FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 25, 1997

SUMMIT, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. CENT 95-108-RM
v.	:	Citation 4422929, 1/9/95
	:	
	:	Docket No. CENT 95-109-RM
SECRETARY OF LABOR,	:	Order 4422930, 1/9/95
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-110-RM
Respondent	:	Order 4422931, 1/9/95
	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	
	:	
v.	:	
	:	
SUMMIT, INC.,	:	Docket No. CENT 96-45-M
Respondent	:	A.C. No. 39-01284-05514 X52
	:	
	:	
CHARLES ROUNDS, employed by	:	Docket No. CENT 97-20-M
SUMMIT, INC.,	:	A.C. No. 39-01284-05517 A X52
Respondent	:	
	:	
TOM LESTER, employed by	:	Docket No. CENT 97-21-M
SUMMIT, INC.,	:	A.C. No. 39-01284-05518 A X52
Respondent	:	
	:	
DELVIN PRICE, employed by	:	Docket No. CENT 97-22-M
SUMMIT, INC.,	:	A.C. No. 39-01284-05519 A X52
Respondent	:	
	:	Open Cut - Lead Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
John D. Austin, Jr., Esq., Austin & Movahedi, Washington, D.C. for Summit, Inc., and the individual Respondents.

Before: Judge Manning

These cases are before me on notices of contest filed by Summit, Inc. ("Summit") and petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Summit, Charles Rounds, Tom Lester, and Delvin Price, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. A hearing was held in Rapid City, South Dakota. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. FINDINGS OF FACT

A. Background

At about 1:50 a.m. on January 5, 1995, Tracy Millard was fatally injured when the east highwall of the mini-pit in the Open Cut-Lead Mine failed. Approximately 60,000 to 70,000 tons of rock engulfed the shovel that Mr. Millard was operating. Michael Wagner, a haul truck operator, was injured by the fall of ground.

The Open Cut Mine is a multiple bench, open pit gold mine owned by Homestake Mining Company of California ("Homestake"). The mine is in Lead, South Dakota. Within the Open Cut Mine there was an area known as the "mini-pit." The mini-pit was abandoned after the accident. The Open Cut Mine is pear-shaped and the mini-pit was at the north end of the pit where the stem is attached to the neck of the pear. (Ex. R-1). At the time of the accident, the Open Cut Mine was about 4,800 feet long north to south, 2,400 feet wide east to west, and 900 feet deep.

In the mini-pit, the east highwall was 80 feet high and the west highwall was about 40 feet high. The mini-pit was about 150 feet wide and 480 feet long. The mini-pit was in the deepest part of the mine. Because the mini-pit was narrow and the bench face on the east side was high, miners felt that they were working in a confined area and were more uncomfortable working there than in other areas of the pit. Mining methods in the mini-pit were the same as in the remainder of the Open Cut Mine. Highwalls are generally 80 feet high and benches are 30 feet wide. The geologic conditions are basically the same in both areas. The rock in the east highwall, the hanging wall, is rather solid and had been relatively stable over the life of the Open Cut Mine. The rock in west highwall, the foot wall, is more unconsolidated with the result that sloughing

often occurs. Homestake retained consultants to design and implement safety precautions to protect persons working near the west wall.

Summit is an independent contractor that extracts ore at the Open Cut Mine for Homestake. Summit began mining in the mini-pit in October 1994. The plan was to extract ore in the mini-pit from the 4900 level down to the 4840 level. Summit was mining the 4840 level at the time of the accident.

B. Events Preceding the Accident

The working face of the mini-pit was on the north side of the mini-pit. The face was removed in 20-foot lifts. Summit employees would drill and blast a designated area of the working face. Other Summit employees would remove the blasted material with a shovel and haul trucks. The shovel would work back and forth between the east and west highwalls loading trucks during a single shift. At the time of the accident, the working face was about 20 feet high and 137 feet wide.

On December 29, 1994, an area of the working face adjacent to the east highwall was blasted in the normal fashion. Part of the east highwall sloughed after the blast. Such sloughing following a blast was not an unusual event in the Open Cut Mine, but it had never occurred within the mini-pit. Summit followed its usual procedures in response to the sloughage; it scaled the affected area to remove loose material and then visually inspected the area to determine if any hazardous conditions remained.

On the afternoon of January 4, 1995, near the end of the day shift, Craig Hall, a senior geologist employed by Homestake, was in the mini-pit. As part of his normal work routine, Mr. Hall walks around the mine looking at the highwalls. He traveled through the mini-pit on a daily basis. When he observed the east highwall in the mini-pit at about 3:15 p.m., he thought that it looked "unusually straight." (Tr. 412). He reported this condition to his supervisor. The supervisor called Tom Lester, Summit's Mine Superintendent, to let him know about Hall's report. In addition, Mr. Hall personally advised Mr. Lester of his observation when he delivered the daily dig maps to Lester's office. At about 3:45 p.m., Hall told Lester that the east highwall in the mini-pit looked "extremely straight." (Tr. 415). He did not observe any cracks in the highwall or tell Mr. Lester that the highwall was dangerous.

Following his conversation with Mr. Hall, Mr. Lester got into his vehicle with Jack Atwater, the blasting superintendent, to inspect the east highwall. (Tr. 814). He first drove to the 4960 bench on the west side of the mini-pit. This bench was wide and was easily accessible. (Ex. R-1). From this vantage point, Messrs. Lester and Atwater looked across the mini-pit to the east highwall. The east highwall was about 150 feet to the east of them and the bench of the east highwall was about 20 feet below the bench on which they were standing. They could see the top of the east highwall bench and the face of the highwall. Lester testified that they did not see any cracks in the east highwall or the bench above the highwall. They then traveled down into the

mini-pit and examined the east highwall from the floor of the mini-pit. They spent about 30 minutes examining the east highwall from these two vantage points. Following his examination, Mr. Lester concluded that the east highwall was in stable condition and safe to work under. Because he did not see any problems with the east highwall, Mr. Lester did not tell Delvin Price, the night foreman, about his conversation with Mr. Hall or his examination of the east highwall. Mr. Lester left the mine soon after this examination.

