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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. AUSTIN POWDER COMPANY, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. KENT 2010-1529-M A.C. No. 15-00079-230016 E24 Mine: Fort Knox Quarry

DECISION

Before: Priscilla M. Rae, Administrative Law Judge

This case comes before me on a Petition for Assessment of Civil Penalties filed in accordance with section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq. At issue is one §104(a) citation issued in violation of 30 C.F.R. § 56.3200 of the Act by a Mine Safety and Health Administration ("MSHA") inspector. A hearing was held in Lexington, Kentucky. The parties introduced testimony and documentary evidence,[1] and post-hearing briefs were submitted.

Findings of Fact

The Fort Knox Quarry is a medium sized limestone quarry located outside of Elizabethtown, Kentucky (Tr. 10). On June 2010, Fort Knox was operated by Vulcan Materials. Vulcan Materials contracted with Austin Powder Company to load headings and benches at the lime stone quarry (Tr. 11). The citation decided herein arose during an inspection of the quarry conducted by an authorized MSHA inspector (Tr. 24).

1. The Inspection

Donald Gabbard is an MSHA inspector with five years of experience in his position.

[1] Respondent's exhibits were marked after the hearing took place and were never offered for admission. They are therefore not part of the official record. Respondent's exhibits were used to assist its witnesses whose testimony is of record. The introduction of the exhibits would not have provided any additional relevant evidence or affected my decision in this matter.

Prior to his employment with MSHA, he completed a two-year associate's degree in which he had some formal training in geology. He also has approximately five years of experience in surface coal mining with highwalls and about 28 years of underground mining experience with extensive work in benching and highwalls (Tr. 55-56).

On June 2, 2010, Gabbard arrived at Fort Knox to conduct an E0-1 quarterly inspection. When he arrived at the active benching area, he observed a sign posted on cones in the haul road that read "Danger, Keep Out" (Tr. 14, Gov. Ex. S-1, p. 1). The sign was close to 500 feet or further away from the mining activity where the benching and drilling took place (Tr. 16). There were fresh tire marks on the road and a highwall could be seen in the distance behind the sign and cones (Tr. 15). Gabbard and the mine representative accompanying him continued on the haul road past the danger sign to observe the condition of the highwall (Tr. 15).

When arriving at the highwall, Gabbard stated that he observed "an exorbitant amount of loose material" in and around the bench and work area of the wall (Tr. 16). He took photographs of the hazardous loose rock on the highwall, and took photographs of the rock that he believed had already fallen in the work area (Tr. 19; Gov. Ex. S-1 pgs. 2-5). He also took photographs of blue paint marks in the active work area where the Respondent's blaster had traveled and marked locations for the quarry driller to drill (Tr. 17, Gov. Ex. S-1 pgs. 2, 3, and 15).

The highwall also had a 20 foot ledge or safety bench (Gov. Ex. S-1 p. 14), which was intended to protect miners by catching any loose rock that could have fallen from the upper ledge (Tr. 95). Gabbard testified, however, that the safety bench was filled with rock piles that caused the ledge to be too narrow to actually control rock that would fall from the upper layer of the highwall (Tr. 18-19; Gov. Ex. S-1 p.3 and p.14). Gabbard concluded that this created a hazard of falling rock that would reasonably likely cause miners serious injuries by crushing their lower legs (Tr. 46).

On the day that the citation was issued, Gabbard noted that a drill had been delivered to the mine site (Tr. 85, Gov. Ex. S-3). Austin Powder sales representative, Hardin Davis, testified that he recalled marking off the area about five days prior to the citation being issued on June 2 (Tr. 119). He stated that typically a company would come out to drill a couple of days after he marked the locations for drilling (Tr. 120).

The highwall was not scaled and there was no berm to protect miners in the area (Tr. 80-81). The citation was abated after a substantial berm was built 25 feet from the bench wall (Tr. 20). The berm was completed before Gabbard completed his inspection that day (Tr. 21).

