CCASE:
SOL (MSHA) V. ADAMS STONE
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-604-M
Petitioner	:	A.C. No. 15-00056-05528
v.	:	
	:	Docket No. KENT 92-770-M
ADAMS STONE CORPORATION,	:	A.C. No. 15-00056-05529
Respondent	:	

DECISIONS

Appearances: Joseph B. Luckett, Esq. U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
David H. Adams, Esq., Pikeville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

These proceedings concern proposals for assessment of civil penalties 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 civil penalty assessments for six (6) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely contests and answers and hearings were held in Pikeville, Kentucky. The parties filed posthearing arguments which I have considered in the adjudication of these matters.

Issues

The issues presented in these proceedings include (1) whether or not the respondent violated the cited mandatory safety regulations; (2) whether the violations were significant and substantial (S&S); (3) whether the violations were the result of the respondent's unwarrantable failure to comply with the cited safety regulations; and (4) the civil penalties to be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory provisions

1. The Federal Mine Safety and health Act of 1977, 30 U.S.C. 820(a).

2. Sections 110(a) and 110(i) of the Act.

3. MSHA's mandatory safety standards found at Title 56, Code of Federal Regulations, sections 56.6305, 56.6313, 56.6320, 56.15005, and 56.18009.

4. Commission Rules, 29 C.F.R., Part 2700.

Discussion

The testimony and evidence adduced in these proceedings establishes that an accident occurred at the respondent's quarry site on January 21, 1992, when Assistant Quarry Superintendent Terry Cantrell was injured and suffered permanently disabling injuries when he fell approximately 25 to 30 feet from the top of a primary crusher to the ground below. Mr. Cantrell was not wearing a safety belt or using a safety line and he was not tied off or otherwise secured against falling. Following this event, and upon receipt of a telephone message reporting the injury, MSHA Inspector Richard L. Jones went to the quarry on January 22, 1992, for the purpose of conducting an investigation and inspection. Mr. Jones issued several notices of violations, beginning with a section 104(d)(1) citation, followed by five section 104(d)(1) orders. The citation and orders are as follows:

Section 104(d)(1) "S&S" Citation No. 3883607, January 22, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.15005, and the cited condition or practice states as follows (Exhibit G-1):

> A lost time injury resulted from the fall of an employee from the top of the primary crusher on 1-21-92. No safety belt or line was being used as Terry Cantrell, assistant superintendent, was attempting to clear the top of the crusher of scrap iron and attached crane rigging in order to remove the top of the crusher. He fell to the ground approximately 30 feet below but not before striking the crusher support iron and pier. One safety belt but no safety line was in the area and was not being used. This is an unwarrantable failure. (See 104(d)(1) Order 3883608).

Section 104(d)(1), "S&S" Order No. 3883608, January 22, 1992, cites an alleged violation of mandatory safety standard

30 C.F.R 56.15005, and the cited condition or practice states as follows (Exhibit G-2):

> Two employees were observed working on the primary crusher approximately 25 feet above ground level while not tied off with safety belts and lines. There was no work platform from which to work as it had been moved to facilitate the removal of the top of the crusher for repairs. Only one safety belt and no lines were in the area and were not being used. This is an unwarrantable failure (See 104(d)(1) Citation 3883607). Employees were withdrawn from the area and ordered not to resume work until proper safety lines/belts are made available, and an MSHA inspector could observe the corrective measures taken and this order is terminated.

Section 104(d)(1) "S&S" Order No. 3883609, January 22, 1992, as amended, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.18009, and the cited condition or practice states as follows (Exhibit G-3):

> Six employees were working in the area of the primary crusher dismantling it for repair without a person on the mine property designated in charge. Their regular supervisor Terry Cantrell, Assistant Superintendent, had been injured on the job 1-21-92, and had not returned to work. (See 104(d)(1) Citation 3883608, 104(d)(1) Order 3883608). The person with overall authority and responsibility, Stuart Adams, President, was also not on mine property. This is an unwarrantable failure. The employees were withdrawn from the work area and ordered not to resume work until a person was designated by the operator as in charge and an MSHA inspector could observe the corrective action taken and the order terminated.

Section 104(d)(1) "S&S" Citation No. 3883610, as amended, issued on January 23, 1992, cites an alleged violation of 30 C.F.R. 56.6313, and the cited condition or practice states as follows (Exhibit G-4):

> Two large limestone boulders were observed in the quarry area that had been drilled and charged with explosives (dynamite, detonating cord and primer) the area was neither attended, barricaded and posted nor flagged to prevent unauthorized entry. The condition has existed since day shift 1-16-92, at which time the blaster was laid off (Section 104(d)(1) order 3883611). The operator was aware that this condition existed. This is an unwarrantable failure. Employees were ordered to remain clear of the area a safe distance except those necessary to abate the hazard, guards were

> posted at each entry to restrict access until an MSHA inspector can observe corrective action taken and this order terminated.

Section 104(d)(1) non-"S&S" Order No. 3883611, January 23, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.6320, and the cited condition or practice states as follows (Exhibit G-5):

> Two large limestone boulders were observed in the quarry that had been drilled and charged with explosives. These charges were loaded on day shift 1-16-92, thus exceeding the 72 hour time limit between charge and blast times. No prior approval for this condition was granted by MSHA. The operator was aware of this condition. This is an unwarrantable failure. (See 104(d)(1) Order 3883610). Employees were ordered to remain clear of the area except those necessary to abate the hazard, guards posted at each entry to restrict access until an MSHA inspector can observe the corrective action taken and this order terminated.

Section 104(d)(1) "S&S" Order No. 3883612, January 23, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R 56.6305, and the cited condition or practice states as follow (Exhibit G-6):

> Unused explosive materials (1000 ft. roll of detonating cord) were not moved to a protected area or magazine within a reasonable time after charging boulders in the quarry for secondary blasting. The detonating cord had been left unattended and exposed in the quarry area since day shift 1-16-92, the date the blaster was laid off. The operator was aware of this condition. This is an unwarrantable failure. (see 104(d)(1) orders 3883610 and 3883611). Employees were ordered to remain clear of the area except those necessary to abate the hazard, secure the area, and until an MSHA inspector can observe action taken and this order terminated.