Mr. Price arrived at the mini-pit at about 6:15 p.m., prior to the beginning of his shift, which started at 7:00 p.m. The foreman from the previous shift had turned on the light plant. The light plant was a set of spotlights stationed near the south end of the mini-pit near the east highwall. It illuminated the working face to the north, as well as the east and west highwalls. Price visually examined the east and west highwalls before the start of the shift. He used a spotlight on his Suburban when examining the walls. He did not go onto any of the benches above the highwalls when conducting his examination. As a result of his examination, he concluded that the highwalls were in good condition and safe to work under.

On the night of the accident, the shovel that Mr. Millard was operating was digging into the previously blasted working face. The record is not clear as to where he started working, but he may have started on the east side of the working face. Sometime around 8:00 p.m. on January 4, while the shovel was near the west highwall, material slid down the west highwall partially covering a tire on a haul truck. The truck was waiting to be loaded and had to be towed out from the rock slide. Mr. Price called Mr. Lester at his home to inform him of the rock slide. Messrs. Price and Lester decided that mining could safely continue in the mini-pit and that the shovel should start working closer to the east highwall. Lester called Chuck Rounds, Summit's vice president, at about 9:00 p.m. at his home and advised him of the rock slide. Mr. Rounds went to the mini-pit at about 10:00 p.m. He discussed the situation with Mr. Price and observed both highwalls in the mini-pit. The mini-pit was illuminated by the light plant. He did not see any unusual conditions in the highwalls that indicated to him that they were not stable. (Tr. 727).

Because of the narrowness of the mini-pit, each haul truck operator parked along one of the highwalls until it was his turn to be loaded by the shovel. Trucks could not park in the middle of the mini-pit because they would get in the way of trucks entering and exiting the area. Two truck drivers stopped parking along the east highwall at about 9:00 p.m. that night because they thought they could hear rocks falling on that highwall. They did not advise Mr. Price, their supervisor, of the falling rock. At about 12:30 a.m. on January 5, the crew took their "lunch" break. Mr. Wagner ate in Mr. Price's Suburban. Wagner told Price that the mini-pit was unsafe and that someone was going to get hurt. He had previously raised concerns to Mr. Price about the stability of the highwalls. He told Mr. Price that if the east highwall ever tips over, it could bury miners in the area. (Tr. 193). There was no specific conversation about truck drivers seeing rocks fall from the east highwall earlier on the shift. Mr. Price briefly inspected the highwalls after lunch and he did not see any problems. (Tr. 865).

At about 1:45 a.m., Wagner was next in line to be loaded. He observed material trickling off the east highwall. He backed his truck up to the shovel to be loaded. The shovel was next to the east highwall and Wagner's truck was next to the shovel. As he was about to pull out after being loaded, the east highwall leaned out towards the west wall and crumbled. The shovel was completely buried and Wagner's truck was partially buried. As stated above, the shovel operator was killed and Wagner was seriously injured.

C. MSHA's Enforcement Actions

At the conclusion of its accident investigation, MSHA issued to Summit one section 104(d)(1) citation and two section 104(d)(1) orders. Each of these enforcement actions is discussed below. MSHA also conducted a special investigation. At the conclusion of the investigation, it filed civil penalty proceedings against the individual respondents under section 110(c) of the Mine Act. These proceedings are discussed below.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Charges Against Summit, Inc.

1. General Considerations

Two fundamental concepts must be kept in mind when analyzing the issues in these cases. First, the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. ' 820(i).

On the other hand, the fact that an accident occurs at a mine, such as a fall of ground, does not establish that the mine operator violated a safety standard. Conditions in a mine are dynamic and can quickly change. A fall of ground may occur despite the fact that an operator is taking all reasonable precautions to ensure that ground conditions are stable in accordance with MSHA's safety standards. In order to establish a violation, the Secretary cannot rely solely on the fact that an accident occurred, but must prove that the operator did not comply with the requirements of the safety standard.

2. Citation No. 4422929

a. Violation

On January 9, 1995, MSHA Inspector Gary Grimes issued Citation No. 4422929 alleging a violation of 30 C.F.R. ' 56.3200. The citation states, in part:

> The night shift supervisor was made aware of possible hazardous conditions at the east highwall mini-pit during the lunch break ... on 01-15-95. An employee reported to the supervisor of his concern working under the 80-foot east highwall. No corrective action was taken by the night supervisor and the employees were allowed to continue work in the mini-pit area. A miner was fatally injured at approximately 1:50 a.m. ... when the east wall failed and fell on the shovel operator.

Inspector Grimes determined that the violation was of a significant and substantial nature ("S&S") and was caused by Summit's unwarrantable failure. Section 56.3200 provides, in part, that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The Secretary proposes a penalty of $25,000 for the alleged violation.

In her brief, the Secretary argues that ground conditions created a hazard to persons as early as January 4, 1995, and that no action was taken to correct them. The Secretary alleges that the hazardous conditions included: (1) the narrowness of the mini-pit; (2) the height of the east highwall; (3) the near vertical nature of the east highwall; (4) the fact that a failure occurred on the west highwall six hours prior to the fall on the east highwall; and (5) the fact that the operator failed to investigate the cause of the west highwall failure prior to moving the crew to the east side of the mini-pit.

The Secretary contends that there were numerous warnings that hazardous conditions existed in the mini-pit that Summit failed to heed. First, Mr. Wagner asked Mr. Price on a number of occasions if the east highwall could be taken down to eliminate the hazard. Second, the east highwall sloughed in two areas of the mini-pit on December 29, 1994. Third, Mr. Lester was advised by Mr. Hall that the east highwall in the mini-pit looked straighter than normal on the afternoon of January 4. Fourth, the west highwall sloughed earlier in the shift on the evening of January 4. Fifth, two truck drivers stated that they heard loose rock moving on the east highwall and stopped parking their trucks along that highwall on the evening of January 4. Finally, Wagner told Mr. Price during his lunch break at 12:30 a.m. on January 5 that the mini-pit was not safe.