The Citation

Citation No. 6518869 reads as follows:

> An Austin Powder worker proceeded past a berm & a Danger-Keep Out sign, and marked off a bench for drilling & blasting that was below a highwall covered with extreme amounts of loose hazardous ground. The majority of the loose material was on the

> lower 20 ft. seam of the highwall but was open to direct access for a distance of about 250 ft. unbermed. The actual marking of the holes (parallel) beneath the highwall extended a measured distance of 110' in length below the wall. The measured distance accessed (perpendicular) from the wall was 16 & ½ ft. Loose material piled up about 4 ½ ft. up the wall to 8 ft. away from wall to propel any falling material toward persons or equipment on the work bench. This exposed this worker to crushing type injuries. The loose condition was highly visible & activity beneath it demonstrated high negligence.

Gov. Ex. 4.

The gravity of the violation was assessed as reasonably likely to result in a permanently disabling injury and as significant and substantial (S&S). The operator's negligence level was assessed as high and the proposed penalty is $15,570. Gov. Ex. 4.

The Standard

30 C.F.R. § 56.3200 provides:

> 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 Violation

The Secretary claims that section 56.3200 requires mine operators to abate hazardous ground conditions in an affected area before work or travel is permitted there. Until abatement occurs, operators must post a warning sign to prevent entry, and when the affected area is left unattended, a barrier must be installed to prevent unauthorized entry, says the Secretary. 30 C.F.R. § 56.3200.

The Secretary asserts that the operator violated section 56.3200 because hazardous ground conditions existed at the highwall, and Davis performed work there without abating the conditions. P. Br. at 6. The Secretary argues that an "exorbitant amount of loose material" at the highwall existed (Tr. 16, 19; Gov. Ex. S-1 pgs. 2-5). The Secretary also relies on the fact that Davis traveled and marked locations by laying down blue paint marks in the hazardous work area for the quarry driller to drill (Tr. 17, Gov. Ex. S-1 pgs. 2, 3, and 15). The Secretary points to Gabbard's testimony that the blue paint marks measured approximately 16 ½ feet from the base of the hazardous highwall (Tr. 29; Gov. Ex. S-1 p. 5 and p. 15). The wall was not scaled and there was no berm or other type of barricade to protect miners in the area (Tr. 80-81).

The Secretary contends that the loose and falling rock was reasonably likely to endanger

Davis and any other miners working near the highwall. The Secretary notes that Gabbard believed that rocks were spilling from the safety bench out and away from the highwall. Gabbard saw rocks that, in his opinion, had fallen an estimated distance of 40 to 45 feet away from the base of the highwall onto the active working floor (Tr. 19, Gov. Ex. S-1 p. 14). Furthermore, according to Gabbard, the spillage was so bad that a loader had been used to push fallen rocks back towards the base of the highwall (Tr. 19; Gov. Ex. S-1 p. 3 and p. 14). According to Gabbard, rocks were piled up at the base of the highwall at such a height and at such an incline that any additional falling rock from the upper shelf would be propelled into the work area (Tr. 19; Gov. Ex. S-1 p. 3, p. 14).

In addition, the Secretary argues that the safety bench would not have mitigated the risk of the hazardous conditions at the highwall. The Secretary relies on Gabbard's testimony that the safety bench was filled with piles of rock, making it too narrow to control any additional rocks falling from the upper shelf (Tr. 18-19; Gov. Ex. S-1 p.3 and p.14).

The Secretary also argues that the "DO NOT ENTER" signage in the road was not an adequate warning sign. The Secretary notes that the signage in the road was close to 500 feet or further away from the mining activity where the benching and the drilling was being conducted (Tr. 16). The Secretary states that ideally, any signage should be located at the edge of the actual active work bench and not so far away (Tr. 16). The Secretary also points to the fact that the highwall was not scaled or supported, no berm or other type of barricade had been erected to protect the miners, and the area "had been accessed with people under it." (Tr. 16).

The operator contends that the Secretary failed to prove that the ground conditions created a hazard in the location where Davis worked. R. Br. 9-11. The operator argues that, in order to prove a violation of section 56.3200, the Secretary must show that the hazard affected the area where work or travel was done or permitted. The operator points to a decision in which an ALJ found no violation of 57.3200,[2] despite the fact that hazardous ground conditions existed, because the Secretary adduced no evidence that there was any work or travel in any area affected by the conditions. *Mountain Parkway Stone, Inc*., 11 FMSHRC 1289, 1298 (July 1989) (ALJ).