Petitioner's Testimony and Evidence

MSHA Inspector Richard L. Jones testified as to his background and mining experience and he stated that after MSHA received a telephone message reporting an injury at the respondent's quarry on January 21, 1992, he went to the site the next morning to conduct an investigation and inspection. He stated that a crew was dismantling the primary crusher and that assistant superintendent Terry Cantrell was injured when he fell from the top of the crusher approximately 25 to 30 feet to the ground below. Mr. Jones stated that Mr. Cantrell had jumped to the top of the crusher from a catwalk to remove some "tramp

metal" from the crusher and to attach rigging to the crusher top so that it could be removed by a crane. Mr. Jones explained that Mr. Cantrell threw the metal material off the top of the crusher and then fell off. Several crew members who were present informed Mr. Jones that Mr. Cantrell was not using a safety belt or line (Tr. 8-13).

Mr. Jones stated that the crusher was mounted on twenty-two foot high pillars and that the crusher itself was another four or five feet high. He believed that there was a danger of falling from the top of the crusher and he cited a violation of section 56.15005 because Mr. Cantrell was not wearing a safety belt or safety line and was not tied off to prevent his falling off the crusher. Mr. Jones stated that Mr. Cantrell received severe head injuries, lost the use of his left eye, and has not returned to work (Tr. 16).

Mr. Jones stated that he based his "high negligence" finding on the fact that Mr. Cantrell was the assistant superintendent and knew that it was unsafe, knew about the regulatory safety belt or line requirement, and engaged in an unsafe act (Tr. 15).

Mr. Jones stated that he based his "S&S" finding on the fact that employees could be injured if the "work practice" of not using safety belts or lines where there was a danger of falling continued (Tr. 16).

Mr. Jones stated that he issued the section 104(d)(1) unwarrantable failure citation because in his capacity as the assistant mine superintendent, Mr. Cantrell was an agent of management and knew that he was engaging in an unsafe act and that his failure to use a safety belt or line was a violation of the cited regulation and resulted in an injury. Mr. Jones confirmed that the violation was abated and that he terminated the citation after quarry operator Stuart Adams provided new safety belts and instructed his employees in their use (Tr. 17-18).

On cross-examination, Mr. Jones confirmed that he determined that Mr. Cantrell was not wearing a safety belt after speaking with the crew who were dismantling the crusher, including crane operator Carl Stumbo. Mr. Jones stated that Mr. Cantrell was in charge of the work crew, and that after he was injured no one was officially in charge. However, Mr. Jones confirmed that Mr. Stumbo assumed control of the situation after the accident and that he and the rest of the crew were highly trained and experienced personnel who had completed all of their training. He confirmed that apart from the dismantling of the crusher, which was "a special operation", the quarry was not in operation (Tr. 21-28).

Mr. Jones confirmed that he did not speak to Mr. Cantrell, and only assumed that he was aware of the safety belt requirement found in the cited standard. Mr. Jones also confirmed that he did not determine whether or not the respondent had any safety belt and safety line rules in place, and he did not know whether the respondent made it "a practice" not to use safety belts or lines where there was a danger of falling. Mr. Jones stated that his visit to the quarry was his first one and he was not aware that the respondent had ever been cited previously for violations of section 56.15005. He confirmed that he found a safety belt in the area of the crusher during his investigation, but that it was in poor condition and would probably not fit around anyone (Tr. 31-36).

With regard to Order No. 3883608, Mr. Jones stated that while he was conducting his inspection on January 22, 1992, he observed two employees working at the top of the same crusher from which Mr. Cantrell fell the day before. Mr. Jones stated that the two men were not using safety belts or safety lines and that they were "perched" at the top of the crusher with one foot on top of a one-inch bolt which was sticking out of the side of the crusher. The men were using cutting torches to cut metal from the crusher and they were within "arm's length" of each other (Tr. 40-42).

Mr. Jones stated that no one was supervising the work of the two individuals in question, and he believed that there was a danger of falling because they were standing on a bolt at the side of the crusher and were using their cutting torches to cut metal away from the crusher. Since there was no one supervising the work, Mr. Jones instructed the men to come down off the crusher and he informed them about the hazard and determined that they were not wearing safety belts or lines. Mr. Jones asked all of the six men present about the whereabouts of any belts or safety lines, and none could be found in the area (Tr. 43-46).

Mr. Jones explained his gravity finding, and he believed that the violation was significant and substantial because it was highly likely that a serious injury or fatality would result if the employees were to continue to work at the top of the crusher without using safety belts or safety lines (Tr. 47).

Mr. Jones believed that the violation resulted from a high degree of negligence because Mr. Cantrell had been seriously injured the day before and one would expect mine management to take steps to insure against another accident.

Mr. Jones stated that he issued the section 104(d)(1) unwarrantable failure order because he was informed by the scale man that he had spoken with quarry operator Stuart Adams after Mr. Cantrell's accident and that Mr. Adams was aware of the fact that Mr. Cantrell had been injured. Mr. Jones confirmed that he

terminated the order on January 23, 1992, after Mr. Adams brought new safety belts and lines to the quarry and instructed the employees to use them (Tr. 48-49).

With regard to Order No. 3883609, Inspector Jones testified that he issued the violation after determining that Mr. Cantrell had not returned to work and that six men continued to work on the crusher with no one designated to be in charge of the crew. Mr. Jones stated that section 56.18009, requires a mine operator to designate a competent person to be in charge at the mine site in the event of an emergency. Mr. Jones stated that none of the six individuals who were present and working on the crusher informed him that anyone was in charge, and although crane operator Carl Stumbo may have worked as a foreman and been in charge at the site in the past, Mr. Stumbo told him that he was not in charge of the work which was taking place on January 22, 1992. Mr. Jones confirmed that he would not have issued the violation if Mr. Stumbo had told him that he was designated to be in charge (Tr. 57-61).

