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SOL (MSHA) V. CHICO CRUSHED STONE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-136-M
Petitioner : A.C. No. 41-00076-05537
v. :
: Chico Plant No. 57
CHICO CRUSHED STONE :
PARTNERSHIP, :
Respondent :

DECISION

Appearances: Daniel Curran, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner;
C. Gregory Ruffennach, Esq., Smith, Heenan
and Althen, Washington, D.C., for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalty
filed by the Secretary of Labor pursuant to section 105(d) of
the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801,
et seq., the "Act," charging Chico Crushed Stone Partnership
(Chico) in a citation issued pursuant to section 104(d)(1) of
the Act with one violation of the mandatory standard at 30 C.F.R.
56.3200.(Footnote 1) The Secretary also issued Order No
3899014 under

1 Section 104(d)(1) of the Act provides as follows:
"If, upon any inspection of a coal or other mine,
an authorized representative of the Secretary finds
that there has been a violation of any mandatory health
or safety standard, and if he also finds that, while
the conditions created by such violation do not cause
imminent danger, such violation is of such nature as
could significantly and substantially contribute to the
cause and effect of a coal or other mine safety or health
hazard, and if he finds such violation to be caused by an
unwarrantable failure of such operator to comply with such
mandatory health or safety standards, he shall include
such finding in any citation given to the operator under
this Act. If, during the same inspection or any subsequent
inspection of such mine within 90 days after the issuance
of such citation, an authorized representative of the
Secretary finds another violation of any mandatory health
or safety standard and finds such violation to be also

Section 104(b) of the Act for Chico's alleged failure to abate the violation charged in the citation.(Footnote 2)

The general issue before me is whether Chico violated the cited regulatory standard and, if so, whether the violation was "significant and substantial," whether the violation was the result of the operator's "unwarrantable failure," whether the subsequent order of withdrawal was properly issued pursuant to Section 104(b) of the Act and the appropriate civil penalty to be assessed.

The citation at bar, No. 3899013, alleges a violation of the mandatory standard at 30 C.F.R. 56.3200 and charges as follows:

Allegation: The pit walls hasn't [sic] been scaled since last summer.

Findings: The b [sic] west highwall at the Jones Property had loose material hanging from it. The highwall is app. 100 feet high and employees are required in the area at various times. The

fn. 1 (continued)

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

2 Section 104(b) of the Act provides as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

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last shot was shot on 5/3 and the walls had not been scaled.(Footnote 3)

This is an unwarrantable failure.

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.

In May 1991 the pit area of Chico Plant No. 57 located on the "Jones Property" had adjacent highwalls on the north, south and west sides. On May 6, 1991, only the northern 200 feet of the 400 foot west highwall was actively being mined for its limestone product. The west highwall was 80 to 100 feet high in the area being actively mined (see Exhibit No. P-2). The mining cycle consisted of drilling and firing explosive shots from the top of the highwall, examining the area for unfired shots and hanging material, removing the blasted limestone product (muck) from the pit and cleaning the top for the next shot.

It is undisputed that at the time Citation No. 3899013 was issued on May 6, 1991, muck or debris consisting of varying sized limestone rocks that had recently been blasted off the northern half of the west highwall lay at the base of the highwall some 20 to 50 feet high and extended into the pit to about 150 feet from the base of the highwall. The credible testimony of blaster Donny Lee Ruddick supports a finding that debris, apparently overburden consisting of soil and rocks blasted from the top, also lay at the base of the highwall around the "point" (see Exhibit No. P-2) -- the only other area identified by the Secretary as being within the scope of the citation at bar. According to Ruddick's testimony, supported by the blasting records (Exhibits R-3 through R-5), this material remained following blasting on April 26 and May 1, 1991, and was 35 to 50 feet high at the base of the highwall and extended at a 37 degree angle of

3 At hearing the cited area of the west highwall was further delineated on Exhibit P-2 as the area outlined in red.

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repose to about 75 feet from the base. It is noted that MSHA Inspector Kirk also acknowledged that there were in fact boulders in this area up to 24 inches by 24 inches in size. He could not, however, recall that the material was piled at the dimensions described by Ruddick.

According to Inspector Kirk, at the time he issued the citation, the muck at the base of the highwall provided a sufficient barrier so that the loose material on the highwall presented no hazard to persons. Indeed, he testified that there would in fact be no hazard to persons from loose material on the highwall unless and until the muck was cleared to within 10 feet of the highwall. Kirk testified, however, that it is MSHA's policy to nevertheless charge the mine operator with a violation under the cited standard even though no present hazard exists if men are in the process of removing the muck -- apparently based on the possibility that at some time in the future persons might become exposed to the hazard if the muck was cleared to within 10 feet of the highwall face and no action was taken to scale the loose material off the highwall.

The Secretary's position is however untenable. It is a basic premise of our system of jurisprudence that one may not be penalized for a violation that may or may not be committed in the future. In any event, the cited standard protects only against existing hazardous conditions, not future possibly hazardous conditions. Moreover, since the Secretary concedes in this case that "ground conditions" on the highwall did not "create hazards to persons" at the time the citation was issued, there clearly could be no violation of the cited standard. The citation would also fail on the basis that the "affected area" involving a hazard was, according to the Secretary, only within 10 feet of the highwall and there is no evidence that any "work or travel" occurred within that affected area.

Under the circumstances the Secretary has failed to sustain her burden of proving that a violation has occurred. Citation No. 3899013 and Order No. 3899014, issued under Section 104(b) of the Act and premised upon that citation, must accordingly be vacated.

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ORDER

Citation No. 3899013 and Order No. 3899014 are hereby vacated and this civil penalty proceeding is DISMISSED.

Gary Melick
Administrative Law Judge
703-756-6261

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