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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 PROCEEDINGS Docket No. CENT 88-118-M A.C. No. 03-01551-05502
v.	Malvern Minerals South Mine
MALVERN MINERALS COMPANY, RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. CENT 88-129-M A.C. No. 03-01551-05501 D9M
v.	Malvern Minerals South Mine
S E C O INCORPORATED, RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. CENT 88-130-M A.C. No. 03-01551-05501 W6C
v.	Malvern Minerals South Mine
GARRETT EXCAVATING, INC., RESPONDENT	

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Professional Corporation, Pittsburgh, Pennsylvania for Respondent Malvern Minerals Company;
Mark Moll, Esq., Jones, Gilbreath, Jackson & Moll, Fort Smith, Arkansas for Respondent SECO, Inc.,
J.E. Sanders, Esq., Wooton, Glover, Sanders & Slagle, Hot Springs, Arkansas for Respondent Garrett Excavating, Inc.

Before: Judge Melick

These consolidated civil penalty proceedings are before me upon separate petitions filed by the Secretary of Labor against the named Respondents pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." The petitions allege violations developed from an investigation by the Secretary of a fatal highwall failure at the Malvern Minerals Company (Malvern) South Mine on October 2, 1987. The general issue before me is whether there have been any violations of the cited regulatory standards and, if so, the appropriate civil penalties to be assessed in accordance with Section 110(i) of the Act.

Background

On October 2, 1987, at about 11:10 a.m., Phil Keeton, a backhoe operator employed by Garrett Excavating Inc. (Garrett), and Bill Williams, a self employed driller, were killed when a highwall collapsed. The evidence shows that Keeton had been employed by Garrett for about 3 1/2 years as a backhoe operator and for the latter 1 1/2 years as a crew leader. He had a total of 40 years mining experience with about one year at the South Mine. Williams had 27 years mining experience with about 3 weeks experience at the South Mine.

The Malvern South Mine is a novaculite quarry located near Hot Springs, Arkansas. Bill Williams was contracted by Malvern to perform the drilling, SECO, Inc., (SECO) was contracted to load and detonate explosives in the drilled holes and Garrett was contracted to load and haul the broken ore and rock. Malvern directed the overall mining sequence.

The mine operated intermittantly, producing for about 4 months with a 2 month period during which the mill continued to process stockpiled ore. When the mine was producing it employed one Malvern employee and 6 contract employees on one shift of 10 hours a day 6 days a week. Mining was performed by drilling and blasting a highwall creating a single bench. The bench would then be removed as mining progressed.

The South Mine contains three stratigraphic units sloping approximately 43 to the northwest. These units have been overturned and are, therefore, stratigraphically upside down. The topmost unit, the Lower Novaculite, is a bed of hard, brittle novaculite. Underlying this is the Middle Novaculite unit--a shale unit containing about 3% graphite. The lowest unit, approximately 30 feet thick, is the Upper Novaculite. According to the record this unit consists of a soft tripolitic novaculite.

Mining had initially progressed from the southwest end of the pit to the northeast to a depth of about 450 feet when the direction was reversed. In October 1987 mining operations were again being conducted in the southwest end of the pit. The pit had been deepened to 80 feet at the time of the accident. On the first pass a bench had been lowered about 50 feet by October 2nd along a distance of about 150 feet. The highwall in the immediate accident area ranged from 80 to 90 feet high and was sloped back at an angle of about 63ø.

Docket No. CENT 88-118-M

In this case the Secretary maintains that she has charged Malvern under Citation No. 2659481 with three violations of the regulatory standards. In proposing a civil penalty the Secretary separated the citation into three parts. Under Part A the Secretary purports to charge a violation of the standard at 30 C.F.R. 56.3200 and seeks a penalty of $10,000. Under Part B the Secretary purports to charge a violation of 30 C.F.R. 56.3130 and seeks a penalty of $4,000. Finally, under Part C the Secretary purports to charge a violation of 30 C.F.R. 56.3401 and seeks a penalty of $1,000.(FOONOTE 1)

On the face of the subject citation the Secretary charges a violation of the standard at 30 C.F.R. 56.3200 and alleges as follows:

> Two employees of contractors to Malvern Minerals were fatally injured when an unplanned slope failure occurred. Several thousand tons of large boulders and loose materials from the approximately 70 foot pit highwall fell completely burying and crushing the operator of a track drill and the operator of a track mounted backhoe. Management of Malvern Minerals and associated contractors and equipment operating personnel of the contractors had observed and were concerned about the highwall condition including a cap rock overhang (the large boulders mentioned above) which protruded approximately 8 feet out from the highwall and was approximately 16 feet thick by 100 feet long.