Mr. Jones stated that he issued the section 104(d)(1) unwarrantable failure order because he concluded that since Mr. Stuart Adams saw fit to designate Mr. Cantrell as the person in charge of the work site on January 21, 1992, before his accident, Mr. Adams should have designated someone to take Mr. Cantrell's place and to be in charge in the event of another emergency situation at the mine after the accident. Mr. Jones confirmed that at the time Mr. Cantrell was injured Mr. Stumbo and the other men did what they could to take care of Mr. Cantrell and that they acted properly to tend to him. Mr. Jones confirmed that he terminated the order on January 23, 1992, after Mr. Adams returned to the site to take charge and designated a chain of command of individuals to be in charge in the event of an emergency (Tr. 62-63).

Mr. Jones stated that following his accident investigation and inspection on January 22, 1992, he met with Mr. Adams and discussed the citation and orders with him. He stated that Mr. Adams informed him that he had other matters to attend to and could not accompany him. Mr. Adams designated Fred Bartley to accompany Mr. Jones during the inspection which he continued on January 23, 1992 (Tr. 74-75).

Mr. Jones stated that he and Mr. Bartley traveled to the quarry first level, and Mr. Jones observed two large limestone boulders which had been drilled and charged for secondary blasting. Mr. Jones stated that he observed detonating cord leading from the drilled holes which were charged with dynamite boosters, and that a new roll of one-thousand feet of denotating cord was nearby within a couple of feet of the charged boulders. Mr. Jones then went to the scale house with Mr. Bartley and

Mr. Jones telephoned Mr. Stuart Adams and asked him to come to the site. Mr. Jones asked Mr. Stumbo to block off all of the entries leading to the charged boulders (Tr. 76-77).

Mr. Jones stated that he spoke with Mr. Adams when he arrived at the site and that Mr. Adams acknowledged that he knew that the boulders were charged and ready to blast and that the roll of cord was laying out in the open area. Mr. Adams informed Mr. Jones that he had laid off the blaster six days earlier and that there was no competent person at the mine to shoot the boulders. Mr. Adams immediately summoned the blaster to the site, and the blaster confirmed that he had left the boulders in a charged condition. He then proceeded to shoot the charged boulders, and Mr. Jones terminated the citation (Tr. 79).

Mr. Jones confirmed that he issued the section 104(d)(1) Order No. 3883610 (Exhibit P-4), because the area where the charged and primed boulders were located was not barricaded, posted, or flagged in any manner to prevent unauthorized entry (Tr. 80). He based his "high negligence" finding on the fact that "I asked Mr. Adams if he knew this condition existed and he said he did" (Tr. 80).

Mr. Jones stated that he based his gravity finding of "reasonably likely" on the following (Tr. 80):

> * * * *Dynamite, detonating cord and primers were not meant to be left out in the exposed weather. Once you put them together, they are ready to shoot. If they are allowed to lay out in the weather for any length of time, they immediately start to deteriorate and become unstable.

Mr. Jones stated that he observed three state reclamation inspectors pass by the area without knowing about the charged boulders. He further stated that large equipment operates in the area, personal vehicles are parked in the area, and if the explosives became unstable "someone could bump into them with a vehicle or loader, sit there and smoke, or just any number of things. There was a lot of exposure there" (Tr. 81). He stated that the boulders were four-to-four and one-half feet in diameter and were located 30 or 40 yards from the main haul road, and 70 or 80 yards from where the crusher operator booth was located (Tr. 81).

On cross-examination, Mr. Jones conceded that it was possible that the charged boulders were " a couple of hundred yards" from the crusher plant (Tr. 86). However, he confirmed that he cited the hazard because of the possibility that the charge could be set off as people were travelling by the area (Tr. 88). Mr. Jones explained that the dynamite did not require a cap and that the detonating cord is cap sensitive and will set

off the booster which in turn detonates the dynamite. Under certain conditions detonating cord can be set off by a one-pound hammer, and if left out in the open "there is no way you can guarantee that it won't be affected by something" (Tr. 90).

In response to further questions concerning Mr. Adams' prior knowledge of the conditions, Mr. Jones stated as follows (Tr. 89):

> A. I asked him did he realize that these boulders were left there, charged; that the area had not been secured, posted, barricaded; and did he know that the thousand-foot roll of detonation cord was laying out there. He said, "Yes. I laid the man off six days ago. I knew it was like that."
>
> Q. Well, now, did he say that he laid him off six days ago knowing that situation existed or that he laid him off six days ago and he just found out that that situation was existing? There is a big difference there.
>
> A. The question I asked him was, "Do you know that these situations exist?" He said yes. "How long has it been that way"" I laid the man off six days ago. Six days, apparently." That is what I was told.

Mr. Jones confirmed that he issued the section 104(d)(1) Order No. 3883611, because the two charged boulders had been left in that condition for more than 72 hours without being blasted (tr. 91). He based his "high negligence" finding on Mr. Adams' admission that he knew the charged boulders had existed past the 72 hour limit (Tr. 92). Mr. Jones stated that he modified his initial "highly likely" gravity finding to "unlikely" because the fact that a time limit had been exceeded does not, in and of itself, constitute a hazard (Tr. 92). He confirmed that he modified his initial "S&S" finding to "non-S&S" after reconsidering the likelihood of any resulting injury (Tr. 93). He further confirmed that he issued the order under section 104(d)(1) because of Mr. Adams' admission that he knew about the condition (Tr. 94).

Mr. Jones explained why he issued two orders even though the cited conditions were the result of the same occurrence. Mr. Jones confirmed that he would not have issued the orders if he knew that Mr. Adams had no knowledge that the conditions had existed since the blaster was laid off a week earlier. However, Mr. Jones stated that "when I talked to him (Adams) for several minutes at the crusher booth, we talked for a long time about that and I was under the perfect understanding that he knew they were like that since he laid the man off six days ago" (Tr. 100).

Mr. Jones stated that if he had misunderstood Mr. Adams, he would have changed his negligence determination (Tr. 100).