The first condition that the Secretary contends created a hazard was the narrowness of the mini-pit. I find that the Secretary did not establish that this condition created a hazard that violated the safety standard. There is no question that all employees felt uncomfortable working in the mini-pit because it was only about 150 feet wide. But this condition did not create a specific safety hazard. If the mini-pit had been 900 feet wide, the shovel would still have to be near the east highwall when digging the working face in the area adjacent to that highwall. The shovel was no closer to the east highwall at the time of the accident than it would have been if the west highwall were not so close. The bucket of the shovel would still need to reach the blasted muck adjacent to the highwall when each lift was removed from the mini-pit. Mr. Wagner

testified that the shovel operator was digging from the working face and not the toe of the east highwall when the accident occurred. (Tr. 219). I credit this testimony. Likewise, Mr. Wagner's truck would have been no further from the shovel when he was being loaded if the mini-pit were wider. The bucket of the shovel must be able to reach the truck to dump its load.

The only specific problem created by the narrowness of the mini-pit concerns traffic congestion. When waiting to be loaded, trucks had to park closer to the highwalls than they would if the mini-pit were wider. While this fact could put the trucks close to the zone of danger in the event of a fall of ground, it did not contribute to a hazardous ground condition. Accordingly, I reject the Secretary's argument that the narrowness of the mini-pit created or contributed to the alleged violation.

The second alleged hazard cited by the Secretary is the height of the east highwall. It is undisputed that the east highwall was about 80 feet high. The mine's plan calls for 80-foot highwalls and 30-foot benches. This height was the standard throughout the Open Cut Mine. Although the metal/nonmetal safety standards do not provide for the submission of mine plans to MSHA, the highwall/bench plan used at the Open Cut Mine was well known to MSHA and had not been cited in the past.

As stated above, the strata of the east highwall had been relatively stable at the mine. Nothing in the record suggests to me that Summit should have been put on notice that the 80/30 highwall plan would not be safe in the mini-pit. Although the sloughage that occurred on December 29 after blasting could indicate that the highwall presented some problems, Summit scaled the area after the sloughage and then examined the highwall. In addition, there is no indication that this sloughage occurred because of the height of the highwall. It appears to have been caused by the fact that the working face adjacent to the highwall had been blasted. I find that the Secretary did not establish that the height of the east highwall created or contributed to a hazardous ground condition.

Another factor relied upon by the Secretary is the sloughage that occurred on the west highwall prior to the failure on the east highwall. As stated above, the east and west highwalls are part of different geologic formations. There is no dispute that the structure of the rock is different. Based on the evidence, I find that the two events are unrelated. That is, the fact that the west highwall failed earlier on the shift did not make it more likely that the east highwall would fail. The Secretary cited Summit for failing to correct hazardous conditions on the east highwall, not the west highwall nor the mini-pit in general. Thus, the fact that the west highwall failed does not help establish a violation. The Secretary also asserts that Summit created a hazard to persons because it allowed mining to continue without investigating the cause of the sloughage on the west highwall. As stated above, the Secretary did not cite Summit with respect to any hazards created by the west highwall. In addition, Summit examined both highwalls after the sloughage. Mr. Rounds visited the mini-pit and management determined that it was safe to continue mining. The sloughage occurred at the bottom of the west highwall; it was not a general

failure of the highwall itself. The west highwall contained unconsolidated material that slid down near the bottom.

The final factor relied up by the Secretary is the near vertical nature of the east highwall. Mr. Hall advised Mr. Lester that the east highwall looked extremely straight on the afternoon prior to the accident. Miners working in the mini-pit also advised management that the highwall was straight. Several miners testified at the hearing that the east highwall tipped out at the top towards the west highwall. Mr. Lester admitted that the highwall was Anearly vertical@ and not in conformance with the Athree-quarter-to-one design.@ (Tr. 831). He believed, however, that the east highwall in the mini-pit Alooked as good as or better than any bench and highwall in the pit.@ (Tr. 830).

I find that the east highwall was nearly vertical on the day of the accident. There is some testimony that the top of the east highwall tipped out towards the west. Messrs. Hall, Price, and Lester did not observe any tipping. The issue is whether the vertical nature of the highwall created a Ahazard to persons,@ as that term is used in the safety standard. MSHA=s accident investigation revealed that the beds in the east highwall where the accident occurred were nearly vertical. (Tr. 359-60). Mr. Ferriter testified that the presence of a vertical highwall in an area where the bedding planes were also nearly vertical created a hazard. *Id.* He compared the situation to standing a deck of cards up on one end. He stated that the highwall was not very stable and was prone to fall. I credit his testimony in this regard. Photographs taken after the accident, such as photo 11 in the Technical Support Report, illustrate the vertical nature of the bedding planes. (Ex. G-8, photo 11).[1]

[1] The Technical Support Report contains a number of statements which are inaccurate. For example, the conclusion section of the report states that the area of the working face adjacent to the east highwall was Aa secondary, or even an emergency, workplace activated in the dark on a cold January night after rock debris from a slope failure impacted operating equipment on a nearby ... work place at the west side....@ This section further states that the fact that Athis work place was activated in the dark of night due to an ore production crisis casts doubt on the validity of a pre-shift inspection....@ (Ex. G-8 page 6). There is no support in the record for either of these conclusions. As discussed above, the east side of the working face adjacent to the highwall

In addition, the highwall failure occurred in an area where the Aeast wall of the mini-pit was engineered into the main pit area.@ (Tr. 435). This area was referred to as a Anose@ at the hearing. A nose is a Acorner ... where you have a change in the highwall angles....@ *Id.* Because of the presence of this nose, the east highwall was not as well supported in the vicinity of the accident. (Tr. 373-75; Ex. G-8 Figure 2, photo 11). I find that the nose contributed to the instability of the highwall.

