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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

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

v.

EUREKA STONE QUARRY, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 88-62-M  
A.C. No. 36-04243-05506

Pocono Quarry & Plant

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Secretary;  
John T. Kalita, Jr., Esq., Eureka Stone Quarry, Inc.,  
Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On January 19, 1988, the Secretary (Petitioner) filed a Petition for Assessment of Civil Penalty for an alleged violation by the Respondent of 30 C.F.R. 56.3200. Respondent filed its Answer on March 2, 1988. Pursuant to notice, the case was heard in Philadelphia, Pennsylvania, on March 25, 1988. Robert L. Carter and Steve Moyer, Jr., testified for the Petitioner. James Cliff, James L. Gower, and Barry Lutz testified for the Respondent. Petitioner filed its Proposed Findings of Fact and Memorandum of Law on August 1, 1988, and Respondent filed its Proposed Findings of Fact, Conclusions of Law, and Memorandum of Law on July 29, 1988. Time was allowed for Reply Briefs, but none were filed.

Stipulations

The Parties entered into the following stipulations as contained in Respondent's Pretrial Statement:

1. Pocono Quarry and Plant Mine (hereinafter referred to as "Pocono Quarry") is owned and operated by Eureka Stone Quarry, Inc., a Pennsylvania Corporation with offices at Pickertown and Lower State Roads, Chalfont, Pennsylvania.

2. Pocono Quarry is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

3. In the 2 year period prior to May 1987, Pocono Quarry had zero paid violations of the standards contested in this case. The size of the operation is that the Pocono Quarry employs 25 employees. The annual production of Eureka Stone Quarry is approximately 304,903 tons; the annual production of Pocono Quarry is approximately 57,562 tons.

4. The Administrative Law Judge has jurisdiction over this matter.

5. The Respondent operates nine mines.

6. The authenticity of the exhibits to be offered at hearing is hereby stipulated. No stipulation is made as to the facts asserted in such exhibit.

7. The subject of the Citation and Termination were properly served on a duly authorized representative of the Secretary of Labor upon agents of Eureka Stone Quarry, Inc. as to the dates, time and places stated therein and may be admitted into evidence for the limited purpose of establishing their issuance, but not for the truthfulness or relevance of any statement asserted therein.

8. The alleged condition was abated within the required time.

9. The imposition of a proposed penalty by the Administrative Law Judge will not affect Respondent's ability to continue in business. However, Respondent does not stipulate to the appropriateness of the imposition of any penalty.

#### Issues

1. Whether the Citation was so vague as to have denied Respondent due process.

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2. Whether the Respondent violated 30 C.F.R. 56.3200, and if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. If section 56.3200 has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977.

#### Regulations

30 C.F.R. 56.3200 provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

#### Citation

Order No. 2851904, issued on May 29, 1987, provides as follows:

A section of high wall on the East face had loose and fractured rock throughout the top half of the high wall. The rock appeared it could slide out and down the face into the shovel that was digging under it (56.3131). The high wall was approximately 50 ft high. The loose fractured rock extended approximately 30 ft wide, at the top of the face on the high wall. The high wall was a working face where the Biryrus crib shovel FÄ614, and three quarry haul trucks had previously worked (56.3200).

#### Findings of Fact and Conclusions of Law

Robert L. Carter, an Inspector for the Mine Safety and Health Administration, testified that on May 29, 1987, in the course of an inspection of Respondent's Pocono Quarry and Plant, he observed, in the muck pile of the highwall, over hanging material which he described as a very large boulder that would not fit in a 35-ton truck, and other large material. He observed a shovel operator, James L. Gower, approximately 5 feet from the face digging material from the face, and below the overhang. He testified that he observed rocks sliding down the pile when Gower dug, and opined that further digging underneath the material that he was concerned about, would cause it to slide down, causing injury to those in the area. Steve Moyer, Jr., an Inspector for the Mine Safety and Health Administration, essentially corroborated Carter's opinion with regard to the hazard of the conditions observed by Carter. Carter further testified that

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testified that when he approached Gower and told him the he was working under a dangerous condition, and asked him if he was aware of it, Gower indicated in the affirmative. Carter testified that Gower said he realized that there was a dangerous rock that could come down on him.

In essence, it is Respondent's position that it was not afforded due process, inasmuch as the Citation in question describes the hazardous condition as being located at the top of the face on the highwall, whereas Carter's testimony placed the condition in the muck pile. Respondent argues that due process was denied, as it prepared its defense based on the condition of the highwall rather than the condition of the muck pile. Respondent further asserts, in essence, that it was irrevocably prejudiced by the failure of the Citation to properly describe the location of the hazardous condition, as the muck pile itself was quarried and no longer available for its testing and measurement.