Mr. Jones confirmed that he made some notes concerning the two citations, but did not have them with him at the hearing. He further confirmed that he spoke with the blaster when he returned to shoot the boulders to abate the citations, but he could not recall if he asked the blaster if he informed Mr. Adams that he had charged the boulders before leaving the site on the day he was laid off (Tr. 102). Mr. Jones then stated that the blaster stated that "Mr. Adams told him he was being laid of as of right now and that he was not done with his duties and he said to go home" (Tr. 103). Mr. Jones stated that the blaster did not explain why he was laid off, and that he (Jones) found it odd that a blaster would jeopardize his license and livelihood by not finishing his job (Tr. 103).

Inspector Jones confirmed that he issued section 104(d)(1) Order No. 3883612 (Exhibit P-6), because of the exposed and unattended detonating cord (Tr. 104). He described the roll of cord as a Class A high explosive, and he explained that it is required to be stored in a magazine to protect it from the elements. He stated that a premature explosion of the roll of detonating cord "would produce a terrible explosion, scattered debris, rocks. The concussion from it, itself, would be tremendous" (Tr. 107). He stated that the cord could be detonated by something being dropped on it or a piece of equipment running over it. The cord weighed approximately 10 to 15 pounds and someone could have picked it up and put it in a truck to transport it in an unauthorized manner (Tr. 107). He confirmed that he modified his "highly likely" gravity finding to "reasonably likely" (Tr. 108). He issued the section 104(d)(1) order because "When I asked Mr. Adams did he realize that that was setting out there unattended, he said he did. And it's an unwarrantable failure" (Tr. 109). He explained the explosion potential for a roll of detonating cord (Tr. 111-113).

On cross-examination, Mr. Jones stated that although he is not a highly qualified industry explosives expert, "I have worked with explosives hands-on. I know how they operate. I know what they're capable of". He confirmed that he has also learned about explosives during his MSHA training, but is not a licensed blaster. He worked as part of a surface mine powder crew for three years, and at different times worked on a blasting crew using the same explosive material used by the respondent (Tr. 117).

Respondent's Testimony and Evidence

Stuart H. Adams, President, Adams Stone Corporation, testified that he first learned about the two charged boulders which are the subject of citation no. 3883610, and order

nos. 3883611 and 3883612, on the morning of January 23, 1992 when Inspector Jones was at the quarry conducting his inspection. Mr. Adams stated that the licensed blaster who had prepared the boulders for blasting did not inform him what he had done on January 16, 1992, and Mr. Adams emphatically denied that the blaster informed him that day that the boulders had been drilled and charged.

Mr. Adams stated that the blaster asked to be laid off on January 16, 1992, because of the weather so that he could receive unemployment compensation. Mr. Adams stated that the quarry was not in full production at that time and that the only activity taking place was the dismantling of the primary crusher by five or six employees so that the crusher could be shipped to the manufacturer for repairs. Mr. Adams stated that the quarry was down for a winter "seasonal layoff", and other than a large crane being used to dismantle the crusher, there was no production equipment operating in the area where the charged boulders were located. He stated that the boulders were located at an elevated bench area approximately 600 to 800 feet from the crusher area.

Mr. Adams did not deny that the cited roll of detonating cord was not protected or stored in a magazine, but he indicated that the blaster had not completed the job by fastening the cord to the detonating devices, and that this would be necessary before the blast could be detonated. He confirmed that after the cited boulder conditions were called to his attention by Inspector Jones on January 23, 1992, he called the blaster at his home and he came to the quarry within one hour and detonated the charge, and the citation and orders were then terminated by Mr. Jones.

Mr. Adams confirmed that he told Inspector Jones that he was aware of the cited conditions and that he did so in response to the inspector's question as to whether or not he knew that the boulders had been charged. However, Mr. Adams stated that when be acknowledged that he was aware of this, his response was in the context of his knowledge as of January 23, 1992, when the inspector brought the conditions to his attention. Mr. Adams stated that he was out of town when the accident involving Mr. Cantrell occurred, and he denied that he ever told Inspector Jones that he was aware of the charged boulders on January 16, 1992, when the blaster was laid off and left the quarry. Mr. Adams stated that he was shocked to learn that the blaster had left the site after charging the boulders, and without notifying him what he had done, and Mr. Adams believed that the blaster should probably have been charged with the violations.

On cross-examination, Mr. Adams reiterated that he laid off the blaster on January 16, 1992, because of the weather and at the blaster's request. He confirmed that one of his employees,

either Fred Bartley, Tom Roberts, or Carl Stumbo, first informed him about the two charged boulders on January 23, 1992.

With regard to the citation concerning the absence of a designated person in charge of the quarry on January 22, 1992, the day following the accident, Mr. Adams stated that Mr. Stumbo has served as one of his superintendents for many years, has installed and dismantled a number of crushers over the years, and had "worked the quarry" for many months. Mr. Adams stated that based on Mr. Stumbo's many years of experience, he designated him to operate the crane for the "heavy lift" required to dismantle the crusher. Mr. Adams stated Mr. Stumbo was in charge of the crew on January 23, 1992, but was reluctant to admit this to inspector Jones. Mr. Adams confirmed that Mr. Stumbo was an experienced and trained superintendent.

In response to further questions, Mr. Adams conceded that he designated Mr. Stumbo as the competent person in charge on January 22, or 23, 1992, after he (Adams) went to the quarry site. Mr. Adams confirmed that except for the crusher dismantling work, everything else at the quarry was shut down, and Mr. Adams believed that Mr. Stumbo was in charge. Mr. Adams acknowledged that Mr. Stumbo may not have informed Inspector Jones that he was in charge, and that Mr. Jones may not have had any reason to believe that Mr. Stumbo was in fact in charge.

With regard to the failure of Mr. Cantrell to use a safety belt or line at the time he fell, Mr. Adams acknowledged that this was the case. However, Mr. Adams stated that one or two safety belts were available and stored in the equipment storage room near the crusher area, and that belts were also stored in a storage shop associated with the Adams Coal operation, which was a separate corporation operating at the quarry site. Mr. Adams stated that Mr. Cantrell knew how to use safety belts and lines, and that he had observed him wearing them in the past during his 30 years of employment at the quarry.