The Secretary established that the near-vertical condition of the east highwall in conjunction with the vertical bedding plane and the presence of a nose in the area created a hazard to persons working in the mini-pit. Summit did not take any steps to take down or scale back the highwall. Accordingly, I find that the Secretary established a violation of section 56.3200.

Summit argues that the Secretary failed to establish a violation. First, it argues that the citation fails to state with particularity what hazard existed on the night shift. The citation simply states that management was made aware of a possible hazardous condition when a truck driver stated that he was concerned about working in the mini-pit. It argues that the citation fails to allege that there were known or observable hazards that were not corrected. I agree that the citation is not well drafted, but it does give notice of the condition cited. The MSHA inspector believed that the east highwall was hazardous and that Mr. Price had been advised of the hazards. The Secretary is not required to set forth in a citation all of the evidence she will rely upon in prosecuting the case. The citation provided Summit with sufficient information to present a defense. While the citation could have provided more detail, I find that it put Summit on notice of the nature of the alleged violation.

Second, Summit argues that the citation relies on the fact that there was a fall of ground to establish a violation rather than on credible evidence that a hazardous condition existed prior to the fall. It contends that the Secretary failed to produce any evidence that a specific, hazardous condition existed prior to the accident. As stated above, I determined that the Secretary did produce evidence that a specific hazardous condition existed prior to the accident. Clearly, it was the accident that brought MSHA to the mine, but it did not rely solely on the fact that an accident occurred to establish the violation. More importantly, I did not base my finding of a violation on the fact that there was a fall of ground. Instead, I conclude that the Secretary established that, on January 4 and 5, 1994, the near vertical nature of the east highwall created a hazard to persons working in the mini-pit, taking into consideration the geologic structure of the area.

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was an integral part of the working place and was not Aactivated@ due to a Aproduction crisis@ after the west highwall sloughed. In addition, both highwalls were examined several times on January 4 before dark.

Third, Summit contends that there can be no violation of section 56.3200 if an examination of the ground conditions fails to reveal any hazard. It relies in part on Judge Gary Melick=s decision in *Malvern Minerals, Co.*, 11 FMSHRC 2382, 2385 (November 1989). I respectfully disagree with Judge Melick=s analysis because the Mine Act holds mine operators strictly liable for violations of the Act. The highwall created a hazard to persons and the fact that this hazard may have been difficult or impossible to detect is not a defense but is taken into consideration when assessing the negligence of the operator.

Finally, Summit maintains that Inspector Grimes determined that he would issue the citation before he arrived at the mine. It argues that this demonstrates bias and further supports its argument that the citation was issued because there was a fall of ground. Proceedings before the Commission are *de novo*. My function is to determine whether the Secretary established a violation, not to evaluate or review the conduct of MSHA personnel. Thus, even if the inspector determined that he would issue the citation before he arrived, the citation is valid if the Secretary establishes the elements of the alleged violation.

b. Significant and Substantial

I find that the Secretary established the four elements of the Commission=s S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is important in this case: whether it was reasonably likely that the hazard contributed to would result in an injury. This element does not require the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury is reasonably likely. In this case the Secretary established that the nearly vertical condition of the east highwall created a hazard that was reasonably likely to result in an injury, assuming continued normal mining operations. As stated above, the presence of a vertical highwall in an area where the bedding planes were also nearly vertical created a hazard. (Tr. 359-60). It was reasonably likely that the highwall would fail as a result of this condition and that someone would be seriously injured.

c. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or a Aserious lack of reasonable care.@ *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has held that Aa number of factors are relevant in determining whether a violation is the result of an operator=s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator=s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.@ *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

The Secretary relies on a number of factors when arguing that the violation was a result of Summit=s unwarrantable failure. First, she contends that the sloughage that occurred on December 29 should have put Summit on notice that hazardous conditions existed on the east wall of the mini-pit. She argues that because this was the only time that the east wall had failed in the mini-pit, Summit was put on notice that the highwall was not stable. Second, the Secretary contends that Mr. Hall=s warning about the vertical nature of the highwall should have alerted Summit to take steps to ensure that the highwall was stable. Third, she maintains that Summit should have tried to identify the cause of the sloughage that occurred on the west highwall earlier in the shift. Fourth, two truck drivers heard rock moving from the east highwall at about 9:00 p.m. during the shift. Although they did not notify Mr. Price of this condition, the Secretary states that he should have been able to make the same observations. Finally, the Secretary argues that Mr. Wagner warned Mr. Price that the east highwall presented a hazard on at least two occasions.

I find that the violation was not the result of Summit=s unwarrantable failure. While it is true that the events relied upon by the Secretary occurred, in each instance Summit took reasonable steps in response. The east highwall sloughed after blasting on December 29. As described above, Summit examined and scaled the area to make sure that it was stable. Although the east wall had not previously sloughed in the mini-pit, such sloughing had occurred after blasting in other areas of the Open Cut Mine. The mini-pit had been operating for a only a few months. As stated above, the sloughage on the west highwall earlier in the shift had no bearing on the cited condition on the east highwall. In addition, Mr. Price and Mr. Rounds examined the highwalls after this sloughage and determined that they were safe to work under.

