

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

March 2, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-858-M
Petitioner	:	A.C. No. 42-01975-143531
	:	
v.	:	
	:	
LAKEVIEW ROCK PRODUCTS, INC.,	:	
Respondent	:	Lakeview Rock Products

DECISION

Appearances: Hillary A. Smith, Conference & Litigation Representative,
U.S. Department of Labor, MSHA, Denver, Colorado,
for the Petitioner;
Kevin R. Watkins, Esq., Lakeview Rock Products, Inc.,
North Salt Lake, Utah, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”), 30 U.S.C. § 820(a), by the Secretary of Labor (“the Secretary”) against the respondent, Lakeview Rock Products, Inc., (“Lakeview”). This matter was heard on November 17, 2009, in Salt Lake City, Utah. The parties’ post-hearing briefs are of record.

The Secretary seeks to impose a total civil penalty of \$1,602.00 for two alleged violations of mandatory safety standards governing surface metal and nonmetal mines. Specifically, the Secretary proposes a civil penalty of \$1,412.00 for Citation No. 6318475 that cites an alleged significant and substantial (S&S) violation¹ of 30 C.F.R. § 56.3131. This safety

¹ Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

standard requires mine operators to keep the area near the perimeter of the pit or quarry highwall free of conditions that create a fall-of-material hazard to persons working or traveling below.² The Secretary also sought to assess a civil penalty of \$190.00 for Citation No. 6318476 that alleges a non-S&S violation of 30 C.F.R. § 56.6132(b) that requires nonmetal magazines to be grounded. At the trial, the parties agreed that Lakeview will pay a reduced civil penalty of \$100.00 in satisfaction of Citation No. 6318476. (Tr. 123). Thus, the only remaining unresolved issue is the fact of occurrence of the alleged highwall violation in Citation No. 6318475.

I. Findings of Fact

Lakeview owns and operates a surface gravel pit located in North Salt Lake, Utah. The highwall at this surface mine is not vertical. Rather, the natural rock formation is recessed and slopes away from the point where the base of the highwall meets the quarry floor. (Gov. Ex. 1, pps. 2-4). The gravel material is loosened from the highwall by an explosive blast. The loosened material is pushed by a dozer from an upper bench to a feed deck below where a loader operator picks up the material at the pit floor and transports it directly to one of several screens and four stationary crushers. (Gov. Ex 1, p. 1). Alternatively, the extracted gravel material is loaded at the bottom of the feed deck by the loader operator and dumped into haul trucks for transport to the crushers. In either case, the route traveled by the loader to and from the feeder deck to the crushers or trucks is in a general direction that is away from the base of the highwall. Specifically, the distance between the loader and the base of the highwall during the course of travel by the loader to and from the crusher and trucks is at least 80 feet as depicted in the photographic evidence. (Gov. Ex. 1, pps. 2, 3; Tr. 110-112,119). At the crushers the material is crushed, sized and stockpiled for sale and use in construction projects.

Mine Safety and Health Administration (MSHA) Inspector Curtis Pittman inspected the Lakeview Quarry on February 11, 2008. Pittman was accompanied by Greg Fowers, Lakeview's plant manager. Pittman initially observed the general condition of the roadways and highwall. Pittman observed the feed deck where a loader operator was removing material that had been extracted and pushed down by a dozer from the bench above. During his testimony, Pittman expressed concern that the angle of repose can be disturbed if the loader operator gets ahead of the dozer by removing unconsolidated material from the pit of the quarry floor in instances when the dozer has not pushed additional material from the bench above for several days. However, Pittman conceded that, at the time of his inspection, the loose unconsolidated material at the feeder deck was resting at an angle of repose and did not create a hazard to the loader operator. (Tr. 31, 49-52).

² Citation No. 6318475 initially cited a violation of the mandatory standard in 30 C.F.R. § 56.3130. The Secretary's motion to amend the citation to reflect the cited standard as 30 C.F.R. § 56.3131 was granted on the record. (Tr. 8-12). The provisions of section 56.3131 are repeated verbatim in Citation No. 6318475 thus negating any claim by Lakeview that it has been surprised or otherwise prejudiced by the Secretary's amendment.

