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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 (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. VA 88-22-M A.C. No. 44-02786-05514
v.	
JAMES RIVER LIMESTONE COMPANY, INC., RESPONDENT	No. 1 Quarry and Mill

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Herbert A. Kelly, Plant Manager, James River Limestone Company, Inc., Buchanan, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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). Petitioner seeks a civil penalty assessment in the amount of $305 for an alleged violation of mandatory safety standard 30 C.F.R. 56.3200. The respondent filed a timely answer contesting the alleged violation, and a hearing was convened in Roanoke, Virginia. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found

in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub.L. 95Ä164, 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.

Stipulations

The parties stipulated to the following (Tr. 8Ä9):

1. Copies of the contested order/citation, and the subsequent modifications, exhibits GÄ1, GÄ2, and GÄ3, were issued by an authorized representative of the Secretary and properly served upon the respondent.

2. The presiding judge has jurisdiction in this matter.

3. The respondent's ability to continue in business will not be adversely affected by any civil penalty imposed as a result of this proceeding.

4. The respondent is a medium-size mine operator.

5. The respondent abated the violation in question in good faith by complying with the order/citation.

Discussion

The combined section 107(a)Äsection 104(a) Imminent Danger Order/Citation No. 2851959, issued by MSHA Inspector Charles E. Rines, cited a violation of mandatory safety standard 30 C.F.R. 56.30 03. This was subsequently modified to reflect the redesignation of the cited mandatory safety standard to the appropriate section which was in effect at the time of the violation, namely, section 56.3200 (exhibit GÄ3). The cited condition or practice is as follows:

> This is an order of withdrawal: A drill shot on the #4 bench had shot into an underground cavern. The ground conditions around the opening appear to be very unstable. No one shall be allowed to enter this area on the #4 bench 350 ft. from the original slide area where the cavern is in the floor until a geologist had inspected the area along with an authorized representative of the Secretary of Labor and the area has been determined safe for mining operations.

Petitioner's Testimony and Evidence

MSHA Inspector Charles Rines testified that the respondent operates a limestone quarry which mines dolomite, and he described the multiple bench drilling and blasting methods used at the mine. He confirmed that he visited the mine on July 1, 1987, for the purpose of checking into the compliance for several previously issued orders of withdrawal which had been served on the respondent to prevent men from working under a slide area where unstable materials had fallen from the top of the mountain. He was accompanied by the pit superintendent Richard Gillam. After viewing the area with Mr. Gillam, Mr. Rines advised him that in view of the presence of unstable materials on the number 2 and 3 benches, the previous areas affected by the outstanding order would be extended for an additional 300 feet (Tr. 21Ä29).

Mr. Rines identified exhibit GÄ1 as a copy of the contested order/citation which he issued, and he confirmed that he issued it during the course of his inspection and observation of the area in question with Mr. Gillam. Mr. Gillam advised him that a shot had been fired into an underground cavern, exposing a hole below the number 3 bench. Mr. Rines stated that he observed an 80ÄD shovel working on the number 3 bench, "just to the right" of the hole. He also observed a truck pull up to within 5 feet of the hole, and then back up to the shovel where it was loaded with materials from the toe of the number 3 bench. The truck left to take the loaded material to the crusher, and Mr. Rines observed another truck drive in to position itself for loading in the same manner as the first one. Mr. Rines estimated the weight of the loaded truck at 54 tons, and the weight of the shovel at 72 tons. He estimated the distance of the shovel from the hole as 25 feet. He estimated the location of the hole as 35 feet beneath the top of the bench, and estimated the dimensions of the hole as 12 feet by 10 feet. Mr. Rines confirmed that he could not see the hole from the top of the bench, and that he had to go down

to the number 4 bench to approach and view it from a position on the loose rock (Tr. 29Ä39).

Mr. Rines stated that Mr. Gillam told him that the shot had been fired several days prior to the inspection, and that the holes had been drilled by IngersollÄRand with an experimental drill. Mr. Rines identified several photographs of the cited area and he described several cracks which he observed in the number 3 bench along the opening and bottom of the bench, and extending from the hole itself. Mr. Rines could not state the depth of the hole in question, and he identified the location of another cavern which had been shot into in the past at the face of the number 4 bench (Tr. 39Ä46).