The Secretary also relies upon the fact the Mr. Hall warned Mr. Lester that the east highwall looked Aunusually straight@ on the afternoon of January 4. The Secretary states that a Athorough examination of the east highwall was mandated, which would include closely observing the top of the highwall....@ (Sec. Br. at 13). There is no dispute that Mr. Lester did not go on the bench at the top of the east highwall to examine the bench and highwall from that position. The question is whether he was required to do so to perform an adequate examination. The Secretary=s principal concern is that Summit failed to take steps to determine whether tension fractures were developing on the bench above the east highwall. She believes that telltale signs of an unstable highwall are always present preceding a massive failure such as the one that occurred at this mine. Mr. Ferriter testified as follows:

> If you=re going to have an unstable highwall, in my experience, you will always see telltale signs. You will see tension fractures starting to form; sometimes days, sometimes weeks, sometimes longer, before the actual failure occurs. But if you don=t go up [on the bench] and look, of course, you don=t know if these things are developing or not.

(Tr. 352). He further testified that he could not Aenvision a case where you would not see some signs of instability.@ (Tr. 353). The Secretary contends that Summit=s failure to inspect the bench and take down the unstable highwall constitutes an unwarrantable failure.

Mr. Lester examined the east highwall on the afternoon of January 4 in response to Hall=s observation. He spent about 30 minutes examining the highwall from the west side of the mini-pit and from the floor of the mini-pit. He did not ignore the situation. His examination demonstrates that he was concerned about Mr. Hall=s observation. After his examination he concluded that the east wall Alooked as good as or better than any wall on the pit.@ (Tr. 817).

The question is whether the failure to examine the bench above the east highwall shows that the violation was the result of Summit=s unwarrantable failure, given the particular circumstances present on the afternoon of January 4. It was not the practice at the mine to examine benches for cracks. The Secretary does not have a regulation requiring the examination of benches to look for tension fractures or cracks. The purpose of benches is to catch falling rocks. They are designed to protect miners working in the pit from the danger of falling rocks. If a bench becomes filled with fallen rock, MSHA expects the operator to clean the bench so that it can continue to function as a catch bench. (Ex. G-4). Prior to the accident, MSHA inspectors did not go on benches to check for cracks or other signs of instability at the Open Cut Mine. (Tr. 160, 712). Mr. Lester considered it to be unsafe to walk onto this bench because of the danger of falling rock. (Tr. 722-23). Other highwalls and benches were above this bench so a miner on the bench would face a danger of being struck by falling rock. (Ex. R-1).

I find that, under these circumstances, the failure to examine the bench above the east highwall did not demonstrate aggravated conduct. The east highwall was generally stable at the mine. It was the west highwall that historically presented stability problems. The fact that the east highwall was straighter than normal was cause for concern, but mine management responded by examining the wall for about 30 minutes. It did not appear to be unstable at that time. The vertical nature of the highwall does not mean that it was inherently hazardous. (Tr. 937). The structure of the rock formation including the bedding plane contributed significantly to the hazard. The actions taken by Messrs. Lester and Atwater were reasonable given the history at the mine.[2]

[2] I do not credit Mr. Ferriter=s sweeping generalization that tension cracks will always develop on the bench several days or more before a large highwall failure. (Tr. 386-87). He admitted that his conclusion was empirical and was based on interviewing people after accidents. (Tr. 393-96). Based on these interviews he concluded that there were Aalmost always@ indications of the failure ahead of time. (Tr. 394). I credit the testimony of Mr. Head that the telltale signs of a highwall failure may occur minutes before the fall. (Tr. 924). The events will play out differently depending on the nature of the rock, the geology of the area, whether the failure originated near the top or bottom of the highwall, and other factors. Tension cracks may or may not have been present on the bench on January 4.

Management was not in a position to know that the structure of the rock formation was vertical in the east wall in the area immediately adjacent to the working face. Mr. John Head, a mining engineer, testified that the bedding in the east highwall is generally stable because it is a locked system in that the Abeds essentially weigh down on one another and keep themselves in position.@ (Tr. 904). It is unlikely that the relatively vertical plane that was visible after the accident was observable prior to the accident. (Tr. 906-09; Ex. G-8 photos 11, 13 -15). Thus, it would appear that the accident was caused in large part by a particular deformation in the area that was not readily observable during an examination of the highwall.

The Secretary also relies on the concerns raised by Mr. Wagner about conditions in the mini-pit. It is clear that miners, including Mr. Wagner, felt confined in the mini-pit. Mr. Wagner raised concerns about the highwalls, including the east wall, on at least two occasions. He asked Mr. Price if the east highwall could be taken down to eliminate any hazard. He felt that the wall was Acrumbly@ and not very stable. (Tr. 174). During the lunch break before the accident, Mr. Wagner told Price that the east wall was not safe to work under. (Tr. 193). In response to these concerns, Mr. Price examined the east highwall numerous times. He did not ignore the concerns, but simply disagreed with Mr. Wagner=s assessment of the hazard after looking at the highwall. He believed that the east highwall was safe. Mr. Price was not aware that two truck drivers heard rocks rolling off the east highwall after about 9:00 p.m. on January 4. These drivers did not raise any concerns with him during the lunch break. Although it was dark at the time he conducted his examination following his conversation with Wagner, Price examined the highwalls using the light plant and his spotlight on a regular basis. MSHA does not prohibit operating open pit mines when it is dark.

For the reasons set forth above, I conclude that the Secretary did not establish that the violation was caused by Summit=s aggravated conduct. I find that the violation was the result of Summit=s ordinary negligence rather than indifference, intentional misconduct, or a serious lack of reasonable care.

3. Order No. 4422930

a. Violation.

Inspector Grimes also issued Order No. 4422930 alleging a violation of 30 C.F.R. ' 56.3130. The order states, in part:

> The east highwall ... in the mini-pit ... failed burying the ... shovel and partially burying a ... truck on the 4840 bench. Mining methods being utilized did not maintain the wall, bank, and slope stability at the east highwall, mini-pit area. An 80-foot east highwall was formed as the mini-pit mining progressed deeper and the wall failed at approximately 1:50 a.m. 01-05-95....

Inspector Grimes determined that the violation was S&S and was caused by Summit's unwarrantable failure. Section 56.3130 provides, in part, that "[m]ining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks." The Secretary proposes a penalty of $30,000 for the alleged violation.