Rather, Pittman was concerned about “some very large rocks precariously perched kind of up on the side of the hill there, and the loader tracks, and where the loader was at, caused me to be concerned that he was close to that area.” (Tr. 31-32). The very large rocks observed by Pittman were located on a ledge to the right of the feeder deck area. The ledge where these rocks were located was recessed back approximately 100 feet from the base of the unconsolidated dolomite stockpile and the pit floor. (Tr. 115). The subject rocks that concerned Pittman were recessed on the highwall in an area where large rock boulders were located at the base of the highwall. (Gov. Ex 1, p. 3). Pittman opined that these large boulders situated at the base of the highwall had fallen from the rock formation. (Tr. 90-91). Lakeview contends that they were intentionally placed there for safety to prevent the loader from traveling near the highwall. In any event, these boulders served as a barrier that prevents the loader from traveling in close proximity to the base of the highwall.

Scott Glen Hughes, Vice-President of Lakeview Rock Products, testified that the subject large recessed rocks that concerned Pittman were placed on the ledge over five years ago as a protective berm for the dozer operating on the upper bench. Although Pittman testified that the rocks were in a “precarious” location, Hughes credibly testified that the rocks were located approximately 30 feet from the edge of the bench or ledge. (Tr. 107; *see* Gov. Ex. 1, pps. 2, 3). Hughes was familiar with the location of the rocks because of their placement as a berm, and because he was responsible for removing the rocks to abate the subject citation. The discrepancy between Pittman’s “precarious” characterization, and Hughes’ testimony that the rocks were 30 feet from the highwall edge, can be attributable to Pittman’s poor vantage point on the pit floor. (Tr. 108). In this regard, Pittman was observing rocks located on a highwall that was approximately 100 feet high, at a location that was recessed approximately 100 feet from the base of the highwall. In addition, Hughes testified that the rocks were stationary and unlikely to move because they required a 150,000 pound D-11 dozer with 1,000,000 pounds of drawbar force to push them off the highwall. (Tr. 109-10).

As a result of his observations, Pittman issued Citation No. 6318475. The second paragraph of the citation contains verbatim the entire provisions of section 56.3131. The citation states:

The loader operators on the feed deck of the upper pit are exposed to loose unconsolidated rocks (some as large as 5 ft. in diameter) from the highwall above.

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 a fall-of-material hazard to persons shall be corrected.

(Gov. Ex. 2, p. 1).

The alleged violation was designated as significant and substantial based on Pittman's belief that the recessed rocks would fall down, either on or in very close proximity to the loader. (Tr. 53). Pittman conceded that the loader could not be directly exposed at the toe of the highwall in the event the subject recessed rocks fell because of the barrier created by the boulders that were located at the highwall base. Moreover, Pittman admitted that it was unlikely that the subject very heavy rocks could defy gravity and pose a hazard to the loader operator situated in the operator's compartment approximately 10 feet above the ground in a loader traveling at least 80 feet from the base of the highwall. (Tr. 65). Undeterred, Pittman concluded that it was possible that the loader operator could be exposed to falling rock as far as 80 feet from the base of the highwall, where the loader tracks are depicted in Gov. Ex. 1, p. 2, because "rocks can bounce." (Tr. 63- 64).

II. Further Findings and Conclusions

Section 56.3131, the subject mandatory standard, concerns two separate and discrete hazards. The first hazard, not relevant here, is caused by loose unconsolidated material. When loose or unconsolidated material is located near the perimeter of a vertical highwall, section 56.3131 requires that such material must be stripped back a distance of at least ten feet from the edge of the quarry highwall. When the loose unconsolidated material is in a stockpile, such as the loading deck in this case, section 56.3131 requires that such stockpiles must be trimmed or sloped back to maintain the angle of repose. Although Inspector Pittman was concerned that blasted material can be removed from the bottom of the stockpile before additional material is pushed by the dozer onto the stockpile from the bench above, thus disturbing the angle of repose, Pittman conceded that the angle of repose was maintained at the time of his inspection. Thus, the Secretary does not contend that the loose unconsolidated blasted material posed a hazard to the loader operator, or otherwise violated the provisions in section 56.3131.