Findings and Conclusions

Fact of Violations

Citation No. 3883607

In this instance, the respondent was charged with a violation of mandatory safety 30 C.F.R. 56.15005, after the inspector determined that Mr. Cantrell was not wearing a safety belt or line when he fell from the top of the crusher while performing work to dismantle the crusher so that it could be shipped for repairs. The cited standard requires that safety belts and lines be worn when persons work where there is a danger of falling. The unrebutted evidence in this case establishes that Mr. Cantrell was working and standing on the top of the

crusher approximately 25 to 30 feet above the ground. He had jumped to the top of the crusher from an adjacent catwalk and he was not tied off with a safety line, nor was he wearing a safety belt. While in the process of removing some material from the top of the crusher and throwing it to the ground below, he fell off and sustained serious injuries.

The respondent does not dispute the fact that Mr. Cantrell was not wearing a safety belt and that he was not tied off while working at the top of the crusher. I conclude and find that Mr. Cantrell, working 25 to 30 feet above ground, at the top of a crusher that was in the process of being dismantled, was in a position or at a location where there was a danger of falling, and that he was required to wear a safety belt or line while performing the work in question. Since it is clear that he was not wearing a safety belt or line, a violation of section 56.15005, has been established by a clear preponderance of the evidence, and the violation IS AFFIRMED.

Order No. 3883608

In this instance the respondent was charged with another violation of the safety belt and line requirements found in section 56.15005, after the inspector observed two employees working on top of the crusher the day following the accident involving Mr. Cantrell. The credible and unrebutted evidence establishes that the two employees were working approximately 25 feet above ground level while standing with one foot on bolts sticking out of the side of the crusher while they were cutting metal with torches. They were not wearing safety belts and lines and were not otherwise tied off to prevent them from falling to the ground below. I conclude and find that the two cited employees were working at a location where there was a danger of falling, and that section 56.15005, required them to wear safety belts or lines while performing work at that location. Since they were not, I further conclude and find that a violation of section 56.15005, has been established by a clear preponderance of the evidence, and the violation IS AFFIRMED.

Order No. 3883609

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. 56.18009, which provides as follows: "When persons are working at the mine, a competent person designed by the mine operator shall be in attendance to take charge in case of an emergency". The inspector issued the violation after returning to the work site the day after the accident and observing that six men were continuing the work of dismantling the crusher. None of the working employees informed the inspector that anyone had been designated by management to be in charge. Although the inspector determined that the crane operator, Carl Stumbo, may have been a foreman in charge at the

site in the past, Mr. Stumbo informed him that he was not in charge on January 22, 1992.

The respondent's defense is that Mr. Stumbo was a longtime employee who was trained in safety and repair matters, and that on the day in question, the inspector admitted that Mr. Stumbo "seemed to be in charge, or at least seemed to know what was going on". The respondent's president, Stuart Adams, testified that Mr. Stumbo had served as one of his superintendents in the past and had installed and dismantled a number of crushers. Mr. Adams initially testified that he designated Mr. Stumbo to operate the crane on the day in question, and he claimed that Mr. Stumbo was in charge of the crew. Mr. Adams later conceded that he designated Mr. Stumbo as the competent person in charge only after he went to the quarry site a day or two later. He also conceded that Mr. Stumbo did not step forward to identify himself to the inspector as the designated person in charge, and when asked what he expected of the inspector under those circumstances, Mr. Adams responded "You're absolutely right" (Tr. 138).

The respondent's defense IS REJECTED. I find no credible evidence to support any reasonable conclusion that Mr. Stumbo was in fact designated to be in charge in case of an emergency on the day the citation was issued. Mr. Stumbo was not called to testify, and I find Mr. Adams' testimony to be rather contradictory and equivocal to support any suggestion that Mr. Stumbo was in fact the designated person pursuant to section 57.18009. If Mr. Stumbo was the designated person in charge, I find it rather strange that neither he or his crew was aware it. I conclude and find that the petitioner has established a violation of section 56.18009, by a preponderance of the evidence, and the violation IS AFFIRMED.

Citation No. 3883610, and Order Nos. 3883611 and 3883612

In the course of the hearing, and in its posthearing brief, the respondent took the position that the three cited violations concerning the charged boulders were not justified because they concern a single condition, namely, the two boulders which had been drilled and charged in preparation for blasting. The respondent questions the legality and propriety of issuing three separate violations and orders for one single condition. However, this issue has been raised in the past, and the defense advance by the respondent here has been rejected by the Commission. See: El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981), and the recent decision in Cyprus Tonopah Mining Corp., 15 FMSHRC 367,378 (March 1993), where the Commission stated in relevant part that "although Cyprus' violations may have emanated from the same events, the citations are not duplicative because the two standards impose separate and

distinct duties upon an operator. Accordingly, we affirm the judge's conclusion that the citations are not duplicative".

After careful consideration of the respondent arguments, I conclude and find that the issuance of the three separate violations by the inspector was justified and warranted and did not constitute an unreasonable or arbitrary enforcement action. The credible and unrebutted testimony of the inspector establishes that each of the cited conditions in question constituted separate and distinct conditions which were in violation of the three cited mandatory safety standards. Indeed, the respondent conceded that the cited conditions existed (Tr. 6-7, 104-109), and its defense is based on certain mitigating arguments in connection with the amount of the proposed civil penalty assessments.

With regard to Citation No. 3883610, mandatory safety regulation section 56.6313, requires that all areas in which loading is suspended, or loaded holes are awaiting firing, shall be attended, barricaded and posted, or flagged against unauthorized entry. The credible evidence establishes that at the time the inspector observed the charged boulders, they were loaded and awaiting firing, and the blaster had left the property. Thus, it seems clear that the loading and blasting of the charged holes had been suspended and were awaiting firing, and the inspector found no evidence that the affected area was attended, barricaded and posted, or flagged against unauthorized entry. Under the circumstances, I conclude and find that the petitioner has established a violation of section 56.6313, by a preponderance of the evidence, and IT IS AFFIRMED.