The Secretary argues that Summit was required to provide additional benching on the east highwall to maintain wall, bank, and slope stability. Summit used 80-foot benches in the Open Cut Mine. She believes that since the mini-pit was narrower, lower benches were necessary. The Secretary further contends that by not providing access to the bench above the highwall, Summit was unable to maintain the highwall. Summit=s equipment could not maintain the highwall from the pit floor because the equipment could only reach 25-28 feet and, thus, could not keep the highwall scaled. Changing weather conditions, blasting, vibrations from equipment, and other factors can cause material within the highwall to become loose or unstable requiring additional steps to maintain the highwall. The Secretary contends that Summit failed to use mining methods that would allow such additional steps to be taken. In short, Summit=s mining methods precluded routine maintenance of the highwall.

The fact that the mini-pit was narrower did not mandate that lower benches be installed. As stated with respect to Citation 4422929, the narrowness of the mini-pit was not a contributing factor in the accident. The highwall would have failed even if the mini-pit were 900 feet wide and the shovel would have been buried if the failure occurred while the shovel operator was removing muck in an area adjacent to the highwall. Nevertheless, it is uncontradicted that Summit was not following its mine plan in the mini-pit. Mr. Lester testified that the east highwall was nearly vertical and not in conformance with the Athree-quarter-to-one design.@ (Tr. 831). Although Summit may have intended to follow the mining methods used in the remainder of the Open Cut Mine, it failed to do so. The mining method used on the east wall of the mini-pit did not maintain the stability of the wall. As discussed above, the vertical nature of the highwall coupled with the vertical angle of the bedding plane and the nose in the area of the accident created a hazard to miners. These conditions existed at the time of the accident because the mining methods being used did not maintain the stability of the east highwall.

In addition, a bench was present above the east highwall and access was not provided to allow the bench and upper portion of the highwall to be maintained. Although the old haul road that formed the bench was not filled with fallen rocks, Summit did not provide any means for the bench to be cleaned. Summit=s mining methods prevented the bench from being cleaned or the upper highwall from being scaled. A program policy letter requires mine operators to maintain one bench immediately above the area where miners work in a condition adequate to retain rock that may slide, ravel, or slough onto the bench from above. (Ex. G-4).

For the reasons set forth above, I find that the Secretary established that Summit failed to use mining methods that would maintain the stability of the highwall in the area where the

accident occurred. Accordingly, I find that the Secretary established a violation of section 56.3130.

Summit argues that the Secretary failed to establish a violation. First, it argues that the order does not state the manner in which Summit failed to use mining methods to maintain wall stability. It states that the order fails to set forth what mining method was faulty or omitted. As with the previous citation, the order is not well drafted, but it does give sufficient notice of the charge. The inspector believed that the mining methods used by Summit did not maintain slope stability on the east highwall. The Secretary is not required to set forth all the facts she will rely upon to establish a case at the hearing. The order presented sufficient information to put Summit on notice of the charge.

Second, Summit argues that the Secretary simply relied on the fact that there was a fall of ground to establish a violation. As I stated with respect to the citation, I base my decision on the evidence presented at the hearing and not on the fact that there was a fall of ground.

Third, Summit argues that Inspector Grimes determined that he would issue the order before he reviewed the facts to determine if there was a violation. As I discussed with respect to the citation, I find that the Secretary established the elements of a violation and suggestions of bias are largely irrelevant.

Finally, Summit argues that this order must be merged into the citation because the Secretary may not issue multiple citations for the same violation. It contends that the two safety standards, when applied to the facts of this case, do not impose Adistinct duties@ upon the mine operator. (Summit Br. 42). Although the citation and order arise out of the same facts, the two safety standards impose distinct duties. Section 56.3200 requires that hazardous ground conditions be taken down or supported before work is permitted in the area. Section 56.3130 requires operators to adopt and use mining methods that maintain wall, bank, and slope stability where persons work. The standards are related but they impose different requirements. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). Accordingly, I reject Summit=s argument.

b. Significant and Substantial

I find that the Secretary established the four elements of the Commission=s S&S test. *Mathies Coal Co.*, 6 FMSHRC at 3-4. The third element of the test is important here. Summit and Homestake developed a mining method that was designed to provide for highwall stability. Summit deviated from this method on the east highwall of the mini-pit by using mining methods that produced a nearly vertical highwall. The Secretary established that the nearly vertical condition of the east highwall created a hazard that was reasonably likely to result in an injury, assuming continued normal mining operations. While vertical highwalls do not always create a hazard, the slope of the highwall in the mini-pit contributed to a safety hazard in this instance, as discussed above. It was reasonably likely that the highwall would fail as a result of this condition

and that someone would be seriously injured. In addition, Summit used a mining method that did not allow the bench above the east wall to be cleaned or the upper areas of the highwall to be scaled. Assuming continued mining operations, it was reasonably likely that this condition would result in an injury of a reasonably serious nature. If the bench became full, falling rocks could easily fall onto workers below. Moreover, failure to maintain access to the bench prevented Summit from scaling the top of the highwall, creating a hazard that miners would be injured by loose material falling from the highwall.

c. Unwarrantable Failure

The Secretary relies on many of the same factors to establish Summit=s unwarrantable failure with respect to this order as she relied upon with respect to the previous citation. These factors include the narrowness of the pit, the sloughage that occurred on December 29, and the inability to gain access to the bench above the east highwall. In addition, the Secretary contends that conditions in the mini-pit had changed in the weeks prior to the fall, warranting a review of the methods currently in use, including the distance between the benches. She argues that management was aware of the changing conditions that routinely take place with freeze and thaw cycles. She maintains that the concerns raised by Mr. Hall provided notice that other methods were required to maintain wall stability. She points to the measures that Summit and Homestake developed to monitor conditions on the west highwall to ensure its stability. The Secretary states that there Awas simply no legitimate excuse for management=s failure to take some action to ensure that the mining methods in use in the mini-pit would maintain wall, bank, and slope stability.@ (Sec. Br. at 27-28).