The operator argues that "distance" is an appropriate factor for determining whether hazardous ground conditions may affect an area where miners work and travel. R. Br. at 10, *citing* Preamble to the Final Rule, 51 FR 36192 (Oct. 8, 1986) (describing standard as intended to be "performance-oriented"). The operator argues that the blue marks that Davis painted measured 20 feet from the base of the highwall, and not 16 ½ (Tr. 123-24), because Gabbard incorrectly measured the distance starting from the toe of the muck pile instead of the base of the wall. (Tr. 98, R. Ex. 3). The operator argues that the 20 foot distance that Davis established was sufficient to prevent a hazard to himself and others.

The operator brings forth testimony from various witnesses to show that the 20 foot distance was sufficient to protect miners from the hazardous highwall. Wayne Lively, a safety

[2] In its brief, the operator erroneously cites section 56.3200 as the standard at issue in *Mountain Parkway Stone*. However, the applicable standard at issue was 57.3200 because the case arose in an underground mine. 56.3200 only applies to surface mines.

consultant at the mine, testified that any material landing on the muck pile would not likely be propelled out onto the bench because "the loose material … acts as a cushion." Lively opined that if the floor were solid, the rocks would "hit and bounce," but "where it's loose, if a rock falls and hits another rock, they just tumble together." (Tr. 149). Lively further testified that the rocks on the active working floor that were 40-45 feet away from the highwall did not fall from the wall, as Gabbard claimed. Rather the rock "could have been left there when … [the operator was] … mucking out," and "[t]here's a thousand places it could have come from." (Tr. 150). In addition, Davis testified that although there was some loose material on the safety bench, it was not full and would continue to absorb the fall of any material that might fall from higher up (Tr. 134). Charles Lambert, a blaster for Austin Power, along with Mr. Lively, also testified that the safety bench was not full. (Tr. 91, 100, 158).

Finally, the operator argues that I should not rely on MSHA policy to find a violation. According to Gabbard, MSHA has a written policy that dictates that highwalls must have a safety zone of at least 25 percent of the height of the wall (Tr. 70-71). For example, if a highwall is 100 feet, the required distance is a minimum of 25 feet away (Tr. 90). In addition, MSHA's policy requires that the operator place a berm outside the 25 percent safety zone (Tr. 70-71). The operator contends that reliance on this policy is objectionable for two reasons: First, the operator claims that MSHA's policy raises constitutional notice concerns. The operator claims that although the policy was cited by Gabbard at hearing, it was never published or publicized by MSHA and does not appear on the agency's website. Furthermore, the Secretary did not enter this policy into evidence, and although Gabbard testified that inspectors were told to enforce the policy, it was apparently never shared with mine operators. (Tr. 70-71). Second, the operator claims that the policy violates the notice and comment rulemaking requirements of the Administrative Procedure Act (APA). 5 USC § 553. The operator argues that Gabbard's description of the policy at hearing indicates that he believed that the policy defines what the standard requires. (Tr. 70). According to the operator, it therefore in effect became the new standard, without ever going through notice and comment rulemaking. The operator points to a D.C. Circuit decision in *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), in which the court noted that "an amendment to a legislative rule must itself be legislative." The D.C. Circuit also held that "new rules that work substantive changes or major legal additions to existing rules or regulations are subject to the APA's notice and comment procedures as legislative rules." See *U.S. Telecom Ass 'n v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 2005). Similarly, "if an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required." *Id*. at 35 (quoting *Shalala v. Guernsey Mem 'l Hosp*., 514 U.S. 87, 100 (1995); *National Mining Association v. Jackson*, 816 F.Supp.2d 37, 45 (D.D.C. 2011). Since the Secretary failed to undertake notice and comment rulemaking, the MSHA policy should be off-limits when determining whether the operator violated section 56.3200, says the operator.