Mr. Rines confirmed that after observing the ground conditions, he advised Mr. Gillam that he would have to issue an order withdrawing men from the number 3 bench. Mr. Gillam ordered the truck and shovel removed from the area, and he left the area to summon Mr. Kelly, the plant manager. Mr. Rines confirmed that he explained his reasons for issuing the order to both Mr. Gillam and Mr. Kelly (Tr. 47Ä48). Mr. Rines also confirmed that he marked the area affected by his withdrawal order with a can of red paint on the face of the number 3 and 4 benches (Tr. 49).

Mr. Rines confirmed that he issued the order because of the unstable ground conditions in the proximity of the hole in question. These unstable conditions consisted of visible horizontal and vertical cracks in the face of the number 3 bench and the floor of the number 4 bench, and on either side of the hole. He also observed material which had slid down toward the opening of the hole itself (Tr. 50Ä51).

Mr. Rines stated that he cited a violation of mandatory safety standard section 56.3200, which requires that certain action be taken when hazardous ground conditions are present which create a hazard to persons. He confirmed that the hazardous conditions consisted of the visible cracks which were present in the wall and floor of the number 3 bench, and the uncertainty of the extent of the cavern and hole in the number 4 bench. In his view, these conditions presented a hazard to the trucks and shovel operating in the proximity of the hole. He was concerned that the trucks were too close to the edge of the hole, and that the weight of the trucks may have caused the wall to give way and break off, thereby causing the trucks to fall into the void. The shovels was located approximately 55 feet from the hole, and the trucks were operating within 5 feet of the hole as they drove into the area, and within 20 feet as they left with their loads.

The cracks which he observed were closer to the trucks than to the shovel. Although the shovel was approximately 35 to 40 feet from the cracks, given the uncertainty of the length and breadth of the cavern hole under the bench where they were operating, he was concerned about the shovel as well as the trucks (Tr. 51Ä56).

Mr. Rines explained his gravity finding of "reasonably likely" as follows (Tr. 57):

> A. Due to the number of cracks and the close proximity that the trucks were coming to those cracks in the wall, that if they had continued operating there, it's reasonably likely we could have had an accident there.
>
> Q. Okay. And you say that the likelihood of the accident would be the ground giving way underneath the trucks?
>
> A. Yes, sir.
>
> Q. And you checked here that the injury was likely to be fatal. Why did you check fatal?
>
> A. Well, if that truck -- if the ground gave way, the truck was going to fall approximately fifty-five feet (55'). And a truck going over the side of a wall, or the wall sloughing off with him, could be a fatal accident.
>
> Q. Okay. You checked the number of persons affected as being two.
>
> A. Yes, sir.
>
> Q. Who would they be?
>
> A. They would have been the shovel operator and the truck driver, himself.

Mr. Rines stated that he made a finding of "moderate" negligence because Mr. Gillam conceded that he had known about the existence of the cavern but had done nothing about it. Mr. Rines believed that once the underground cavern was detected, and given the presence of cracks, the area should have been barricaded or blocked off. Holes could also have been drilled to determine the extent of the cavern hole opening, and the top of the number 3 bench could have been bermed.

Had these measures been taken, the respondent would have been in compliance with the cited standard (Tr. 59).

On cross-examination, Mr. Rines confirmed that he did not speak with any geologists after issuing the violation. He explained that the truck in question was 5 feet from the edge of the bench above the hole which was located below the bench, and he identified the location of the hole by referring to respondent's photographic exhibit RÄ2 (Tr. 75). He confirmed that there was no actual hole on the flat surface of the number 3 bench haulageway where the truck was operating, and that the hole was located at the face of the number 4 bench (Tr. 76). He reiterated his concern that the area beneath the roadway where the truck was located could have given way and engulfed the truck (Tr. 77). He explained the work being performed with the truck and shovel, and indicated that material was being removed after the area was drilled and blasted (Tr. 79Ä82). Mr. Rines stated that he was unaware that any geologists were examining the area after he issued the violation, and that he next returned to the mine on August 22, 1988 (Tr. 85).

Charles B. Vance, MSHA supervisory mine inspector, testified that the respondent's mine has been under the enforcement jurisdiction of his office, and that he has visited the mine 15 to 20 times over the past 3 years. He confirmed that he visited the mine in July, 1987, in the company of MSHA district manager Mike Trainer, safety specialist Roger McClenta and sub-district manager Ray Austin. The purpose of the visits was to observe the ground conditions involving the cavern and slide area in question (Tr. 90). Mr. Vance confirmed that he visited the mine on July 15, 1987, to examine the cavern area. He identified a copy of a modification he issued to the citation issued by Inspector Rines to allow work to correct the hazard noted in his initial order. The modification made reference to the removal of material from the floor of the number 3 bench, and the filling of the cavern on the number 4 bench (Tr. 91). Mr. Vance stated that he had expected the respondent to blast 10 holes which had been drilled along the edge of the number 3 bench in order to fill the cavern and hole with the material blasted from above that location (Tr. 92Ä93).