I find that the Secretary did not establish that the violation was the result of Summit=s unwarrantable failure, for reasons that are essentially the same as set forth with respect to Citation No. 4422929. The Secretary=s analysis puts too much weight on the fact that the accident occurred, rather than on the conditions that existed prior to the accident. For example, changes caused by freeze and thaw cycles would always be present in the winter. Summit had been mining under those conditions using 80-foot highwalls for years without any major highwall failures. Thus, rain and freeze/thaw cycles were a normal condition of mining that would not require Summit to re-evaluate its mining methods.

In addition, Mr. Hall regularly traveled around the mine and delivered dig maps to Mr. Lester=s office at the end of the day shift. Mr. Hall testified that prior to the accident, he visited the mini-pit on a daily basis and that he had not observed any problems with the east highwall. (Tr. 427). He stated that the west wall contained geology that was Adynamically changing@ due to folds in its structure, but the east wall was comparatively simple. (Tr. 439). He did not observe anything unusual in the geology of the east wall of the mini-pit on January 4. (Tr. 419, 428). I find that Summit=s failure to shut down the mini-pit on January 4 until it could re-evaluate its mining method because Mr. Hall observed that the east wall was straighter than normal does not constitute aggravated conduct. Although Mr. Lester had been given notice that the east wall was straighter than normal, he personally examined the highwall and determined that

it was safe to work under. In addition, the bench was not full of fallen rock or in need of cleaning. Summit=s failure to comply with the standard constituted ordinary negligence not an unwarrantable failure. Accordingly, the order is modified to a section 104(a) citation.

4. Order No. 4422931

Inspector Grimes also issued Order No. 4422931 alleging a violation of 30 C.F.R. ' 56.3401. The order states, in part:

> Miners were allowed to work on the 4840 bench on 1/5/95, even though management failed to adequately examine ground conditions at the east highwall prior to work commencing after weather conditions, prior blasting, and other conditions warranted. This violation is part of a failure to conduct adequate examinations that contributed to the failure of the east highwall on 1/5/95, which resulted in the death of a miner. An adequate examination of the east highwall would have determined that possible evidence was visible and that the east highwall was progressively deteriorating, endangering the miners performing their assigned duties on the 4840 bench. Adequate ground examinations of the east highwall were warranted to protect the miners regularly required to work in the area.

Inspector Grimes determined that the violation was S&S and was caused by Summit's unwarrantable failure. Section 56.3401 provides, in part, that "[a]ppropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift." The Secretary proposes a penalty of $20,000 for the alleged violation.

The Secretary argues that the issue is whether the visual examinations of the east highwall made by Summit management were sufficient to meet the requirements of the standard. The Secretary contends that a highwall cannot adequately be examined from the ground. She maintains that an adequate examination must include a check for tension cracks and that the only method to check for such cracks is to examine the bench above the highwall.

I agree with the Secretary=s description of the issue. If the standard required Summit to examine the bench above the east highwall for cracks or other signs of a potential failure, then the standard was violated. Summit visually examined the east highwall on numerous occasions on January 4 and 5, as described in detail above. At no time, however, did anyone travel to the bench above the highwall to look for cracks. Indeed, easy access was not provided to that bench.

The standard requires that designated persons examine and, where applicable, test ground conditions in areas where work is to be performed, after blasting, and as ground conditions warrant. The Secretary does not contend that testing was required. Section 56.3401 is a general standard designed to be applied in many situations. The fact that the highwall failed does not establish that a proper examination was not conducted. *Asarco, Inc.* 14 FMSHRC 941, 945-47 (June 1992). An examiner may have a concern about a particular area of a highwall, examine the area and determine that it is safe. If subsequent events reveal that the area was not adequately supported, there may be a violation of section 56.3130 or 56.3200, but that fact does not establish that the examination was inadequate. In cases where there has been a fall of ground, the burden of proof does not shift to the operator to prove that an adequate examination was conducted. *Id.* at 947.

Section 56.3401 does not mention highwalls much less require that benches be examined. This standard is simple and brief in order to be broadly adaptable to a wide variety of circumstances. The Commission held that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343, (September 1991). The safety standard must Agive the person of ordinary intelligence a reasonable opportunity to know what is [required], so that he may act accordingly.@ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Summit has been examining the highwalls of the Open Cut Mine, including the mini-pit, by visually observing them from the floor of the pit since the mine was opened in 1985. There is no evidence that anyone had ever traveled onto a bench in order to look for tension cracks during an examination of a highwall under section 56.3401. In addition, there is no evidence that any MSHA inspectors traveled onto a bench to determine whether tension cracks were present. I was unable to find any Commission or administrative law judge decisions that discuss this issue. Apparently, this is a case of first impression.

Applying the reasonably prudent person test, described above, I find that, as a general matter, the safety standard does not require operators to examine benches for tension cracks during their regular examinations of highwalls. The Secretary did not establish that such examinations are a practice in the mining industry or that MSHA issues citations when an operator fails to include such examinations as part of its regular procedure under section 56.3401 at open pit mines. The Secretary=s *Program Policy Manual* does not discuss this issue, and the Secretary did not introduce any other evidence that she generally requires operators to examine benches for tension cracks. A reasonably prudent person would not know that such examinations are regularly required under the safety standard.

The issue is whether the particular conditions that existed on January 4 triggered a requirement for such an examination. Would a reasonably prudent person have recognized that an examination of the bench was required under the standard given the state of the east highwall?

Summit management knew that the highwall was nearly vertical and was, thus, not in compliance with the mine=s design specifications. Management also knew or should have known that the crew was working in the vicinity of a nose on the east highwall where the wall of the Open Cut turned into the mini-pit. Management also knew that miners working in the pit voiced concern about the stability of the east highwall.