> A tension crack varying from 3-7 inches wide exists back from the brow of the highwall running from the area of failure, angling NNE, back from the highwall for a distance of approximately 150-200 feet to a point north-east of the area of failure 35 feet back from the highwall.

The cited standard 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 cited standard clearly presupposes that the ground conditions that create a hazard have manifested themselves so that they can be discovered by appropriate examination of the ground (as required by the standard at 30 C.F.R. 56.3401) and so that they can be corrected. The purpose of the regulation is to require elimination of hazardous conditions. It is not to make the operator a guarantor protecting against unforeseeable or hidden hazards. If indeed an appropriate examination, performed as required under section 56.3401 would not have revealed a hazardous ground condition it may reasonably inferred that there could be no violation of section 56.3200.

Inasmuch as I have found, infra, that examination of ground conditions above the highwall was not required under 30 C.F.R. 56.3401 I cannot find that there was any violation of 30 C.F.R. 56.3200. In sum, since I have found that Malvern performed the required examination of ground conditions by "persons experienced in examining and testing for loose ground" and those persons did not upon such examination discover any ground conditions that created a hazard "before other work or travel [was] permitted in the affected area", there was in any event no violation of the standard at 30 C.F.R. 56.3200.

The Secretary, in her post hearing brief, maintains in particular that a crack in the ground above the highwall existed for several weeks before October 2nd and that it should have been discovered and corrected. This argument is predicated however upon the inference that because the crack existed after the highwall collapsed it also existed before the collapse. Any such inference must however be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. Here the required nexus is absent. See Mid-Continent Resources, 6

In this regard I note that the crack in the ground above the highwall was not even discovered until October 5, three days after the highwall failure and a period of time during which additional ground movement could have been triggered by the initial failure. Moreover Irvin Garrett was in the immediate vicinity of the failure area the day before the failure and testified credibly that he saw no sign of a crack. Even the Secretary's witnesses conceded that the crack could have developed at the time of the highwall failure.

The persuasive expert testimony of Mssrs. Steuart and Blancke also convinces me that the Secretary's proferred inference that the crack existed before the highwall collapse is based on unreliable speculation. The proferred inference is accordingly rejected. For this additional reason the alleged violation has not been proven and Part A of Citation No. 2659481 must be vacated.

Part B of Citation No. 2659481 purports to charge a violation of the standard at 30 C.F.R. 56.3130 and alleges as follows:

> The slope failure was induced because the bench was removed from the area of failure resulting in the highwall being too steep for the existing rock structures. The company failed to use safe mining practices including the proper use of benching which had been discontinued for economic concerns.

The cited standard provides as follows:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or scaling of walls, banks and slopes.

The Secretary charges in this part of the citation that Malvern failed to construct appropriate benches on the highwall. The cited standard requires benching however only when "necessary". Since the determination of when benching is "necessary" within the meaning of the cited standard is subjective, the standard must appropriately be measured, in order to pass constitutional muster, against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegely hazardous condition, including any facts particular to the mining industry, would

recognize a hazard warranting corrective action within the purview of the regulation. Alabama By-Products Corporation, 4 FMSHRC 2128 (1982); Canon Coal Co., 9 FMSHRC 667 (1987); Ozark-Mahoning Co., 8 FMSHRC 190(1986)

In this case it is undisputed that before the rock fall here at issue the superintendent of the South Mine, Charles Steuart, sought approval from the District Office of the Federal Mine Safety and Health Administration (MSHA) in Little Rock, Arkansas to discontinue the practice of benching. Steuart submitted his proposal to Billy Richie, the MSHA District Manager having inspection authority over the South Mine, in 1979. According to the unchallenged testimony of Steuart, Richie verbally approved this method of mining for the South Mine. The evidence further shows that in spite of both State and Federal inspections since that date (until the citation at bar) Malvern had never been cited for failure to utilize benches at the South Mine although the practice of mining without benches was continuously followed.

While in hindsight several of the Secretary's witnesses concluded at trial that the practice of benching should have been followed at the South Mine the evidence is clear that preceding the accident, all persons familiar with the conditions at the mine, including MSHA officials, had approved of the practice of mining without benching. I cannot therefore find that the standard as applied in this case did indeed require "benching" at the South Mine prior to the date of the accident. Accordingly there was no violation as alleged. Part B of Citation No. 2659481 must therefore also be vacated.

Part C of the citation alleges a violation of the standard at 30 C.F.R. 56.3401 and charges as follows:

> A contributing factor to the injuries resulting from the ground failure was the fact that supervisors or other designated persons had not examined the top of the pit highwall for hazardous ground conditions at least weekly. The absence of inspection and examination precluded the discovery of the tension crack existing in the ground behind the highwall. The pit had ceased operation in June 1987 and reopened September 3, 1987. The last known examination of the area behind the highwall occurred in June 1987 when survey flags were placed above the brow. No cracks were observed during this examination. Highwall failure occurred along the line of survey stakes placed during the June examination.