Mr. Vance stated that he observed no equipment or work taking place when he was in the area on July 15th, and the cavern or hole was still open and unfilled, and nothing had been done to correct the cited condition. He observed several cracks "all around that area," and "in and around" the cavern (Tr. 94). He considered the ground conditions at that time as hazardous to persons working in the area because there was no

indication as to the extent of the cavern or how much weight it would take to break into it, and he believed that the rock could give way and a vehicle could go over the edge of the bench or break into the cavern (Tr. 94).

Mr. Vance confirmed that the visit by Mr. Trainer and Mr. Austin came after he issued his modification of July 15, 1987, and since that time the respondent has not requested him or anyone else in MSHA to further modify the order issued by Mr. Rines. Mr. Vance also confirmed that no further work has been done by the respondent in the affected area, and as far as he knows "it has been left alone" (Tr. 96). He confirmed that the respondent has the option of either abating the hazardous cited conditions before continuing any further work in the area, or simply leaving it alone (Tr. 96).

On cross-examination, Mr. Vance was of the opinion that the safest method for addressing the hazard in question would be to seek the aid of a geologist to survey the cavern area and then fill it with shot rock, or by blasting the material down into the hole from the drill holes which were not previously shot (Tr. 96Ä97). Mr. Vance confirmed that he was not with Inspector Rines when he issued his order on July 1, 1987.

Respondent's Testimony and Evidence

Herbert A. Kelly, respondent's former plant manager, testified that he is a professional geologist, and holds a degree in geology from the South Dakota School of Mines, and a master's degree in mining engineering from the South Dakota School of Mines and Technology. He stated that the cited area in question was not an active bench for quarry production at the time of the inspection conducted by Mr. Rines. Mr. Kelly explained that the IngersollÄRand Company had requested permission to test a drill and the respondent permitted them to do so at the area in question. The location was selected because "the wall between the No. 3 bench and the No. 4 bench was pretty ragged. We had what we call a belly rock hanging out, and it was cracked away in at least one location. And this historically had been an area of underground caverns, in this particular corner of the quarry. We had no idea that one was lurking as close as it was" (Tr. 100).

Mr. Kelly explained that after the blast holes were drilled, some of them were shot in order to recover some of the rock. When the shot was fired, the bottoms of the drill holes broke into the natural cavern under and beyond the reach of the holes. Mr. Kelly stated that the area was then

observed for a day or two by himself, and the quarry and plant superintendent, and they detected no problem in working on the number 3 bench with equipment to remove materials which had been previously shot from the bench above. The work in question "had nothing to do with this cavern shot, other than the fact that we would have to go near the top of the bench above it" (Tr. 101).

Mr. Kelly stated that it is not unusual for quarry trucks to come close to the edge of a wall, and that usually, a better berm or big rocks are used to protect equipment from rolling over the edge to the bench below. He conceded that in the instant case, "we did not have a very planned arrangement above the top of this hole" (Tr. 102). Mr. Kelly stated that he detected no cracks on the face of the number 3 bench or the wall between the number 3 and 4 benches leading into the cavern in question. He believed the ground conditions were safe for equipment to operate, and by throwing rocks down the cavern hole, he determined that the cavern was going down rather than up. He confirmed that work had been done in the cited bench area for the past 6 years without breaking into anything, and that this was the first time a cavern had been discovered in that area (Tr. 103).

Mr. Kelly stated that he had no objection to the withdrawal order at the time Mr. Rines informed him that he would issue it. Mr. Kelly explained that the cited area was not an urgent operational area, and it was simply "a side job" which was not holding up production. In weeks following the order, Mr. Kelly and another company geologist inspected the area and believed that there was no problem in continuing work on the number 3 bench. In addition, MSHA personnel from Pittsburgh, including a geologist, inspected the area and agreed that the only way to resolve the situation was to attempt to fill the cavity by drilling and blasting material from above, or trucking in material or bulldozing it in from above to fill the cavity. Mr. Kelly confirmed that the MSHA personnel did not believed there was any problem with proceeding in the manner stated in Mr. Vance's modification of July 15, namely, "to work on the No. 3 bench to fill the cavern down to the No. 4 bench" (Tr. 104).

