of the stope to support its assertion that the stope was hazardous when Mr. Swem initially reported there to begin his work. After careful review and consideration of Mr. Drake's testimony, I conclude that it is contradictory and equivocal and does not support petitioner's arguments that it has proven its case by a preponderance of the evidence. My reasons in support of this conclusion follow below.

Inspector Drake's direct testimony that he considered the stope area in question to be hazardous because prior scaling and pinning in the area led him to believe that there had been a preexisting "problem," is contradictory. On cross-examination, he denied that the previous pinning influenced his decision that the area was hazardous.

In view of Inspector Drake's recognition of the fact that a miner is free to make his own determination as to whether or not his work area is hazardous, I find it rather strange that he would accept Mr. Swem's determination on the day following the accident that the stope was at that time not hazardous and safe, yet reject or ignore that very same determination made by Mr. Swem the day before when he was working in the same stope. Inspector Drake conceded that Mr. Swem told him that he did not believe the stope was hazardous when he went to work on Monday morning, yet Inspector Drake concluded that at the time of the accident the area was hazardous. He did so after he and fellow Inspector Paro discussed the matter further during a close-out conference held after the inspection party left the stope area at the conclusion of the accident inspection. Since Inspector Paro is no longer employed by MSHA and did not testify in this case, any observations that he may have made at the time he signed and issued the citation are not available.

I take note of Inspector Drake's candid admissions that during his discussions with Inspector Paro prior to the

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issuance of the citation, Mr. Paro telephoned their supervisor. Although Mr. Drake denied that they discussed the question as to whether a citation should be issued, I cannot believe that this call was totally unrelated to the accident inspection conducted by Mr. Drake and Mr. Paro. I also take note of Inspector Drake's testimony that his contemporaneous notes made at the time of his inspection do not reflect that he made any determination that the stope area in question was hazardous.

I take particular note of Inspector Drake's testimony that he cited section 57.18-25, because no other standard was applicable to the facts presented. It seems to me that absent any facts to support the contention that the area was in fact hazardous, and that the respondent somehow permitted Mr. Swem to enter a work area which endangered his safety, an inspector should not rely on after-the-fact speculative conclusions simply to justify or support a violation which he may feel compelled to issue in response to a complaint for an accident inspection or investigation.

Petitioner's arguments imply that the respondent should have made a determination that the stope area where Mr. Swem was working on Monday morning was hazardous, and that recognizing this fact, respondent had an obligation to assign a second miner to work with Mr. Swem. This argument is not well taken. Aside from the fact that Inspector Drake admitted that he did not review any mine inspection records, and could not recall whether he asked mine management whether the stope had been inspected before Mr. Swem arrived there Monday morning, he conceded that there is no mandatory standard requiring management to inspect the workplace before a miner is allowed, required, or assigned to perform any work. It seems to me that if MSHA wishes to impose such a requirement on a mine operator, then it should seriously consider promulgating a standard to cover just such a situation.

I also take particular note of Inspector Drake's testimony in explanation as to why he felt compelled to cite section 57.18-25. At page 390 of the hearing transcript, he stated that "There wasn't any other violation, as far as I'm concerned. The man was there taking down the loose. That's all you could reasonably expect a man to do. He was working at the situation at the time" (Tr. 290). In my view, this is the essence of this case. Mr. Swem was working in a stope which he considered safe and not hazardous, and was going about his business making the area safe by scaling so that he could continue his work. It is unfortunate that the unexpected event occurred, and fortunate that he was not seriously injured. However, on the facts of this case, I cannot conclude that the respondent's failure to comply with the cited standard was the proximate cause of this incident.

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I reject the petitioner's reliance on Mr. Swem's testimony as to the conditions of the roof area in the stope to support the notion that the area was "hazardous," thereby requiring the presence of a second miner. Mr. Swem was obviously aware of these conditions and that it is precisely why he was following his normal precautionary procedures to test and scale as he went about his work. It seems to me that if he was really concerned about these conditions to the point where he felt he needed assistance and a second miner present, he had ample opportunity to summon such assistance. However, on the record here, he admitted that he felt safe and comfortable in the stope. Had he believed otherwise, he was free to leave work as he had done in the past when he felt exposed to hazardous conditions.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has failed to establish by a preponderance of any credible evidence that the stope area where Mr. Swem was working on Monday, April 27, 1981, was a hazardous area known to the respondent, and that the fact that Mr. Swem was working there alone does not establish a violation of section 57.18-25, by the respondent. Accordingly, section 104(a) Citation No. 201695, served on the respondent on April 29, 1981, IS VACATED, and this case IS DISMISSED.

George A. Koutras  
Administrative Law Judge