The rocks in question were, as indicated by Carter, located in the muck pile. Carter also recognized the difference in definition between a highwall and a muck pile, and appeared to agree that to be "technical" the Citation should have referred to the muck pile. (Tr. 47) I find that the language of the Citation in its entirety is specific enough to provide notice of the location of the rocks as depicted in Government Exhibits 2, 3, 4, and 6. Additionally, I find that the wording of the Citation has not prejudiced the Respondent, as it has not been established that it prevented Respondent from defending against the Petition herein. The evidence fails to establish that Respondent was not apprised of the alleged hazardous material in question. Barry D. Lutz, Respondent's driller, was working on the highwall on the date in question, and indicated there was no loose or unconsolidated material on the highwall, and that there was not any rock on the face that appeared to be in danger of slipping down. Thus, Lutz may not have had knowledge of the location of the cited material. However, he was not one of Respondent's managers, and there is no evidence he had any conversations with Carter with regard to the latter's finding of a dangerous condition. In contrast, Carter testified he discussed the condition with Joe Less, Respondent's Superintendent, and had a "long discussion" with Respondent's Manager, James Cliff. (Tr. 69) The former did not testify, and the latter (Cliff), did not state that he had no notice of the location of the alleged hazardous rocks. Indeed, although he opined there was no danger, he saw some large rock when viewing the face and indicated the highwall had loose material and was fractured. His testimony further indicates he was aware of large pieces of rock which he thought were on the muck pile not attached to the highwall. (Tr. 125, 126) Also, James C. Gower, Respondent's Shovel Operator, although he denied that he told Carter he was aware he was working under a dangerous condition, he nonetheless indicated that although the highwall did not have loose rock, there was fractured rock. Also, in its Response filed on March 2, 1988, Respondent manifested that it had notice of the location of

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the rocks in question, as it indicated that the "mass of rock" was not in danger of falling and that attempts were made to scale it back. This can only refer to the rocks in question, as there is no evidence that any large loose rocks were on the highwall.

According to Cliff, the conditions herein were blown down approximately 2 weeks after the citation was written. Further, pictures indicating the location of the rocks in question were taken by Petitioner 4 or 5 days after the Citation was issued. Thus, any ambiguity with regard to the location of the Complainant of conditions could here been ascertained with certainty by way of pretrial discovery. (I have examined these pictures and conclude that GX 2 and GX 3, provide a depiction of the relative size of the rocks in question compared to the two men in the pictures). Respondent asserts, in essence, that inasmuch as, when it was cited, it had no notice of the correct location of the rocks in question, it lost its right to a defense as it was unable to get "... information, tests, measurements, or the like regarding the muck pile." (Respondent's Memorandum of Law, Page 6). Respondent has not indicated with any specificity the information or tests it would have taken, and how these would have related to its defense. Indeed, I find Respondent's witnesses provided their opinion with regard to the lack of hazard from rocks in the muck pile.

James Cliff, Respondent's Manager, testified that he looked at the face approximately 7:15 on May 29, 1987, and that when viewing the face, there was "some large rock" and "loose and fractured rock on top of the highwall," (Tr. 124, 125), but that he did not feel there was any danger, and that it did not appear that the material will slide out. He was asked whether in his opinion anyone was in danger, and he testified that he did not feel so "at that particular time," (Tr. 126), and that his opinion has not changed. Barry D. Lutz, Respondent's Driller, who was working on the highwall on May 29, 1987, provided his opinion that there was no danger of any rock falling on the shovel, and that no one was in danger from any condition. Also, Gower, when asked on direct-examination whether it appeared that the loose fractured rock on the muck pile could slide out, stated "not out of the ordinary." (Tr. 140) He indicated that there was no indication of instability which would have dislodged the rock. Gower also indicated on direct-examination that he did not tell Carter that he was fearful that a rock would fall and did not say that he felt endangered. Gower stated that Carter told him that he (Gower) was in danger, but he Gower did not tell Carter he felt endangered. However, I note that on cross-examination, when asked whether he told Carter he was watching the rocks above him, Gower testified that he did not recall that specific statement and "couldn't you tell exactly what was said." (Tr. 147)

Further, in support of its contention that the material observed by Carter was not in any danger of sliding down, Respondent refers to testimony, indicating that on May 29, 1987,

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a crane fell off the highwall and ran over the boulder observed by Carter without dislodging it. (The testimony was in conflict between Carter and Lutz, with regard to the path taken by the crane falling off the highwall. I have adopted the version testified to by Lutz as he, not Carter, actually observed this mishap). Carter in cross-examination, agreed that this provides an indication that the boulder in question would not slide.

I find the opinion of Carter and Moyer with regard to the danger posed by the material in question to be credible, inasmuch as it appears likely that continued shoveling (Footnote 1) would have deprived the material of its support and hence it would have fallen down. (Footnote 2) In contrast, neither Cliff, nor Lutz, nor Gower provided any basis to support their opinion that the material in question was not in danger of falling. Also, I note that although the falling crane did not dislodge the material in question, this does not negate the opinion of Carter and Moyer that continued digging by the shovel operator would have deprived the material in question of support, thus causing it to slide or fall. Therefore, based upon all the above, I conclude that the conditions observed by Carter, as testified to, created a hazard to persons within the purview of Section 56.3200, supra, and hence, this section has been violated.

In the opinion of Carter and Moyer, continued shoveling below the cited material would cause it to fall and that the shovel operator and truck driver working in the area would be exposed to the danger of being hit with falling material. Carter and Moyer further testified, in essence, that there was a reasonable likelihood of a serious injury or a fatality should the cited material fall. I do not find any significant evidence of record to contradict the opinions of Moyer and Carter, that there was a reasonable likelihood that the hazard of the materials sliding down the muck wall would result in an injury of reasonably serious nature.





as much of the muck pile as possible prior to shooting the top of the pile down (Tr. 134). Also, Gower indicated that he was planning on digging in the muck pile in an area that is depicted as below the material in question (Tr. 145, GX 4).

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2 I accepted Carter's opinion that with further digging underneath the material in question could fall down, as it is based on the laws of gravity. It thus is irrelevant that he is not a geologist, nor licensed blaster, nor has experience in the reduction of a mountain.