

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 22, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-298-M
Petitioner	:	A.C. No. 29-00708-05577
	:	
v.	:	Chino Mine
	:	
CHINO MINES COMPANY,	:	
Respondent	:	

DECISION

Appearances: Sheryl L. Vieyra, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
 Laura E. Beverage, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Chino Mines Company (“Chino”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Silver City, New Mexico. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Chino Mine is a large surface copper mine operated by Chino in Grant County, New Mexico. Phelps Dodge Corporation has a controlling interest in Chino. On February 2, 2000, MSHA Inspector Abel Cisneros conducted an inspection at the mine. A number of citations were issued including the single citation at issue in this proceeding.

Citation No.4450231 alleges a violation of 30 C.F.R. § 56.3131. The condition or practice section of the citation stated, as edited by me to correct spelling and grammatical errors:

Between the Lampbright Road and the North face of P-16 dump, a very large rock averaging approximately 30 tons was sitting on loose, unconsolidated material, where the weather "rainfall" had washed out approximately a third of the rock support. The rock

was sitting approximately 150 feet from Lampbright Road where employees travel on a daily basis conducting regular assigned duties in a sloped area of approximately 70/80 percent grade thus creating potential hazards to vehicles/employees of being accidentally hit by large rock, if for some reason it became loose.

By not removing potential hazards in employees' work or travel areas, injury to employees is reasonably likely to happen in a given time. Note: other very large rocks had rolled down the North face of P-26 dump and were sitting on the Lampbright Road adjacent berm thus indicating the potential hazard of being hit by rolling rocks.

(Ex. G-1; Tr. 12-13). In the citation, Inspector Cisneros determined that the violation was of a significant and substantial nature ("S&S"), and that Chino's negligence was moderate. The Secretary proposes a penalty of \$557 for this violation. The safety standard provides, as follows:

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.

During his inspection, Inspector Cisneros traveled down the Lampbright Road (the "road"). The road travels alongside one of the dumps at the mine. This dump had been used to deposit waste rock from the pit, but new material was no longer being added. The road was at the bottom of this dump with a large hillside of waste rock on one side of the road and a berm on the other side. The hillside was at an angle of about 35 degrees above the road. (Tr. 134). This hillside had not been disturbed for several years. (Tr. 137).

While traveling down the road, Inspector Cisneros observed a large rock on this hillside, where he stopped to inspect. He had observed this same rock during an inspection he conducted at the mine in mid-September 1999. In September he believed that this rock was supported. (Tr. 14, 35). For that reason, he did not issue a citation at that time. He testified that at the conclusion of his September 1999 inspection, he recommended to company representatives that the rock be taken down.

When Inspector Cisneros observed the rock in February 2000, he believed that the rock was no longer adequately supported. He believed that heavy rains that occurred after his previous inspection "had washed out about a third of the support in front of that rock." (Tr. 13-14). He looked at the rock from several angles and "observed a lot of unconsolidated material, loose material from [adverse] weather conditions." (Tr. 14). He determined that there had been

a "heavy rainfall and [that this] rainfall had washed most of the support out from the front of the rock." *Id.* He believed that this rainstorm occurred during the previous week. (Tr. 21). The inspector estimated that the rock weighed about 30 tons.

Inspector Cisneros also observed other rocks along the side of the road. He testified that he did not recall seeing these rocks there during his September inspection. (Tr. 18-21). He believes that many of these rocks had rolled down the hillside of the dump as a result of the heavy rains between his September and February inspections. *Id.* In short, he believes that the hillside suffered heavy erosion as a result of the rains. The inspector also stated that the muddy conditions in the area indicated recent rains. He feared that unconsolidated material, including the cited rock, could roll down the hillside and hit a vehicle using the road. (Tr. 21).

Inspector Cisneros does not dispute that Chino was complying with the first sentence of the safety standard. Although he believes that the hillside contained loose, unconsolidated material, it was sloped to the angle of repose. (Tr. 63). He cited Chino for violating the second sentence of the standard. He believes that erosion around the cited rock on the hillside created "a fall-of-material hazard to persons" who travel down the road. Inspector Cisneros believes that the violation was S&S.