The cited standard, 30 C.F.R. 56.3401, provides as follows:

Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the workshift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

At hearing the Secretary narrowed the charges to a failure by "appropriate supervisors or other designated persons" to have tested ground conditions in "areas where work is to be performed prior to work commencing". In particular the Secretary now maintains that the area above the pit highwall should have been included as part of the required examination.

Because of the imprecision and subjectivity of the regulatory language requiring examinations in "areas where work is to be performed" this regulation too must appropriately be measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts particular to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. Alabama By-Products Corporation, supra.

The Secretary offered no evidence in this case to show that in the mining industry an examination of the work area would ordinarily include the ground above the highwall. Indeed the MSHA inspector responsible for inspecting the South Mine before this accident acknowledged that he did not, as part of his inspections of the mine, examine the area above the highwall nor did he require such inspections by the mine operator. The practice was to examine the highwall by standing back from the base and visually observing the exposed face.

Moreover the expert witnesses produced by Malvern, Dudley Blancke and Charles Steuart, testified that it was not the industry practice to examine the ground above the highwall. Within this framework of evidence I cannot conclude that the area above the highwall was an area subject to the testing of ground conditions under the cited regulatory provisions. Accordingly that part of Citation No. 2659481 alleging a violation of 30 C.F.R. 3401, must also be vacated.

ORDER

Citation No. 2659481 (A) (B) and (C) is hereby vacated and Civil Penalty Proceeding Docket No. CENT 88-118-M is dismissed.

Docket No. CENT 88-129-M

In this case the Secretary has charged SECO Incorporated (SECO) in Citation No. 3063001 with one violation of the standard at 30 C.F.R. 56.3401. The citation alleges as follows:

> On October 2, 1987 a massive highwall failure fatally injured one employee of each of two contractors other than SECO. The lone SECO employee assigned to this mine was not knowledgeable or experienced in examining and testing for loose ground conditions. This resulted in the absence of any examination of ground conditions on top of the pit highwall. This employee narrowly escape being buried by the highwall failure.

At hearing the Secretary charged that the only employee of SECO assigned to the mine was neither properly "designated" by the mine operator nor "knowledgeable or experienced in examining and testing for loose ground conditions" within the meaning of the cited standard. On the face of the citation however the Secretary did not allege that the SECO employee was not properly designated but only that he was "not knowledgeable or experienced in examining and testing for loose ground conditions." She is accordingly limited to only those allegations charged in the citation.

In addition the Secretary cites no evidence in her post hearing brief to support this charge and, to the contrary, the overwhelming uncontradicted evidence is that the lone SECO employee was indeed "knowledgeable" and "experienced" in examining and testing for loose ground. This employee, Glen "Buzz" Brown, had 3 years experience in the mining industry and was a certified blaster. He testified that on the date of the accident he followed his practice of visually examining the face of the highwall before commencing work and found no dangerous conditions.

Moreover since I have found that examination of ground conditions in the area above the highwall was not required by established MSHA and industry practices before this accident I cannot infer from the failure of Brown to have examined the area above the highwall that he was not qualified to perform the examinations required. Under the circumstances the citation must be vacated.

ORDER

Citation No. 3063001 is vacated and Civil Penalty Proceeding Docket No. CENT 88-129-M is dismissed.

Docket No. CENT 88-130-M

The Secretary charges Garrett Excavating Inc. (Garrett) under Citation No. 2659482 with one violation of the regulatory standard at 30 C.F.R. 56.3401 and charges as follows:

> The lead person of the crew of the contractor was fatality injured when a massive ground/slope failure occurred. This person was not properly experienced in testing and examining loose ground conditions, resulting in the absence of an examination of the top of the pit highwall. The lead person was designated to insure the safe working conditions surrounding the crew.

The essence of the Secretary's allegations here is that because the designated person failed to examine the ground above the pit highwall that person was therefore not "properly experienced in testing and examining loose ground conditions". However for the reasons already cited in regard to the disposition of similar charges against Malvern Minerals and SECO in this decision I also vacate this citation. Lack of experience in testing cannot be inferred from the failure to have examined above the pit highwall since the established industry and MSHA practice did not include such examinations.

ORDER

Citation No. 2659482 is vacated and Civil Penalty Proceeding Docket No. CENT 88-130-M is dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. Malvern presents persuasive arguments in its post hearing brief that the citation herein failed to comport with the Section 104(a) particularity requirements and that the Secretary has improperly proposed penalties in excess of $10,000 for what is arguably only one violation. In light of the disposition of the citation(s) herein there is no need to address these issues.