Mr. Kelly confirmed that no work has been done to fill the cavern in question because the area is not critical, and other pending work took priority. He explained that work had started at the top of the quarry in an attempt to rectify previous ground control withdrawal orders by making benches at the very top of the quarry, and it is impossible to work safely on the benches below because of falling rocks. The

respondent intended to fill the cavern, but Mr. Kelly was unaware of any timetable for this to be done (Tr. 105). Mr. Kelly agreed that it would be unsafe to bring equipment to the number 4 bench to try and work around and too close to the cavern, but he saw no problem in the work being performed on the number 3 bench on July 1, 1987, and the work which would be permitted by Mr. Vance's modification (Tr. 106).

Mr. Kelly confirmed that the drill holes were 55 feet deep and did not reach the cavern. He estimated the thickness of the material below and between the surface of the number 3 bench roadway and the cavern area to be at least 55 feet, but agreed that he had no idea as to the parameters of the cavern and conceded that depending on the extent of the cavern, and its direction, the roadway could be undermined. He confirmed that caverns are natural occurrences in limestone mines (Tr. 108).

Mr. Kelly stated that he objected to the civil penalty assessment points for negligence and lack of good faith abatement, and he believed that the respondent had a good relationship with the inspectors and responded quickly to their requests (Tr. 109). He also stated that while he had "no quarrel" with the withdrawal order issued by Mr. Rines, he did not believe that fines and "bad marks on our record for negligence and lack of good faith" were deserved (Tr. 122). When asked whether he agreed that a hazard existed, Mr. Kelly responded "we agreed to get another look from experts on the outside. We recognize that there's a problem there with the caverns. We don't pretend to know it all, about them. And since it was not holding up our operation, we were certainly willing to wait for somebody to come in and check it out" (Tr. 122).

Mr. Kelly confirmed that he was aware of the existence of the cavern hole prior to July 1, 1987, when Mr. Rines came to the mine, and that it had been exposed from the experimental drilling which was taking place to shoot down the crack and "belly rock" which posed a hazard to a shovel and loader working below. Mr. Kelly also confirmed that he was aware of the fact that a network of caverns were present in that area of the quarry, but he was not aware that the cavern in question was so near to the area where drilling would be taking place. Previous caverns which have been exposed have been filled with rock (Tr. 124).

Mr. Kelly confirmed that his contacts with MSHA's technical personnel came after the order and modification were issued by Mr. Rines and Mr. Vance, and that he requested their

assistance in order to obtain an outside opinion. Although Mr. Kelly agreed that drilling a test hole from the number 3 bench to determine the extent of the cavern was a good idea, he stated that this was never suggested by any of the MSHA people (Tr. 116Ä117). During this period of time, no work was being performed on the bench and nothing further was done (Tr. 117).

On cross-examination, Mr. Kelly confirmed that there are a number of holes in the face of the pit which have not been filled in, and that at the location next to the shot hole, there was no berm which was placed there intentionally (Tr. 125). He confirmed that he walked and observed the area several times after the shots were shot through to the cavern, and saw no significant cracks which penetrated the rock to any depth. He confirmed that the equipment was moved to the cited location approximately 4 hours before the order was issued (Tr. 127). He also confirmed that in the past, there was another location where machinery and miners were working within 15 feet of a cavern which had been bridged over, and where the thickness of the pillar was about 15 feet. However, he stated that after "we worked that for a while, we backed off from it. We scared ourselves" (Tr. 128).

Inspector Vance was recalled, and he identified exhibit GÄ11, as a photograph of the cavern in question which he made on July 15, 1987, when he modified Mr. Rines' order, and he identified the area where work would be permitted to continue pursuant to his modification in order to fill the cavern (Tr. 133Ä136). Mr. Vance stated that Mr. Trainer and Mr. Austin never told him that it was safe to operate machinery on the floor of the number 3 bench in the area of the cavern, and that the matter was not discussed. In Mr. Vance's opinion, proper blasting and filling should have been done to fill the hole (Tr. 137). He believed that this could have been done from a good distance away from the hole, or from the next bench above, or from blasting the holes which had already been drilled (Tr. 138). Mr. Kelly stated that this was tried, but that the holes were blocked off and could not be opened (Tr. 138).