For the reasons set forth below, I find that the Secretary did not establish a violation of section 56.3131. There is no question that during the relevant time period, the road was a "place where persons worked or traveled in performing their assigned tasks." Thus, Chino was required to comply with the requirements of the standard along the road. The issue is whether the rock or the hillside presented "a fall-of-material hazard to persons."

First, I find that conditions along the hillside had not changed significantly between Inspector Cisneros's September 1999 and February 2000 inspections. The only witness who testified that the area around the rock had been recently eroded was the inspector. Concepcion Fierro, an hourly employee who was on the safety committee at Chino, was subpoenaed by the Secretary to testify at the hearing. He testified that there was no significant change in the support for the rock between the two inspections. (Tr. 75-77). He believed that any erosion of material around the rock occurred before the September 1999 inspection, not after. *Id.* As set forth in more detail below, the two company witnesses testified that the hillside was stable; the rock was well supported; and there had been no erosion of support for the rock between the two inspections.. (Tr. 103). All of the witnesses who worked at the mine testified that the weather had been cool and dry in the weeks preceding the February 2000 inspection. The U.S. Department of Commerce has a weather monitoring station about seven miles from the mine. Weather data from that station shows that it did not rain in the area in October or November 1999. (Ex. R-2). It rained 0.2 inches in December 1999. The data also establishes it rained 0.04 inches on January 2 and 3, 2000. *Id.* Local conditions could vary, however.

There is no evidence, other than the testimony of the inspector, that heavy rains at the mine caused the support in front of the rock to be washed out in the weeks prior to February 2,

2000. I find that the conditions on the hillside did not change to any significant degree between Inspector Cisneros's two inspections. This finding does not end the matter, however, because the issue is whether the standard was violated on February 2, 2000, not whether any hazard presented by the rock was of recent origin. The presence of this rock on the hillside may have violated the safety standard in September 1999, even though the inspector did not issue a citation.

The language of section 56.3131 is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). A broadly written standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991). The mine operator need not have actual notice of a specific requirement, but the standard must "provide adequate notice of prohibited or required conduct." *Id.* The Commission developed the "reasonably prudent person test" to be applied in such circumstances. The test is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Id.* (citations omitted). Thus, the issue is whether such a reasonably prudent person would have recognized the hazard presented by the cited rock.

Prior to the September 1999 inspection, several miners complained about the rock to the union-management safety committee or to a Chino supervisor. Inspector Cisneros testified that Mr. Fierro and others reported this condition. (Tr. 30). Around the time of the September inspection, Herby Allsup, a dozer foreman with about 23 years experience at the mine, was asked by Chino management to look at the cited rock on the dump hillside. He investigated the conditions and did not observe any evidence of cracks or movement in the area supporting the rock. (Tr. 98-99). He concluded that the "rock had not moved; it was in the same position since day one, [and that it did not present] a safety hazard." (Tr. 99). He concluded that it was safer to leave the rock in place than to bring it down. (Tr. 103-04). He testified that the particular slope on which the rock rested had a history of being very stable. (Tr. 91). This particular slope existed since about 1995. *Id.*

Terry Rigoni, the mine superintendent, who has a degree in geological engineering, testified that the hillside in the area of the rock was stable. (Tr. 138). When he was advised that Chino was going to be issued a citation, he went to observe the cited rock. He testified that there was no evidence that any of the material supporting the rock had eroded away. (Tr. 139). He believes that the rock was stable and that it was not prudent to take it down. (Tr. 143). He testified that he reached this conclusion based on the "lack of any kind of evidence of slope movement or instability...." *Id.* He stated that the hillside was "set up like concrete." *Id.* He also believes that it was not prudent to disturb the bank by bringing the rock down. As discussed below, Chino cut into the hillside to gain access to the rock in order to abate the citation. Because this abatement exposed fresh material and steepened the hillside, Chino permanently closed the road for safety reasons after the rock was brought down. (Tr. 143-44).