The second hazard in section 56.3131, that is in contention in this matter, is a generic fall-of-material hazard. Specifically, section 56.3131 requires the removal of "[o]ther conditions [not associated with unconsolidated materials in stockpiles] *at or near the perimeter of the pit or quarrywall which create a fall-of-material hazard* to persons" (Emphasis added). This potential hazard consists of two elements. The first element is whether the subject rocks or other materials pose a fall-of-material hazard. In other words, the issue is whether the subject material is essentially stable, or, in danger of falling. It is significant that the cited rocks are recessed rather than situated at the perimeter of the highwall. The second element concerns whether there is a risk that persons will be exposed to the falling material because there is a reasonable possibility that the material will fall where persons work or travel.

As a threshold matter, it is worth noting that the circumstances in this case do not present a typical risk of exposure to quarry personnel who are working on the pit floor below loose rock or unconsolidated material located at the edge of a vertical highwall. Rather, the instant case concerns boulders, as large as five feet or more in diameter, that are on a bench that is set back approximately 100 feet from the toe of the highwall. Hughes, Lakeview's Vice-President, credibly testified that these boulders were placed on the bench approximately five years ago as a protective berm for the dozer operator. These recessed boulders are located in an area where large boulders are stacked at the base of the highwall as a barrier to prevent persons from working or traveling in the area directly adjacent to the highwall. In fact, Pittman believed construction of a barrier, that would achieve the same purpose as the existing boulders located at the base of the highwall, was an acceptable alternative method of achieving abatement if Lakeview elected not to remove the subject boulders from the bench. (Tr. 45-47). The uncontradicted evidence reflects that, during the route taken by the loader to off-load the blasted material, the loader maintains a distance of at least 80 feet from the highwall base.

The Secretary bears the burden of proving by the preponderance of the evidence, that the conditions cited support the fact of a violation of the mandatory safety standard in issue. The Commission has noted that the preponderance of the evidence standard requires the trier of fact believe that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

To satisfy her burden of demonstrating that the subject rocks pose "a fall-of-material hazard to persons," the Secretary argues ". . . that if several ton[s] of rock fell and landed in the wrong place ... we could have tragic consequences, serious injury and potentially death." (Sec'y Br. at p. 2). Indeed. However, the Secretary's "anything can happen theory" falls far short of satisfying her burden of proof by a preponderance of the evidence. Rather, the evidence reflects that these very large rocks were essentially stationary and extremely unlikely to move. In this regard, they had remained in place for several years and they could only be moved by a very large D-11 dozer.

Assuming, for the sake of argument, that the subject rocks did roll from their recessed location to the edge of the highwall, the Secretary's speculation that they could hit the ground and bounce for a distance of more than 80 feet, or, be propelled from the edge of the highwall, and strike the side or top of the loader operator's compartment is unavailing because it is contrary to the law of gravity. Rather these rocks would fall at the base of the highwall on the boulders that currently serve as a barrier preventing the loader from operating in proximity to the toe of the highwall.

Thus, in the final analysis, the Secretary has failed to demonstrate by a preponderance of the evidence that the cited rocks "create a fall-of-material hazard to persons" as contemplated by section 56.3131. Accordingly, Citation No. 6318475 shall be vacated.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 6318475 **IS VACATED**.

IT IS FURTHER ORDERED, consistent with the parties' settlement terms, that Lakeview Rock Products, Inc., **SHALL PAY**, within 45 days of the date of this Decision, a civil penalty of \$100.00 in satisfaction of Citation No. 6318476.

IT IS FURTHER ORDERED that, upon timely payment of the \$100.00 civil penalty, this proceeding docketed as WEST 2008-858-M **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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