Petitioner's Arguments

During oral argument at the hearing, petitioner's counsel argued that the evidence establishes that a hazardous ground condition existed on July 1, 1987, and that under the circumstances, the order issued by Inspector Rines was justified and that a violation of section 56.3200 has been established. Counsel pointed out that Mr. Kelly conceded that he had no

knowledge of the extent of the cavern which had been exposed by prior drilling and blasting, and that men and equipment were working on the bench area above the location of the exposed cavern. Although Mr. Kelly further conceded that he had observed ground cracks which he believed were not significant, counsel pointed out that the cracks were not probed to determine whether they were surface or sub-surface cracks. Conceding that Mr. Kelly kept the area under observation after the cavern was exposed, since he was a trained geologist, counsel suggested that Mr. Kelly should have taken further steps to address the hazardous ground conditions, but that nothing was done other than to throw some rocks into the hole in an attempt to determine its depth and breadth (Tr. 139Ä144). Counsel believed that once the cavern was discovered, the respondent had an obligation to do something about it before sending men back in for normal operations (Tr. 149).

Petitioner's counsel argued further that a reasonable interpretation of section 56.3200 would lead one to conclude that the existence of surface ground cracks, coupled with an exposed cavern hole, the extent and condition of which are unknown, constituted a hazard to the truck and shovel operators working on the bench above the cavern. Counsel asserted that the respondent had a duty to at least determine the extent of the cavern or to fill it up, and that drilling to determine the extent, thickness, and integrity of the ground above the location of the cavern would have been the kind of action expected by MSHA to address the hazard. Counsel also suggested that the respondent could have called in MSHA after such drilling for a determination as to whether or not its efforts were sufficient (Tr. 147).

In its posthearing brief, petitioner's counsel reiterates his arguments made at the hearing, and concludes that the hazard presented by the cavern hole and the surrounding ground conditions where work was taking place at the time of the inspection by Inspector Rines posed a danger and risk of injury to the miners working on the number 3 bench. Conceding that the term "hazard" is not further defined by the Act or MSHA's standards, counsel cites the dictionary definitions of the term as found in Black's Law Dictionary, Pg. 647 (rev. 5th ed. 1979), and Webster's Ninth New Collegiate Dictionary, Pg. 557 (1986), which define the term as "a risk or peril, assumed or involved; a danger of risk lurking in a situation which by chance or fortuity develops into an active agency or harm; a source of danger; a chance event." Counsel asserts that these definitions are consistent with the intent and purpose of the standards found in 30 C.F.R. Part 56, namely, the "protection of life, the promotion of health and safety,

and the prevention of accidents." Counsel also points out that the rulemaking history concerning the promulgation of section 56.3200, reflects an intention that the standard have broad application and would apply wherever a fall of ground hazard is present.

Counsel asserts that the respondent violated section 56.3200, by permitting miners to operate heavy equipment in the vicinity of the cavern or hole, the extent of which was unknown, but which it knew existed beneath the area where the work was being performed. Counsel concludes that this conduct by the respondent violated the standard because any ground condition which creates a risk of injury to a miner must be taken down or supported before miners resume work in the vicinity of that ground condition.

Respondent's Arguments

In support of his belief that the cited area did not pose a hazard, Mr. Kelly relies on the fact that Inspector Vance's modification to the order issued by Inspector Rines allowed entry to the cited area for the purpose of removing materials from the floor of the number 3 bench to fill the cavern on the number 4 bench. Mr. Kelly asserted that the modification indicated to him that without doing anything else, work could safely proceed in the cited number 3 bench area to excavate materials in an attempt to fill the cavern hole below. Since this permitted excavation work was precisely what was being done on July 1, 1987, when work was stopped by the withdrawal order issued by Inspector Rines, Mr. Kelly did not believe that a hazard existed on that day (Tr. 117Ä118). Mr. Kelly advanced this same argument when he stated as follows in his posthearing argument filed in this case:

> The respondent requests that the monetary penalty assessment, penalty points for negligence, penalty points for lack of good faith and the citation on our record with MSHA should all be rescinded. We followed the inspector's instructions promptly, courteously and explicitly when he ordered us to withdraw from the area. We had other MSHA officials visit the site as required. Two weeks later MSHA modified the withdrawal order to permit us to return to work at the same location under the same conditions. The modification of the order makes me believe that the alleged safety hazard was not serious enough to be citable in the first place.