With regard to Order No. 3883611, section 56.6320, of MSHA's mandatory standards provides that all charged holes are to be blasted as soon as possible after charging has been completed. However, the standard further provides that "In no case shall the time elapsing between the completion of charging to the time of blasting exceed 72 hours unless prior approval has been obtained from MSHA". The credible and unrebutted evidence in this case establishes that more than 72 hours passed from the time the boulders were charged on or before January 16, 1992, until they were blasted on January 23, 1992, and MSHA had not granted permission for an extension of time. Under the circumstances, I conclude and find that the petitioner has established a violation of section 56.6320, by a preponderance of the evidence, and the violation IS AFFIRMED.

With regard to Order No. 3883612, section 56.6305, of MSHA's mandatory standards requires that all unused explosive materials be moved to a protected location as soon as practical after loading operations are completed. The credible evidence in this case establishes that the 1,000 foot roll of detonating cord was an explosive material which had not been moved to a protected

location or stored in a magazine, and the respondent presented no credible evidence that it was not practical to move the roll of exposed detonating cord to a protected area before it was found by the inspector. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the violation IS AFFIRMED.

Significant and Substantial Violations

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, 3-4 (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, 1574-75 (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). Further, any determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Company, 6 FMSHRC 1573, 1574 (July 1984); U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citation No. 3883607 and Order No. 3883608

The evidence reflects that Mr. Cantrell fell from the top of the crusher while in the process of throwing some material to the ground below. The two other employees who were observed working at the same location the next day were in the process of cutting metal with torches while in close proximity to each other and with one foot on bolts which protruded from the side of the crusher. They too were not wearing safety belts or lines, and they were not otherwise secured against falling approximately 25 to 30 feet to the ground below. Under the circumstances, I believe that one can reasonably conclude that these individuals were exposed to a falling hazard, and that in the event of a fall they would reasonably likely suffer serious or fatal injuries. Indeed, Mr. Cantrell fell and suffered serious and disabling injuries, and in the context of continuing mining operations, I conclude and find that the two employees who were busy working with cutting torches in their hands while "perched" atop the crusher in rather precarious positions would be exposed to a discreet falling hazard, and if they were to fall, it would be reasonably likely that they would suffer serious or fatal injuries. Under all of these circumstances, I conclude and find that the inspector's "S&S" findings with respect to both of these violations were justified, and they ARE AFFIRMED.

Order No. 3883609

Inspector Jones concluded that the failure of the respondent to designate someone to be in charge of the work crew in case of an emergency was a significant and substantial violation because "the mining industry has been proven to be a dangerous industry. Injuries happen all the time. . . . it has been proven to me that in the event of an emergency, somebody needs to be in charge" (Tr. 62). On the facts of this case, it seems obvious to me that Mr. Jones was influenced by the fact that after Mr. Cantrell was injured, the crew continued working on the very same crusher from which Mr. Cantrell fell without anyone being officially designated to be in charge in the event of any further emergency situation similar to the one involving Mr. Cantrell. Mr. Jones also believed that someone needed to be designated in charge so

that proper decisions could be made, and proper precautions taken in time of an emergency (Tr. 60).

In this case, Mr. Cantrell was the designated person in charge prior to his injury, but after he was injured work continued without anyone being officially designated to be in charge in case of any further emergency. Although crane operator Stumbo assumed control of the situation when Mr. Cantrell was injured, and properly attended to him while awaiting assistance, the failure to designate someone to be in charge when the dismantling work continued in the absence of Mr. Cantrell exposed the employees who continued with the work to the hazard of not having anyone immediately available to take over in the event of an emergency. If someone had been specifically designated to be in charge as the work on dismantling the platform continued, and was held accountable, it is altogether possible that the two employees observed working on top of the crusher without being secured against falling would not have been allowed to continue working under those hazardous conditions, and they presumably would have been instructed by the person in charge to wear safety belts and lines. Under the circumstances, I conclude and find that the inspector's "S&S" finding was justified, and IT IS AFFIRMED.

Citation No. 3883610 and Order No. 3883612

Inspector Jones' credible and unrebutted testimony clearly establishes the hazards associated with leaving charged explosive devices such as dynamite, detonating cord, and primer exposed and unattended to (Tr. 84). While it is true that the mine was not in operation when the inspector found the charged materials, and that the boulders which were primed for blasting were in a remote area, the inspector's unrebutted testimony reflects that equipment and mine personnel, as well as other individuals who had business at the site, would be exposed to hazards resulting from a premature detonation of the charged boulders. The inspector observed three state inspectors pass by the area, and given the fact that there were no barricades to prevent anyone from venturing near the boulders, and the area was not flagged to alert persons of the danger, I believe that in the event of a premature detonation, it would be reasonably likely that anyone in the blast area would suffer injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the inspector's "S&S" findings with respect to both of these citations were warranted and justified, and they ARE AFFIRMED.

Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided

under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Inspector Jones testified credibly that he based his unwarrantable failure finding on the fact that Mr. Cantrell was serving as the assistant mine superintendent at the time he was injured because of his failure to wear a safety belt and line. As an agent of management, Mr. Jones believed that Mr. Cantrell knew that what he was doing was an unsafe act, and that he suffered serious injuries because of his own actions (Tr. 17). Mr. Jones later conceded that he did not speak with Mr. Cantrell after he was injured and he simply assumed that as an experienced and trained superintendent, Mr. Cantrell would be expected to know that a safety belt and line were required to be worn and that his working on top of the crusher without wearing a belt and line was an unsafe act (Tr. 31-34).