Chino's witnesses testified that most of the rocks that were present along both sides of the road had been there since the road was built. They stated that some of the rocks may have fallen when an additional road was built higher up on the dump in 1998. They stated that these rocks did not represent material that had fallen from the hillside between the September and February MSHA inspections, as the Secretary contends. Mr. Allsup testified that the road was not very wide and that if rocks had fallen from the hillside many of them would have landed in the road. (Tr. 94). As the dozer foreman, Mr. Allsup was responsible for keeping the road clear of rocks and other materials. He testified that he did not send out equipment to remove rocks from the road. (Tr. 94). He believes that most of the rocks along the side of the road were deposited there around 1995 when the dump was built. (Tr. 95-96). Mr. Rigoni testified that he does not believe that the rocks along the road had recently rolled down the bank. (Tr. 142). He testified that the rock was placed there when the road and dump were built. He testified that, as the mine manager, he would have known if material was rolling off the dump slope.

It is not surprising that there were some concerns raised by miners about the rock in the summer of 1999. Chino was building a sump for its leaching solution in this area. Miners regularly traveled on this road during that summer as this facility was being built. Normally, the road was not used very frequently. Mr. Fierro testified that he and other employees raised concerns about the rock because it looked dangerous. (Tr. 78). In response to these concerns, Chino evaluated the situation and determined that the rock did not present a hazard. The rock is shown in Exhibits G-4 through G-6. These photographs were taken from the road after Chino had cut away the hillside as part of the abatement process. From that angle, it is not clear whether the rock is adequately supported. Chino determined that it was supported in September and believes that it still was when it received the citation. It investigated the stability of the rock when miners raised questions about it and when the inspector issued the citation.

Based on evidence presented by Chino, I find that the rock was supported and did not "create a fall-of-material hazard to persons" or equipment. The rock was sitting in a mini-bench that was not readily observable from the road. This bench can be seen to a certain extent in Exhibit G-6. Plastic pipelines are present throughout the dump to transport a liquid called "raffinate," which is produced during the solvent extraction process in which copper is leached from the oxide ore through the use of an acid. There is a partially buried raffinate pipeline along the road and along another road above the Lampbright Road. At one time, there was a pipeline running through the area where the rock was sitting. Indeed, the rock was sitting in this former "pipeline run," which was flatter than the surrounding hillside. (Tr. 135). This mini-bench provided support for the rock.

Chino arranges to have aerial photographs of the mine taken on a regular basis. Coincidentally, such an aerial survey was made on February 2, 2000, before Chino started to abate the citation. An enlargement of the photograph taken during this survey shows the road, the rock, the hillside, the raffinate pipelines, and the mini-bench that the rock was in. (Ex. R-2).

Chino abated the citation by removing the rock. It accomplished this task by using a front-end loader to remove some of the hillside below the rock. The loader removed about

3,000 tons of material. (Tr. 140). Chino then used a water cannon to remove the supporting material under the rock. The water cannon pumped about 300 gallons of water a minute for about ten minutes before the rock was dislodged. (Tr. 141). As stated above, Chino believes that the abatement rendered the hillside unstable so it permanently closed the Lampbright road.

Although it is understandable that someone viewing the rock from the Lampbright Road might believe that the rock presented a hazard, upon further investigation a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized" that the presence of the rock on the hillside did not violate the "requirement of the standard." I credit the testimony of Chino's witnesses on this issue. The material on the hillside was stable rather than loose and unconsolidated; the rocks at the bottom of the hillside had not recently fallen and did not indicate a potential falling rock hazard; the support for the cited rock had not eroded away during recent rains; and the rock was sitting on a flat area that was created when a pipeline was at that location. The inspector was mistaken about some of the facts upon which he based the citation. Consequently, I vacate the citation.

II. ORDER

Citation No. 4450231 is **VACATED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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