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. 56.3200, which 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.

The respondent's position with respect to the existence of any hazardous ground conditions rests on Mr. Kelly's argument that the modified order issued by Inspector Vance allowed work to continue in the very same area which Inspector Rines determined was hazardous. Mr. Kelly also believed that there was sufficient ground support and stability between the two benches in question to allow the trucks and shovel to operate without posing a hazard to miners or equipment.

Although the two actions taken by the inspectors appear to be contradictory and lend some support to Mr. Kelly's argument, I take note of Mr. Vance's explanation concerning the area which he had in mind when he modified the order to allow work to proceed to address the hazardous ground conditions. I also take note of the fact that Mr. Vance's modification is qualified and conditional in that it allowed work to the limit of the area previously sprayed in red paint by Mr. Rines. Taken in context, I cannot conclude that Mr. Vance's modification per se supports a reasonable inference that the ground conditions which he and Mr. Rines believed were hazardous never existed. In my view, any determination as to whether or not any hazardous conditions were present at the time the order/citation was issued by Mr. Rines must be made on the basis of an evaluation of all of the facts and evidence available to Mr. Rines when he made his evaluation of the ground conditions and came to the conclusion that they presented a hazard to miners while they were engaged in the excavation work which was taking place at that time.

Although Inspector Rines made reference to a drill shot on the No. 4 bench in his order, he clarified this by confirming that the violation did not directly involve the number 4 bench because it was blocked off by stored materials and there was no access into the area by any equipment, and that his reference to the number 4 bench was intended to refer to a production shot on the number 4 bench if it were to be mined (Tr. 114Ä115). Mr. Kelly agreed that Mr. Rines was concerned that the ground on the number 3 bench could give way to the cavern below, and his belief of the existence of a hazard because of a possible vertical drop of equipment caused by the edge of the bench cracking and coming down from the weight of the equipment operating over the cavern hole (Tr. 113).

The evidence in this case reflects that Inspector Rines issued the withdrawal order/citation on July 1, 1987, after observing the exposed cavern and cracks in the floor of the number 3 bench and the face of the number 4 bench. Coupled with the uncertainty as to the extent of the cavern or hole which had been exposed by prior blasting and drilling, Mr. Rines concluded that the ground conditions where trucks and a shovel were engaged in the excavation and removal of materials were such as to create a hazard in that the weight of the equipment could have caused the floor of the number 3 bench to give way beneath the trucks and shovel. Two weeks later, on July 15, 1987, Inspector Vance viewed the same ground conditions, and he observed cracks in the floor of the number 3 bench near the shot hole, and cracks in the immediate vicinity in and around the hole. Mr. Vance also believed that the ground conditions he observed presented a hazard in that the rock and material could give way, causing a vehicle to go into the cavern.

Mr. Kelly confirmed that he had no quarrel with the withdrawal order issued by Inspector Rines. Mr. Kelly confirmed that the quarry area in question had a history of underground caverns, and that the particular location which was cited by Mr. Rines was selected for drilling and blasting because it had "bellied out" with hanging rock, was cracked in at least one location, and that the wall between the number 3 and 4 benches was "pretty ragged." Mr. Kelly conceded that these conditions posed a hazard to miners and equipment working below. He also alluded to a prior incident where equipment and miners were withdrawn from a working area over a cavern with a pillar thickness of 15 feet because "we scared ourselves." Mr. Kelly also confirmed that caverns may vary from inches wide to 100 feet wide, and he conceded that no drilling was done to determine the direction or extent of the cavern in question, and that in the event it extended back under the

number 3 bench, the roadway used by the truck and shovel could be undermined by the cavity. Although Mr. Kelly saw no problem with working on the number 3 bench, he agreed that it would be unsafe to bring in equipment to try and work around and too close to the cavern.

After careful consideration of all of the facts in this case, I conclude and find that the petitioner has established by a preponderance of all of the evidence that the ground conditions observed by Inspector Rines were hazardous and presented a risk and danger to the miners who were performing work in the cited area. Although the respondent was aware of the hazard presented by the cavern which had previously been exposed in the course of drilling and blasting to excavate and remove materials from the area, it simply kept the area under observation and took no action to fill the cavern or take down and support the rock and materials in the affected area. Under the circumstances, I conclude and find that a violation of section 56.3200, has been established, and the citation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury

in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

I conclude and find that the hazardous ground conditions, including the unknown extent of the cavern hole beneath the bench where men and equipment were working, presented a danger of the ground giving way under the weight of the equipment. In the event this had occurred, I believe it would be reasonably likely that the miners working in the area would have suffered injuries or a reasonable serious nature. Under the circumstances, I agree with the inspector's "significant and substantial" finding, and IT IS AFFIRMED.