Mr. Adams did not dispute the fact that Mr. Cantrell was not wearing a safety belt and line when he fell from the crusher. Mr. Adams asserted that belts were available and were stored nearby in two storage rooms, and he produced some new belts and lines after the violation was issued. Further, Mr. Adams believed that Mr. Cantrell knew how to use a belt because he had observed him doing so during his many years of working at the site. Inspector Jones confirmed that the respondent had not previously been cited for any safety belt violations, and he conceded that he did not determine whether the respondent had any established safety rules in place, or that the respondent made it a practice to allow workers to work on high places without wearing a safety belt (Tr. 37-38). Although these factors may be considered by me in mitigating the civil penalty assessment for the violation in question, they may not serve as an absolute defense warranting a dismissal of the violation.

The evidence here establishes that Mr. Cantrell was an experienced and trained management member who had worked for the respondent for thirty years and served in a responsible superintendent's position. It is difficult for me to comprehend what may have prompted Mr. Cantrell to place himself in such a precarious position on top of the crusher without securing himself from falling. While it is most unfortunate that Mr. Cantrell's actions resulted in his serious and disabling injuries, as a member of management, he must nevertheless be held responsible and accountable for his reckless and inexcusable conduct. I conclude and find that Mr. Cantrell's failure to comply with the requirements of the cited standard by failing to wear a safety belt or line while working on top of the crusher where there was a danger of falling constituted sufficient "aggravated conduct" to support the inspector's unwarrantable failure finding. Accordingly, the inspector's finding and the contested citation ARE AFFIRMED.

Order No. 3883608

Inspector Jones testified that he based his section 104(d)(1) unwarrantable failure order on the fact that the individual tending the scale house told him that he had spoken to Mr. Stuart Adams a couple of times about Mr. Cantrell's accident and informed him about what had happened to Mr. Cantrell (Tr. 46). Mr. Jones believed that Mr. Adams was aware of the fact that Mr. Cantrell had fallen off the crusher the day before and that he was aware of the fact that he was not wearing a safety belt. Since the work of dismantling the crusher continued after Mr. Cantrell's accident, Inspector Jones believed that Mr. Adams "could understand the possibility of a man getting injured" if he were not wearing a safety belt or line when the work continued (Tr. 47-48).

The evidence reflects that the respondent had erected a work platform around the crusher, but it was dismantled to facilitate the final removal of the structure. The inspector confirmed that he found one safety belt in the work area, but he did not believe it was usable. He also testified that he looked around the immediate work area and found no other safety belts or lines, and asked the employees about them (Tr. 44). Mr. Adams claimed that safety belts were stored in a storage room near the crusher area, and that additional belts were stored in another storage shop associated with a coal mining operation carried out by the respondent at the site.

I conclude and find that the inspector's unwarrantable failure finding was justified. While it may be true that safety belts and lines were stored in storage rooms, the fact remains that the two cited employees were not wearing them at the time they were observed working at a precarious position on top of the very same crusher from which Mr. Cantrell fell and was seriously injured because he was not wearing a safety belt or line. As the responsible mine operator, Mr. Adams had an obligation and duty to insure that the men who continued to work on the crusher after Mr. Cantrell was injured were wearing safety belts and lines to preclude another serious accident. I conclude and find that Mr. Adams' failure to do so constituted "aggravated conduct" and clearly supports the inspector's order. Accordingly, the inspector's finding and the contested order ARE AFFIRMED.

Order No. 3883609

Inspector Jones testified that since quarry operator Stuart Adams initially found it necessary to designate Mr. Cantrell as the person in charge in the event of an emergency, he should have designated someone to replace Mr. Cantrell as the person in charge after Mr. Cantrell was injured. Since he did not do so, Mr. Jones believed that the unwarrantable failure order was justified (Tr. 62).

The credible and unrebutted testimony of Mr. Adams reflects that he was out of town on the day that Mr. Cantrell was injured, that the quarry was not in a normal production mode, and the only work taking place was the dismantling of the crusher. Mr. Adams stated that he designated Carl Stumbo, an experienced and trained crane operator, who had previously served as one of his superintendents, to operate the crane used to dismantle the crusher. Conceding that he did not formally designate or advertise Mr. Stumbo as the person in charge, Mr. Adams testified credibly that he believed that Mr. Stumbo was in charge, but that Mr. Stumbo was reluctant to admit this to the inspector.

I take note of the fact that section 56.18009, requires the designation of "a competent person" to be in charge in the event of an emergency. A "competent person" is defined in section 56.2, as a person "having abilities and experience that fully qualify him to perform the duty to which he is assigned". I find no evidence to suggest that Mr. Stumbo was not qualified to perform his crane duties, and although I have concluded that Mr. Adams did not specifically designate Mr. Stumbo to be in charge in case of an emergency in violation of section 56.18009, I find his explanation in mitigation of the violation to be plausible and believable.

After careful consideration of all of the evidence presented in support of the disputed order, I conclude and find that the inspector's asserted justification for his unwarrantable failure finding does not support a finding of aggravated conduct on the part of the respondent. In my view, the inspector's testimony reflects the application of a "knew or should have known" standard to support a moderately high degree of negligence, rather than the kind of "aggravated conduct" reflected by the Commission's relevant decisions. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) Order IS MODIFIED to a section 104(a) citation with "S&S" findings.

Citation No. 3883610 and Order Nos. 38833611 and 3883612

The evidence reflects that the blaster who prepared the boulders for blasting was laid off on January 16, 1992, and that when he left the mine site that day the boulders had not been shot, and they remained in that condition until January 23, 1992, when Mr. Jones observed them during his inspection. Mr. Jones testified that Mr. Adams admitted that he knew that the cited conditions existed, and because of these purported admissions, Mr. Jones concluded that the violations were unwarrantable failure violations pursuant to section 104(d)(1) of the Act (Tr. 80, 89, 109).

Mr. Adams testified that he was informed of the existence of the two charged boulders on the morning of January 23, 1992, by

one of his employees while Mr. Jones was at the quarry, and that he immediately called the blaster at his home and instructed him to come to the site and detonate the charged boulders. Mr. Adams confirmed that the blaster left the site on January 16, 1992, when he was laid off at his own request, but Mr. Adams denied that the blaster informed him that day that the boulders had been drilled and charged. Mr. Adams further denied that he admitted to Mr. Jones that he had been aware of the conditions since January 16, 1992. Mr. Adams acknowledged that he answered in the affirmative when Mr. Jones asked him if he were aware of the cited conditions, but he explained that this response was made in the context of his knowledge as of the day of the inspection on January 23, 1992, after he learned of the cited conditions from one of his employees.

The critical issue in support of the unwarrantable failure findings by Inspector Jones is whether or not Mr. Adams had known since January 16, 1992, that the boulders had been drilled and charged and left in that condition by the blaster at the time he was laid off at his own request, or whether Mr. Adams first learned of the conditions on January 23, 1992, as he claims.

The burden of proof with respect to the alleged unwarrantable failure violations lies with the petitioner. Although the citation and orders include a statement that "the operator was aware that this condition existed" as part of the description of the cited conditions, I find no credible evidence to support a conclusion that Mr. Adams knew that the cited conditions existed as of January 16, 1992, when the blaster was laid off. Nor do I find any credible evidence that Mr. Adams laid the blaster off knowing full well that the boulders had been drilled, loaded, and made ready to be blasted, and that he simply allowed them to remain in that condition indefinitely.

The blaster was not called to testify, and there is no indication that he was deposed, or that he was unavailable for the hearing or beyond the reach of a subpoena. Inspector Jones confirmed that he spoke with the balster when he returned to the site on January 23, 1992, in response to Mr. Adams' request, but Mr. Jones could not remember whether he asked the blaster if he had informed Mr. Adams on January 16, 1992, that he had drilled and charged the boulders before he left the quarry site that day. Further, although Mr. Jones confirmed that he made some inspection notes concerning the violations, he did not have them with him during his hearing testimony, and none have been produced.

The respondent's compliance history does not reflect any prior blasting citations, nor does it reflect any prior unwarrantable failure violations. Further, Mr. Adams' testimony that the blaster himself asked to be laid off is not rebutted, and it stands in contrast to the inspector's undocumented

testimony that the blaster told him that Mr. Adams came to the site on January 16, 1992, and told him that he was laying him off "as of right now", and that the blaster simply walked away. When asked whether or not the blaster gave any explanation for Mr. Adams' rather abrupt and unannounced layoff, the inspector stated that the blaster told him that Mr. Adams "did what he pleased" and that his decisions were "final and instant" (Tr. 103).

Having viewed Mr. Adams in the course of the hearing, he impressed me as being rather independent and not too enchanted with the inspector, but he did not impress me as the kind of individual who would deliberately leave himself open to severe sanctions pursuant to section 110(c) of the Act, or to possible criminal action, by knowingly allowing a blaster to walk away from his quarry leaving behind two charged boulders which had been readied for blasting. Mr. Adams also impressed me as a credible individual, and I find his testimony that he first learned about the boulders on January 23, 1992, on the day of the inspection, rather than on January 16, 1992, as suggested by the inspector, to be believable and plausible. I take note of the fact that the boulders were located in a remote area of the quarry, and based on the testimony and evidence adduced in this case it does not appear that Mr. Adams was continuously at the quarry site for any extended periods of time. Under the circumstances, and in the absence of any evidence of aggravated conduct on the part of the respondent, I conclude and find that the petitioner has failed to make a case in support of the unwarrantable failure findings by the inspector. According, his findings in this regard ARE VACATED, and the contested section 104(d)(1), citation and orders ARE MODIFIED to section 104(a) citations.

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

Inspector Jones described the respondent's mining operation as a multi-bench limestone operation which crushes limestone rock in the primary crusher. After the crushing process, the limestone is transported to a conveyor belt to a screen where it is sized in different categories and stockpiled for sale to customers. Mr. Jones stated that the quarry consists of approximately twelve acres. At the time of his inspection there were approximately six employees dismantling the primary crusher so that it could be repaired, six-to-eight employees were working in the shop, and one employee was at the scale house where the stockpiled crushed limestone would be loaded on the customers trucks. He also indicated that at one time the respondent had as many as fifty employees working at the quarry property.

The information provided on the face of MSHA Forms 1000-179, Proposed Assessment, which are part of the pleadings, reflect

that the respondent produced 86,640, tons of crushed limestone annually (Exhibits G-7 and G-8).

Based on all of the available evidence and testimony, I conclude and find that the respondent is a small mine operator, and absent any evidence to the contrary, I further conclude and find that payment of the civil penalty assessments which I have made for the citations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

An MSHA computer print-out reflects that the respondent paid civil penalty assessments of $870, for eighteen (18) section 104(a) citations during the period January 22, 1990, through January 21, 1992. Twelve (12) of the citations are "single penalty" non-"S&S" citations, and there are no prior violations for any of the mandatory safety standards cited in these proceedings. Under all of these circumstances, I cannot conclude that the respondent's compliance record warrants any additional increases in the civil penalty assessments that I have made for the violations which have been affirmed.

Good Faith Compliance

The evidence adduced in these proceedings reflects that all of the violations were timely abated by the respondent in good faith.

Gravity

With the exception of non-"S&S" Citation No. 3883611, and based on my findings and conclusions affirming the inspector's "S&S" findings with respect to the remaining violations, I conclude and find that those violations were all serious.

Negligence

I conclude and find that the two unwarrantable failure violations (Citation No. 3883607 and No. 3883608), were the result of a high degree of negligence. Taking into account the fact that the Act imposes a high degree of care on a mine operator to insure compliance with all mandatory safety standards, I conclude and find that the remaining violations all resulted from the respondent's failure to exercise reasonable care amounting to a moderately high degree of negligence.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the

following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation/Order No.	Date	30 C.F.R. Section	Assessment
3883607	1/22/92	56.15005	$1,600
3883608	1/22/92	56.15005	$1,000
3883609	1/22/92	56.18009	$225
3883610	1/23/92	56.6313	$275
3883611	1/23/92	56.6320	$75
3882612	1/23/92	56.6305	$250

ORDER

The respondent IS ORDERED to pay the civil penalty assessments enumerated above within thirty (30) days of the date of these decisions and order. Payment is to be made to the petitioner (MSHA), and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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