As stated above, Mr. Lester examined the highwall following his conversation with Mr. Hall from two vantage points, a location across from and slightly above the east highwall, and the floor of the pit. Although he could see the bench above the east highwall when looking across the mini-pit from the east side, he would not have been able to see small tension cracks. Price examined the east highwall at the beginning of the shift and following Mr. Wagner=s comments during the lunch break. In addition, Mr. Rounds examined the highwalls when he came to the mine following the sloughage on the west wall. All three men determined that the highwall was stable. The fact that subsequent events proved that they were wrong does not establish that their examination was not adequate.

I find that the Secretary did not establish that an examination of the bench above the highwall was required on January 4 under the standard. The record establishes that a reasonably prudent person faced with the conditions that existed at the time of the accident would have conducted examinations of the highwall in accordance with the mine=s normal procedures and, once it was determined that the highwall was safe, would have determined that it was not necessary to travel to the bench above the highwall to look for tension cracks. Benches are designed to catch falling rock and the Secretary did not show that it is the practice of mine operators to go onto benches when examining highwalls under the cited safety standard. Traveling onto benches that are below other highwalls presents a hazard of being struck by falling rock.

As stated above, the Secretary=s witnesses testified that an examination for tension cracks along the bench was crucial because cracks always develop on the bench a few days or more before a massive highwall failure. Assuming that to be true, I cannot understand why the Secretary does not specifically mandate such examinations when circumstances warrant. The Secretary has not issued any guidelines to the mining industry stating that such examinations are required under the standard. The Secretary introduced a program policy letter concerning wall, slope, and bank stability under section 56.3130. This letter states that operators must maintain one bench above an area where miners work Ain a condition adequate to retain material that may slide, ravel, or slough onto the bench from the wall, bank, or slope.@ (Ex. G-4). Neither this program policy letter nor any other such guideline suggests that examinations be conducted for tension cracks. It appears that no contested citations have been issued alleging that an operator failed to conduct such an examination. If such examinations are of such a critical nature, the Secretary should issue a program policy letter or other interpretative rule setting forth, in at least general terms, when such examinations are required under the standard. 5 U.S.C. ' 553(b)(A).

For the reasons set forth above, I find that the Secretary did not meet her burden of proof with respect to Order No. 4422931 and the order is vacated.

B. Charges Against the Individual Respondents

MSHA conducted a special investigation. At the conclusion of the investigation, it filed civil penalty proceedings against the individual respondents under section 110(c) of the Mine Act. The Secretary proposes: (1) a penalty of $5,000 against Mr. Rounds for the alleged violations set forth in Order Nos. 4422930 and 4422931; (2) a penalty of $4,500 against Mr. Lester for all three alleged violations; (3) and a penalty of $3,250 against Mr. Price for all three alleged violations.

The District of Columbia Circuit recently summarized the case law interpreting section 110(c) of the Mine Act, as applicable here. *Freeman United Coal Mining Co. v. FMSHRC,* 108 F.3d 358, 362-64 (1997). To establish liability under section 110(c), the Secretary is required to show that the person charged demonstrated aggravated conduct, as distinguished from ordinary negligence. *BethEnergy Mines,* 14 FMSHRC 1232, 1245 (August 1992). A finding of ordinary or high negligence will not, by itself, support a violation of section 110(c). *Freeman United* at 364.

I find that the Secretary did not establish that Charles Rounds, Tom Lester, or Delvin Price violated section 110(c) of the Mine Act. That section provides that whenever a corporate operator violates a safety standard, Aany director, officer, or agent ... who knowingly authorized, ordered, or carried out such violation@ may be held liable. I find that Messrs. Rounds, Lester and Price were agents of Summit. As set forth above, Summit violated sections 56.3200 and 56.3130. I found, however, that these violations were the result of Summit=s ordinary negligence. The Secretary did not establish that the violations were caused by Summit=s unwarrantable failure. I specifically determined that the violations did not result from the aggravated conduct of Summit management.

It is not disputed that the three individual respondents charged by the Secretary were the key management officials who made the determination to extract ore in the mini-pit on the evening of January 4, 1995, without making any changes to the east highwall. It does not appear that other management officials were involved in this decision. Based on the evidence presented at the hearing, I find that the violations were not the result of the aggravated conduct of Mr. Rounds, Mr. Lester, or Mr. Price. My reasons for this finding are set forth in section II.A. of this decision. At most, they were moderately negligent. Accordingly, they did not Aknowingly violate@ 30 C.F.R. '' 56.3200 or 56.3130.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Summit was issued 65 citations and orders between March 1978 and July 1995. (Ex. G-1). I also find that Summit was a medium-sized mine operator that

employed between 90 and 100 people who worked on one of the two ten hour shifts. (Stipulation). I find that the civil penalty assessed in this decision will not affect Summit=s ability to continue in business. The Secretary has not alleged that Summit failed to timely abate the citation and order. I find that both violations were significant and substantial in nature, were serious, and were the result of Summit=s moderate negligence. Based on the penalty criteria, I find that a penalty of $18,000 is appropriate for Citation No. 4422929 and a penalty of $22,000 is appropriate for Citation No. 4422930.

VI. ORDER

Citation No. 4422929 is **MODIFIED** to a section 104(a) citation by deleting the unwarrantable failure designation and reducing the level of negligence to moderate. As modified, the citation is **AFFIRMED**. Order No. 4422930 is **MODIFIED** to a section 104(a) citation by deleting the unwarrantable failure designation and reducing the level of negligence to moderate. As modified, the citation is **AFFIRMED**. Order No. 4422931 is **VACATED**. The civil penalties brought against Charles Rounds, Tom Lester, and Delvin Price in CENT 97-20-M, 97-21-M, and 97-22-M are **VACATED**.

Summit Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $40,000.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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