I reject the argument that MSHA's policy is invalid because it did not go through notice and comment rulemaking. MSHA's policy is basically an informal interpretation of section 56.3200's phrase "affected area," to require a distance equal to 25% of the height of the highwall. Although MSHA's policy does not carry force of law, I grant it some deference because I find that it has the "power to persuade" based on its "thoroughness of consideration, validity of reasoning, consistency with earlier and later pronouncements, and all other relevant

factors." *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944); *Arriaga v. Fla. Pac. Farms, L.L.C*., 305 F.3d 1228, 1238 (11th Cir. 2002) (giving *Skidmore* rather than *Seminole Rock* deference to agency opinion letters interpreting regulations); *U.S. Freightways Corp. v. Comm'r,* 270 F.3d 1137, 1142 (7th Cir. 2001) (holding that *Mead* requires application of *Skidmore* rather than *Seminole Rock* deference to informal interpretations of existing agency regulations). I find the interpretation persuasive because it has been adopted by mine operators generally as a wide-spread industry practice. See e.g., *Robert Sand*, No. 11-3032, 2013 WL 772843 *2 (January 4, 2013) (describing industry practice to keep the excavator away from the wall by at least 25 percent of highwall's height in clay pit operations); see also Mine Safety Health Administration, *Guidelines for Submittal and Evaluation of Ground Control Plans* (for underground coal mines, "the distance that … extends out from the base of the wall is usually determined by measuring out from the base of the highwall a distance of approximately 25 percent of the highwall height."); Tr. 90, 118, 144 (describing Austin Powder's practice as using the 25 percent distance rule). Accordingly, the Secretary's interpretation that an "affected area" is within a distance measured at 25 percent of the height of the highwall is entitled to *Skidmore* deference.

Likewise, I reject the operator's argument that MSHA's policy raises constitutional notice concerns. Although the broad wording of section 56.3200 allows it to be applied to myriad factual contexts, I find that notice exists because the Secretary can show that a "reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that the condition of the quarry wall posed a hazard to persons" in the working area. *Shine Quarry, Inc*., 17 FMSHRC 1397, 1400 (Aug. 1995) (ALJ). Gabbard testified that he and other inspectors personally notified operators during inspections about the 25% distance and berm requirements of the policy (Tr. 70-71). This is corroborated by Davis, Lambert and Lively's statements that the operator uses the 25% requirement as a "rule of thumb" for drilling highwalls (Tr. 90, 118, 144). Thus, I find that the operator had actual notice of MSHA's interpretation of the phrase "affected area." See e.g., *Consolidation Coal Co*., 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); see also *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warning to bring about compliance with its interpretation will provide adequate notice). As a result, MSHA's interpretation of an "affected area" covering a distance measured at 25 percent of the height of a highwall constitutes relevant guidance to determining whether Davis violated section 56.3200.

Based on MSHA's interpretation and the evidence presented in the record, I find that the operator violated section 56.3200. To prove a violation of section 56.3200, the Secretary must establish the following three elements:

- First, hazardous ground conditions must have existed at the highwall.
- Secondly, an employee must have performed work in the area affected by the hazard.
- Third, the operator must have failed to undertake proper corrective action such as scaling, support, or erecting a barrier.

I find that the Secretary has met his burden of proof on each element, as discussed below:

First, a hazard existed at the highwall. I credit Gabbard's testimony that hazardous ground conditions existed at the highwall. Gabbard is an experienced inspector and is well-qualified to expose the opinion he reached in this case. He has personally observed hazardous highwall conditions that led to a rock crushing fatality in the past (Tr. 51-52). He testified that the conditions he observed in the instant case are similar to those in which the previous fatality occurred. (Tr. 52). He also testified that the highwall was in the worst shape he had ever seen (Tr. 17). An experienced MSHA inspector's opinion that a hazard exists is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Thus, I find that a safety hazard occurred.

Secondly, I find that the safety hazard affected the area where Davis worked. Specifically, loose rocks were likely to fall or roll into the area where Davis painted down the blue markings. I do not give weight to any the evidence offered by Respondent's witnesses that Davis's distance from the highwall was sufficient to avoid any danger. As noted above, the operator has adopted the 25% requirement as a "rule of thumb" for drilling highwalls. Regardless of whether Davis was 20 feet or 16 ½ feet from the highwall, he was too close of a distance to be working. The highwall was 88 feet high, which would call for a minimum distance of at least 22 feet out from the base of the highwall.

Likewise, I do not give weight to Lively's testimony that the material would not be propelled out into the area where Davis worked. A rock could have fallen from the upper bench, hit the safety bench which was filled with muck, and be propelled out beyond where work was being done. Rock could also fall from the wall, hit other rocks, miss the safety bench and follow a trajectory out and past where the work was being performed. I do not credit Davis's testimony that the safety bench was not full and would continue to absorb the momentum of any material that might fall from higher up. I also do not credit Lambert's testimony that the rock would fall straight down into the safety bench, which was wide enough to catch the rock (Tr. 99), and that many of the rocks were flat and jagged, as opposed to round, and, as a matter of physics, were unlikely to bounce or roll into the working area. This argument ignores the fact that as rocks fall, they can strike the side of the wall and bounce out and away from the wall. They do not necessarily fall straight down, no matter what shape they are, and this could endanger the safety and lives of miners working nearby. Furthermore, Davis himself testified that "the wall was getting ratty looking, and it had loose material laying on the …[safety] bench" and he was concerned that the loose rock on the edge of the safety bench would fall into his work area. (Tr. 124 and 135). This corroborates Gabbard's assessment of the hazard affecting miners working in the area. I also reject the notion that the muck at the toe of the highwall would have absorbed the falling rock. As Gabbard testified, a considerable amount of the muck was "built up" at an incline, which would only speed up any falling rock as it rolls toward the working area (Tr. 59). I also credit Gabbard's testimony that rocks had already rolled about 40 to 45 feet away from the base of the highwall onto the active working floor (Tr. 19, Gov. Ex. S-1 p. 14). Although Gabbard did not observe the rocks falling from the highwall, I find that the rocks were likely to have fallen from the highwall and rolled out into the working area, due to their weathered condition and circular shape. Furthermore, the rocks were larger than the other rocks that were located in that part of the working area. Thus, I find it more likely than not that the rocks

originated from the highwall, as opposed to having merely fallen from a truck during the mucking out process (Tr. 76, 78-79). Thus, I find that the hazardous ground conditions at the highwall affected the area where Davis was working.

Third, I find that the operator failed to undertake proper corrective action as required by section 56.3200. The standard requires scaling or support to abate the hazard of loose ground, or alternatively, a barrier must be erected when the affected area is left unattended. 30 C.F.R. § 56.3200. It had been several days since the area was used when Gabbard issued the citation so the area was unattended. Lively's testimony that there was a barrier because of an orange line drawn parallel to the wall that Davis made is completely unsupported by the record and contradicted by his own testimony. When questioned by the Court, Lively admitted that he did not know the color of the line, and that the blue dots that were drawn to mark the shots functioned as the barrier to mark off the safety zone (Tr. 163-65). Lively's testimony is also contradicted by Davis himself who drew the blue dots to mark the shots, and not to mark off a danger zone. The fact that the markings were drawn to designate shot holes means that miners were required to work in that area, which supports Gabbard's testimony. In any case, markings or lines drawn on the ground, regardless of color, do not constitute a "barrier." A barrier is something that is designed to prevent unauthorized entry into an area, such as a berm. Thus, the blue markings do not constitute a "barrier" within the plain meaning of section 56.3200. [3]

Likewise, the "DO NOT ENTER" sign does not constitute a barrier. The sign was 500 feet away from the wall and too far away to prevent unauthorized entry. This is consistent with the fact that Davis admitted that the sign was not intended to prevent miners from entering the area, but rather to tell haul truck drivers to stay out (Tr. 127). Therefore, the sign is not an adequate "barrier" within the meaning of section 56.3200.

Moreover, Commission precedent supports a violation finding. *Cyprus Tonopah Mining Corp*. No. WEST 90-202-M, 1993 WL 396988 (March 22, 1993) is relevant here. In *Cyprus*, the Commission upheld the judge's finding of a violation of section 56.3200 based upon a similar set of facts. Specifically, the Commission affirmed the judge's findings that the safety benches were full, that there was loose material on the faces, and that the loose material "could come down and get somebody." *Id*. at 3. In addition, the Commission also upheld the judge's finding that pieces

[3] Even assuming such markings could constitute a barrier, 30 CFR § 56.2 defines a barrier as an "object" that "demarcates in a *conspicuous* manner" through means "such as cones, a warning sign, or tape." 30 C.F.R. § 56.2 (emphasis added). The blue markings here were not "conspicuous" for three reasons: First, they were not drawn in a continuous manner to indicate a marking off sign. Second, I do not give much weight to the operator's testimony that the blasters knew to interpret such blue markings to mean "DO NOT ENTER." Rather, I credit Gabbard's testimony that such blue lines are typically intended to denote drill places for drill holes and not to mark off a hazard area (Tr. 167). Drilling holes and marking off hazard areas are two entirely different tasks that could call for potentially different marking locations. Third, the markings were not parallel to the base of the highwall, which indicates that they were unrelated to the hazardous wall and thus not intended to serve as a warning sign for it. Accordingly, the blue markings were not conspicuous and do not constitute a "barrier" within the language of section 56.2.

of loose material, up to several feet in diameter, existed near the top of the highwall, and that such conditions were hazardous because they could feed rock onto the slopes below and allow material to roll into the working area. Finally, the Commission affirmed the judge's finding that the rough surface of the wall would allow falling rock to bounce, become airborne, and assume a "considerable horizontal velocity." *Id*. The Commission concluded that substantial evidence supported the judge's determination that the ground conditions created a hazard within the meaning of section 56.3200.

Likewise, the safety bench at Fort Knox Quarry was full, there was loose material on the face, and the inclined surface of the wall and muck could allow falling rock to bounce or roll at a "considerable horizontal velocity" into the working area. Furthermore, no berms existed to protect people in the case of falling rock. Therefore, I find the ground conditions constituted a hazard within the meaning of section 56.3200. I further conclude that a "reasonably prudent employer familiar with the mining industry and the protective purposes of the standard would have recognized that the condition of the quarry wall posed a hazard to persons" in the working area. *Shine Quarry, Inc*., 17 FMSHRC at 1400.

Accordingly, I affirm the Secretary's violation finding.

Significant and Substantial (S&S)

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "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 Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984); see also, *Buck Creek Coal Co*., Inc. 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc*., 7 FMSHRC 1125, 1129 (Aug. 1985); see also *Cyprus Tonopah Mining Corp*. No. WEST 90-202-M, 1993 WL 396988 *3 (March 22, 1993) ("In establishing that a violation is S&S, the Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury … [whereas] section 56.3200 [merely] requires that operators restrict miners' access to areas where hazardous conditions exist, whether or not it is likely that the hazard will result in an injury."). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc*., 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co*., 18 FMSHRC 1541, 1550 (Sept. 1996).

The Secretary argues that the violation is S&S. Namely, the underlying conditions at the highwall of loose unconsolidated material, the safety bench being full of rock, and fallen rock on the bench floor all contributed to a safety hazard that was reasonably likely to cause permanently disabling injuries to Davis and other miners who had traveled and had been exposed to the hazardous highwall just days before MSHA arrived. P. Br. at 6-8.

The operator argues that the alleged violation is not S&S, primarily because the Secretary did not provide any concrete evidence that an injury was "reasonably likely" to occur. Rather, the operator contends that it is unlikely that any falling rocks could roll or bounce off the muck pile and travel more than the 20 feet provided by the safety zone. R. Br. at 14-15.

I find that the violation is S&S. With regard to the first and second elements of *Mathies,* I have already found that section 56.3200 has been violated, and that the violation contributed to a discrete safety hazard. As shown above, the safety bench was close to full, there was loose cracked material on the face, and the inclined surface of the wall and muck was reasonably likely to allow falling rock to bounce and roll into the working area. I also find that the third and fourth elements of *Mathies* have been met. As shown above, a miner was within 16 ½ feet from the toe of the muck pile and only 20 feet from base of the highwall, and rocks had already fallen 40-45 feet beyond the highwall. The miner was therefore exposed to the hazard of falling rock. This hazard was reasonably likely to seriously injure and permanently disable the miner's lower legs. Furthermore, there was no question that drillers were going to come in next and drill the shots, assuming continued normal mining operations. They would have been in serious danger as well. Therefore, I find that the Secretary has established the four *Mathies* criteria. Several other Commission judges have also affirmed S&S violations of section 56.3200 where the presence of loose, overhanging and cracked material, and other dangerous conditions were present on a highwall above an area where miners worked. *Lakeview Rock Products*, 34 FMSHRC 244, 258 (Jan. 2012) (ALJ); *Connolly- Pacific Co*., 33 FMSHRC 2270, 2272, 2288-90 (Sept. 2011) (ALJ); *Richard E. Seiffert Resources*, 23 FMSHRC 426, 430 (Apr. 2001) (ALJ); *Summit Inc.*, 19 FMSHRC 1326, 1335 (July 1997) (ALJ). Accordingly, I affirm the Secretary's S&S designation.

Negligence

The Secretary argues that the violation was the result of Respondent's high negligence in failing to comply with section 56.3200. P. Br. at 8. The Secretary contends that Davis knowingly exposed himself to the hazardous work area when he painted the drill marks at the highwall, and that he was a trained, competent miner who knew that the area was unsafe and too hazardous for travel and work. *Id*.

The operator counters that the alleged violation did not result from high negligence. It emphasizes that Davis's actions to prevent hazardous conditions constitute a mitigating

circumstance because he carefully examined the condition of the highwall and extended the distance away from the highwall before commencing work. R. Br. at 15-16. The operator also claims that it had never previously been cited for laying out a shot or working too close to a highwall. R. Br. at 3.

I find that the violation resulted from high negligence. High negligence occurs when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). No mitigating circumstances exist here. Davis knowingly exposed himself to the hazardous work area when he painted the drill marks at the highwall, and took no efforts to abate the violation prior to receiving the citation. Davis is a trained, competent miner, and either knew or should have known that the area was unsafe and too hazardous for travel and work (Tr. 47). Furthermore, the fact that Davis extended the distance from the highwall to 20 feet does not constitute a mitigating circumstance. As shown above, 20 feet was still too close to constitute a safe distance. The operator was well-aware of MSHA's interpretation of "affected area," which requires a distance of 25% of the height of the highwall. This requirement was not satisfied. Also, the hazardous conditions at the highwall were obvious, as Gabbard testified that the wall was in the worst shape he had ever seen (Tr. 17).

Furthermore, Lively referenced the cost of scaling numerous times as a justification for failing to do so (Tr. 161). This indicates to me that the company was more concerned with production costs than safety (Tr. 160-61). Nothing indicates to me that Respondent would have taken the action required by the standard to make the condition safe before blasting again. Accordingly, I affirm the Secretary's designation of high negligence.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo*, including proposed special assessments, for violations of the Mine Act are well established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. §820(i). The Act requires that in assessing civil monetary penalties, the Commission or ALJ shall consider the six statutory penalty criteria:

1. The operator's history of previous violations;

2. The appropriateness of such penalty to the size of the business of the operator charged;

3. Whether the operator was negligent;

4. The effect on the operator's ability to continue in business;

5. The gravity of the violation; and,

6. The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. §820(i).

The record establishes that the mine is medium-sized (Tr. 10). The operator does not argue that the proposed penalties would affect its ability to continue in business. There is no dispute that the conditions were abated in good faith (Tr. 20-21). The mine does not have a significant history of violations. Mine Data Retrieval System, http://www.msha.gov/drs/ASP/MineAction.asp. The findings with regard to the negligence involved are discussed at length above. With regard to gravity, I find this violation to be serious.

The appropriate penalty is $15,570.

Order

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), I affirm the citation as proposed and assess a penalty of $15,570.00. Austin Powder is **ORDERED** to pay the Secretary of Labor the sum of $15,570.00 within 30 days of the date of this decision.[4]

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN 37219, on behalf of the Secretary of Labor;

Nichelle Young, Esq., Law Office of Adele Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705, on behalf of Austin Powder Company, Inc.

[4] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.