History of Prior Violations

An MSHA computer print-out reflects that for the period July 1, 1985 through June 30, 1987, the respondent paid civil penalty assessments in the amount of $570 for 10 section 104(a) citations, seven of which are $20 "single penalty" assessments. I take note of the fact that none of the prior citations are for violations of the safety standard cited in this case, or for any ground control violations.

Inspector Rines was of the opinion that the respondent's compliance record was "a little bit higher than normal" as compared to quarries of similar size. In addition, he stated that the respondent has had chronic ground control problems which have been of concern to MSHA, and that several ground control imminent danger orders have been issued, terminated, or are still outstanding at the quarry. Mr. Rines believed that the respondent's ground control practices were poor, and he confirmed that the two outstanding imminent danger orders were issued in 1984, but that no active mining was taking place in those areas. Mr. Rines explained that a previous slide caused by blasting and drilling close to the highwall resulted in some of the material sliding into the quarry, and that MSHA has been on the property periodically attempting to control the overburden so that the quarry may be made safe (Tr. 60Ä70).

Although petitioner's counsel stated that Inspector Rines believed that the respondent had a "poor attitude" in connection with ground control, I find no credible evidence to support any such conclusion. Further, even though the respondent may have been served with prior imminent danger orders, some of which may be outstanding, this does not per se establish a "poor attitude" with respect to ground control. Absent any facts or evidence to the contrary, I cannot conclude that the respondent has failed to comply with any MSHA orders or directives, nor can I conclude that the record in this case supports a finding that the respondent's compliance record with respect to its paid history of assessed civil penalties is such as to warrant any additional increase in the civil penalty assessment which has been made for the violation in question.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a medium-size mine operator and that the civil penalty assessment made in this case will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Gravity

On the basis of my findings and conclusions affirming the "significant and substantial" findings made by Inspector Rines, I conclude and find that the violation in question was serious. The unstable ground conditions presented a hazard to both the miners and equipment working in the cited bench area.

Negligence

Inspector Rines made a finding of "moderate" negligence, and he testified that "their negligence wasn't all that high. They just hadn't done anything." The evidence establishes that the respondent was aware of the cavern which had been exposed as a result of prior drilling and blasting which was done in an effort to take down part of the bench wall which had cracked and "bellied out." Although Mr. Kelly confirmed that he was aware of the cavern and had inspected it and kept it under observation prior to the inspection by Mr. Rines, no particular action was taken to fill the hole or to determine its extent, and the area was not barricaded or otherwise secured against entry. Under the circumstances, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and the inspector's negligence finding is affirmed.

Good Faith Abatement

The record reflects that the cited conditions have not been corrected, and that the contested order is still "outstanding." The respondent has apparently opted to leave the affected area and continue its mining operations elsewhere in the quarry. The petitioner has stipulated that the respondent acted in good faith by immediately withdrawing the miners and equipment from the cited area, and I find no evidence that the respondent has been uncooperative with MSHA in attempting to address the hazardous ground conditions in question. Mr. Kelly testified that in compliance with Inspector Rines' order, the respondent requested assistance from MSHA's technical support personnel, and petitioner's counsel agreed that the unstable ground conditions in the area of the cavern presented a difficult situation in that any attempts to go back into the area to evaluate the ground conditions, including the filling of the cavern hole, would in itself present a hazard and danger (Tr. 150, 154). I find no evidence that the respondent has ever attempted to place men or equipment back to work in the area which has been withdrawn.

Petitioner's counsel agreed that the respondent withdrew its miners as soon as the order was issued and that the designated danger area has in effect been dangered or marked off and has remained so to the present. Counsel conceded that once this was done, "the violation ceased to exist," and he could offer no explanation as to why the respondent received "negative" civil penalty assessment points with respect to the issue of good faith (Tr. 109Ä112). Under all of the aforesaid

circumstances, I conclude and find that the respondent acted in good faith once the order/citation was issued, and I have taken this into account in the civil penalty assessment which I have made for the violation in question.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $250 is reasonable and appropriate for the violation which has been affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $250 for a violation of mandatory safety standard 30 C.F.R. 56.3200, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge