

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 25, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1138-M
Petitioner,	:	A.C. No. 35-03298-149593
	:	
v.	:	
	:	
THREE WAY PORTABLE CRUSHING,	:	
INC.,	:	
Respondent.	:	Mine: Portable

DECISION

Appearances: John D. Pereza, Certified Mine Safety Professional, U.S. Department of Labor, Vacaville, CA, on behalf of the Secretary
Wendell H. Lux, Three Way Portable Crushing, 6330 Harmony Road, Sheridan, OR, on behalf of Three Way Portable Crushing

Before: Judge Barbour

This is a civil penalty proceeding brought pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §§ 815, 820. The Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”), petitions for the assessment of a civil penalty of \$946.00 for one alleged violation of Section 56.3131, a mandatory safety standard applicable to surface metal and nonmetal, including open pit, mine operators. The alleged violation is set forth in a citation issued pursuant to Section 104(a) of the Mine Act. 30 U.S.C. § 814(a).¹

¹ The citation was originally issued pursuant to Section 104(d)(1), but was subsequently modified to a 104(a) citation.

Three Way Portable Crushing, Inc. (“Three Way Portable”) is a six or seven-man crushed stone operation that removes and crushes basalt stone once it has been shot from the high wall. (Tr. 54; 156) Three Way Portable began working at the quarry on January 07, 2008 and planned to operate there for approximately fifteen days. (Gov. Ex. 7) Weyerhaeuser owns the quarry where Three Way Portable was working and Weyerhaeuser developed the high wall.(Tr. 160-161) MSHA Inspector Anderson conducted a regular inspection of the quarry on January 15, 2008 and January 16, 2008. (Tr. 169)² Inspector Anderson issued Citation No. 6430303 based on an alleged violation of Section 56.3131, which requires that loose materials be stripped back from the top of the quarry wall in places where persons work and that fall-of-material hazards be corrected.³ The company contested the penalty assessed for the alleged violation. The matter was assigned to me by the Chief Judge and was heard in Salem, Oregon.

STIPULATIONS

The parties have agreed to the following stipulations:

1. Three Way Portable ...is engaged in the mining of washed rock in the United States, and its mining operations affect interstate commerce, and is subject to the Federal Mine Safety and Health

Section 104(a) states in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a . . . mine subject to this Act has violated . . . any mandatory health or safety standard . . . or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

² Anderson is an MSHA mine inspector with six years of prior experience inspecting mines and 23 years of prior experience working in open pit mines with high walls. (Tr. 23) He has experience with both high wall failures and rock falls. (Tr. 41)

³ 30 C.F.R. § 56.3131 states:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create fall-of-material hazard to persons shall be corrected.

Act of 1977, 30 U.S.C. § 801, et seq.

2. The history of violations as shown in Exhibit A of the Petition for Assessment accurately reflects that of Three Way Portable....
3. The area referred to in citation 6430303 is a pit or quarry.
4. The pit or quarry wall was about two-hundred (200) feet high.
5. There was loose, unconsolidated material on the pit or quarry wall.
6. The pit [or] quarry wall was not sloped to the angle of repose.
7. The top pit or quarry wall had not been stripped back for at least ten (10) feet.
8. Richard Holub, foreman, was on site the day of the inspection which resulted in the subject citation.
9. The mine is located about five (5) miles past the locked gate on the access road to the quarry.
10. The citation was abated in a timely manner.
11. The mine size is small.

(Joint Ex. 1.)

CONTENTIONS RELATING TO CITATION NO. 6430303

Inspector Anderson, testifying on behalf of the Secretary, stated that he issued Citation No. 6430303 after observing a violation of the mandatory safety standard in Section 56.3131, which requires that loose material on quarry walls be stripped back in work areas and that fall-of-material hazards be corrected. 30 C.F.R. § 56.3131. Anderson was accompanied during the inspection by the pit foreman, Rick Holub; Rodric B. Breland, an MSHA Supervisor-Inspector conducting a routine review of Inspector Anderson; and an MSHA trainee. (Tr.25; Tr. 70-71; Tr. 169.) During his inspection, Inspector Anderson noticed that the high wall, measuring approximately 200 feet, had loose material on it. (Tr. 23; Gov. Ex. 4.) Rocks, dead trees and other unconsolidated material had not been stripped back and were hanging on the face of the high wall. (*See* Tr. 26.)

Inspector Anderson testified that he observed a load operator on the left side of the pit repairing a 2.5 or 3.0 foot berm approximately 20 to 25 feet from the high wall. (Tr. 24; Tr. 57.)

These estimates were agreed to by Holub during the inspection. (Tr. 24; Tr. 130; Gov. Ex. 4.) Inspector Anderson did not see the load operator go behind the berm area or see the operator exit the loader while working on the berm. (Tr. 36.) He determined that only one person was affected by the violation based on the fact that he observed only the load operator working under the high wall. (Tr. 43.) Inspector Anderson testified that he saw the load operator digging for material for the berm to the right of the high wall and marked the location on Exhibit 5. (Tr. 48; Gov. Ex. 5.)

Inspector Anderson considered the high wall hazardous because the loose material on top of the high wall presented a fall-of-material hazard to loaders driving down the travel way. (Gov. Ex. 4.) Anderson stated that loose material was likely to fall off the high wall, bounce off the full bench-like structures on the wall and get projected out from the base of the wall at speeds fast enough to cause a fatality. (Tr. 42.) Supervisor-Inspector Breeland affirmed Inspector Anderson's assessment of the likelihood of injury. (Tr. 78.) Breeland testified that he had done an inspection in Colorado involving a fatality caused by the fall of materials from a high wall. (Tr. 77-78.) A small boulder had rolled down the high wall to the road. (Tr. 78.) It hit a loader below and broke through the front windshield with so much force that the seat and the operator were hurled out of the back of the loader. (*Id.*) Anderson determined that the approximately 2.5 or 3.0 foot berm being erected was inadequate protection against this hazard. (Tr. 24-26.) Supervisor-Inspector Breeland testified that he also found the berm inadequate. (Tr. 73.) Anderson recommended that the height of the berm be increased and that the berm be moved farther away from the high wall. (Tr. 48-49.) The operator abated the violation by erecting an approximately 6 foot berm about 50 to 75 feet from the high wall and by moving workers out of the area near the high wall. (Tr. 49-50.)

Inspector Anderson concluded that the violation of Section 56.3131 was significant and substantial based on his determination that a mandatory standard had been violated, there was a discrete danger to persons, injury was reasonably likely to occur and any injury that occurred was likely to be serious. (Tr. 43.)

Inspector Anderson determined that injury from a fall of material was reasonably likely to occur due to weather conditions such as wind and the freezing and thawing of materials on the high wall, the close proximity of the berm being constructed to the high wall and the close proximity of the high wall to the areas where he was digging materials for the berm. (Tr. 37; 43.) Inspector Anderson found high negligence because the berm was placed too close to the high wall and was incomplete at the time of inspection. (Tr. 44.)

Rod Klenski, a load operator for Three Way Portable, testified on behalf of the company. Klenski stated that he and Holub were using a 966F loader and a 966G loader to both repair the berm in question and dig out rock to feed into the crusher plant. (Tr. 110; 114-115; 120.) He stated that approximately 100 feet of the berm was missing. (Tr. 114.) Klenski, who constructed the original 2.5 to 3.0 foot berm located 20 to 25 feet from the high wall, believed that the berm provided adequate protection against a

fall-of-material hazard (Tr. 111.) Holub testified that he told workers to dig on either end of the high wall and not go anywhere near the high wall. (Tr. 131.)

Wendell H. Lux, Secretary for Three Way Portable, disputed the estimates, originally agreed to by Rick Holub during the inspection, and argued that the original berm was actually at least 4.0 feet tall and 50 feet away from the high wall. (Tr. 150) Lux theorized that part of the berm was missing when the inspection began because a road construction contractor working in the pit removed it over the weekend for use as fill material for pipes. (Tr. 159 -160) He testified that this had happened in the past. (*Id.*) The company operated at a reduced level on Monday, January 14, 2008 and did not replace the berm that Monday. (Tr. 172.)

RESOLUTION OF THE ISSUES

CITATION NO. 6430303

Citation No. 6430303 states:

The material at the top of the high wall at the cross over road quarry was not strip[p]ed back 10 ft from the top of the quarry and there was loose and unconsolidated materials including, rocks, and dead trees hanging on the face of the wall. The high wall was estimated to be about 200 ft. in height and was not benched in the area of concern. At the time of inspection a front end loader was observed installing a berm within about 20 ft. from the toe of the high wall. Dave Hansen/President, and Wendell Lux/ Secretary stated that they were aware of the hazardous condition of the high wall and directed employees to install the berm. The loader was directed to dig materials from the shot muck from each end of the pit. Due to the close proximity of the loaders travel way, if materials were to fall from the wall it could result in a fatal injury. Owners Dave Hansen and Wendell Lux engaged in aggravated conduct constituting more than ordinary negligence in that they were aware of the hazardous condition of the high wall and allowed the front end loader operator to travel within approximately 20 ft. of the hazardous high wall area. This violation is an unwarrantable failure to comply with a mandatory standard.

Note: A 6 ft. barrier was erected to eliminate access to the hazardous area. Termination due time will be set to allow operator reasonable time to correct the hazard.

Note: All measurements were agreed upon by the foreman.
(Gov. Ex. 4.)⁴

⁴ As previously noted, the citation was modified from a 104(d)(1) citation to a 104(a) citation.

THE VIOLATION

_____ I conclude that the Secretary has established a violation of the first part of 30 C.F.R. § 56.3131, which requires that loose material be sloped to the angle of repose or stripped back at least 10 feet from the top of the quarry wall. The parties stipulated that there was loose material on the approximately 200 foot high wall and that the material had not been sloped to the angle of repose or stripped back at least 10 feet. Inspector Anderson's testimony that he observed a load operator repairing a berm near the toe of the high wall during his inspection is sufficient evidence to establish that persons travel in the area while performing their assigned tasks. (Tr. 24.)

I conclude that the Secretary has also established that Three Way Portable violated the second sentence of Section 56.3131, which requires that fall-of-material hazards at the base of a quarry wall be corrected. 30 C.F.R. § 56.3131. The parties contest whether there was a berm under the high wall prior to the day of inspection. However, even if the 2.5 to 3.0 foot berm had been in place under the high wall prior to the inspection it would have been inadequate. Given Inspector Anderson's 23 years of experience working in open pit mines with high walls and his personal experience with both high wall failures and minor rock falls, I credit his testimony that a 2.5 to 3.0 foot berm placed 20 to 25 feet from the high wall was inadequate protection against a fall-of-material hazard and that a berm of approximately 6 feet placed 50 to 75 feet from the wall was necessary.

During the inspection Anderson estimated that the berm was 2.5 to 3.0 feet and located 20 to 25 feet from the high wall. These estimates were recorded on the citation he issued and confirmed by Rick Holub, foreman for the company, during the inspection. At the hearing Wendell Lux then claimed that the berm was actually at least 4 feet tall and 50 feet away from the high wall. I find Wendell Lux's argument that the Secretary incorrectly estimated the size and placement of the berm unpersuasive. The Secretary's estimates were made contemporaneously with the inspection and confirmed by Three Way Portable's foreman, Rick Holub. Wendell Lux is the only witness for the respondent who disputed the estimates.

NEGLIGENCE

_____ Though Inspector Anderson modified the citation from a 104(d)(1) citation to a 104(a) citation his negligence finding remained high. Anderson determined the degree of negligence was high based on the fact that the berm being erected was too close to the high wall, part of it was not in place when the inspectors arrived and Holub was aware that miners were erecting the berm. I conclude that the company was moderately negligent. As Holub admitted, Three Way Portable operated on Monday, January 14, 2008 without completing the berm and had not completed the berm by the time the inspection occurred. I credit Holub's testimony that miners

were instructed not to work under the high wall because as foreman he is in a position to know where workers were performing their duties. The only two persons working under the high wall were erecting a safety berm. Further, the company had a partial berm erected which provided some notice and protection to Three Way Portable miners. These facts support a finding of moderate, not high negligence.

S&S GRAVITY

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 that 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 (April 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 3-4 (January 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135(7th Cir. 1995); *Austin Power Co. 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.*, 7 FMSHRC 1125, 1129 (Aug. 1985). Further, 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.

Finally, 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 has proven that a violation of Section 56.3131 occurred. It has been established that the violation contributed to a fall-of-material hazard for miners using the loader travel way. Specifically, the danger was that loose material could fall off the high wall, bounce off the full bench-like structures and get projected out from the base of the wall at speeds fast enough to cause a fatality.

The Secretary has also established that the safety hazard identified was reasonably likely to cause injury. Inspector Anderson determined that the loose materials and inadequate berm

contributed to a fall-of-material hazard for loaders traveling near the high wall. I credit the testimony of Inspector Anderson and Supervisor-Inspector Breeland that this hazard was reasonably likely to cause injury. Inspector Anderson has over 23 years of experience with open pit mines and Supervisor-Inspector Breeland offered persuasive testimony regarding a fatality at another mine caused by material falling from a high wall. Government Exhibit 1 clearly shows at least one uprooted tree dangling down the face of the high wall. This photographic evidence lends further support to Inspector Anderson's assessment of the likelihood of injury. In light of this evidence, I credit Inspector Anderson's finding that injury was reasonably likely, even though Three Way Portable operated at the site for only about 15 days and is a very small six or seven-man operation.

The Secretary has proven that the hazard would cause reasonably serious injury. Given Inspector Anderson and Supervisor-Inspector Breeland's experience, I credit their testimony that loose material falling from the top of the high wall could cause serious injury or even a fatality. For the reasons above, I find that the violation was both significant and substantial and serious.

REMAINING CIVIL PENALTY CRITERIA

The Act requires that I assess a civil penalty for the violation. It also requires that in doing so, I consider the statutory civil penalty criteria. 30 U.S.C. § 820(i).

HISTORY OF PREVIOUS VIOLATIONS

Three Way Portable's history of previous violations reflects very few prior violations. I find, based on the record in this case, the applicable history of previous violations is a mitigating factor. Therefore, I will reduce the penalty based in part on Three Way Portable's prior history.

SIZE

The parties have stipulated that Portable is a small mine. (Joint Ex. 1) Accordingly, I will assess a lesser amount than I would for medium or large operations.

ABILITY TO CONTINUE IN BUSINESS

There is no evidence the size of any penalty assessed will adversely affect Three Way Portable's ability to continue in business, and I find it will not. Therefore, when assessing a penalty, I will neither increase nor decrease it on account of this criterion.

GOOD FAITH ABATEMENT

Finally, the parties agreed that the alleged violation was abated in good faith by Three Way Portable and in a timely manner.(Joint Ex. 1.) The company's prompt good faith abatement supports a reduction in penalty.

CIVIL PENALTY ASSESSMENT

Given the civil penalty criteria discussed above, I assess a civil penalty of \$600.00.

ORDER

Consistent with this Decision, it is **ORDERED** that Citation No. 6430303 is **AFFIRMED** except that the inspector's negligence finding is **MODIFIED** from "high" to "moderate."

Within 40 days of the date of this decision, Respondent is **ORDERED** to pay civil penalties totaling \$600.00 for the violation found above. Upon payment of the penalty and modification of the citation, this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution:

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