FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 28, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2000-395-M A.C. No. 41-01684-05507
v.	:	
	:	Roper Quarry
BILBROUGH MARBLE DIVISION, TEXAS ARCHITECTURAL AGGREGATE, Respondent	:	

DECISION

Appearances: Tina D. Campos, Esq., Mary Schopmeyer Cobb, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;
David M. Williams, Esq., San Saba, Texas, for Respondent.

Before: Judge Bulluck

This case is before me upon Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against Bilbrough Marble Division, Texas Architectural Aggregate ("Bilbrough"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). The petition seeks a civil penalty of $500.00 for an alleged violation of section 56.15003, 30 U.S.C. § 56.15003.

A hearing was held in San Antonio, Texas. During the course of the hearing, the parties reached a settlement on all eight citations respecting Docket No. Cent 2000-336-M, which was approved by Decision Approving Settlement issued April 27, 2000. The parties' Proposed Findings of Fact and Briefs are of record. For the reasons set forth below, the citation and order shall be VACATED.

I. Stipulations

The parties stipulated to the following facts:

1. Bilbrough Marble Division of Texas Architectural Aggregate ("Bilbrough") Mine ID No. 41-01684, is the lessee and operator of the Roper Quarry.
2. Bilbrough is engaged in mining, and its mining operations affect interstate commerce.

3. Bilbrough is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*.

4. True copies of Citation Nos. 7889527, 7889528, 7889529, 7889530, 7889531, 7889532, 7889533, 7889534 and 7889535 were served on Bilbrough or its agent, as required by the Act.

5. The plastic gasoline can brought to the hearing by Respondent was fairly and accurately represented by Government Exhibit P-13.

6. The language on the back of the plastic gasoline can brought to the hearing by Respondent read: "Nonmetallic petroleum product container, classified by UL, Inc., in accordance with the standard specs for plastic container (Jerry cans) for petroleum products, ANSI/ASTN @ 343J-00, approved mass gasoline container."

7. The idler brought to the hearing by Respondent was fairly and accurately represented by Government Exhibit P-5.

8. The mine history, Government Exhibit P-1, was authentic.

II. Factual Background

On March 2, 2000, MSHA Inspector Danny Ellis conducted a regular inspection of Bilbrough's Roper Quarry, a surface limestone/dolomite mine and crushing operation, located in Marble Falls, Texas. At the time of the inspection, 8:30 a.m., he observed stockpiles of material, a front-end loader loading a customer truck, a Euclid haul truck operating, and two employees in the open break area (Tr. 12-14, 18-19, 87). Inspector Ellis observed the operator of the Euclid haul truck wearing tennis shoes and another employee wearing cowboy boots and, with all employees assembled in the break area, the inspector inquired whether they were wearing hard-toed footwear and he physically checked their footwear by touch of his hand or foot (Tr. 16-19, 85, 87-89). Foreman Ollie Joe Conely, who had been working the excavator in the pit, summoned general manager Joe Williams, Jr. to the mine, and by the time Williams arrived within the half hour to accompany Inspector Ellis on his inspection, Ellis had prohibited the workers' entry to certain areas of the plant, unless they changed to steel-toed footwear (Tr. 14, 53, 59, 83-84, 97, 144, 150-52). As a consequence, Conely had instructed the workers to cease operations (Tr. 91).

Inspector Ellis ultimately cited Bilbrough for several violations (including a citation for the four workers' unsuitable protective footwear) which citations are not at issue herein, and before the inspection actually got underway, the subject of suitable protective footwear became a hotly contested issue between Ellis and Williams, especially since the workers had mistakenly believed that Ellis had shut down the mine (Tr. 25, 75, 83-84, 97, 100, 103, 127-28). Williams

was wearing a pair of Redwing Pecos leather workboots with leather reinforced toes (Tr. 32-33, 98-99), and pursuant to cellular phone conversations with Ellis's supervisor, Ralph Rodriguez, Williams was permitted to accompany Ellis on inspection in his leather workboots, except for areas where, in Ellis's opinion, his footwear would pose a hazard (Tr. 103-04, 144-46, 148-49). As the inspection and footwear debate progressed, with Ellis pointing out to Williams areas in the plant where falling objects could cause foot injuries, Ellis inquired about a belt idler that had come into view. By then, Williams had become quite frustrated, and while explaining how the welder (in steel-toed footwear) would be installing the belt idler on the tailing conveyor, that the idler was light in weight and that installation would not pose a hazard to the feet, Williams lifted the 25-35 pound belt idler waist high to demonstrate how the task would be performed (Tr. 31-32, 105-110, 135-37). Inspector Ellis immediately directed Williams to put the belt idler down and Williams complied (Tr. 32, 107, 109). Apparently, both Williams and Ellis were highly agitated, and Williams telephoned Rodriguez again (Tr. 91-92, 107, 109, 135). As a consequence of Williams having lifted the belt idler, Inspector Ellis issued combined 104(a) Citation/107(a) Order No. 7889528, alleging a significant and substantial violation of 30 C.F.R. § 56.15003 and describing the hazardous condition as follows:

> The supt. Joe Williams, Jr. was not wearing hard toed footwear and he picked up a 30 inch belt idler that weighed approximately 20 lbs. The belt idler was made out of angle iron with rollers attached to the angle iron. The belt idler could have fallen on his feet causing a lost time injury. This AR told Mr. Williams to not pick up the belt idler since he did not have on suitable protective footwear and he still picked up the belt idler

(Ex. P-4). Although the citation/order estimates the weight of the belt idler at 20 pounds, 25-35 pounds is a more accurate assessment (Tr. 31; Ex. P-5).

III. Findings of Fact and Conclusions of Law

A. 104(a) Citation No. 7889528

30 C.F.R. § 56.15003 provides as follows:

> All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

The Commission and the courts have recognized the broad applicability of generally worded standards, and have applied an objective test to challenges based on failure to provide adequate notice of prohibited or required conduct, i.e., 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. *BHP Minerals International, Inc.,* 18 FMSHRC 1342, 1345 (August 1996) (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416

(November 1990)); *Freeman United Coal Mining Co. v. FMSHRC* 108 F.3d 358, 362 (D.C. Cir. 1997). In interpreting a standard, the Commission has determined how a reasonable person would act by considering such factors as accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP Minerals International* at 1345 (citing *U.S. Steel Corp.,* 5 FMSHRC 3, 5 (January 1983)).

Although section 56.15003 is not specific as to the type of footwear necessary for adequate protection in and around the various areas and activities of a mine, a reasonably prudent person working in the mining industry is put on notice that, where the feet are exposed to the hazards of being struck by falling or stationary objects of a nature that can be expected to cause broken bones or other serious injuries, hard-toed protective footwear must be worn. MSHA's Program Policy Manual is worded in general terms, as well, indicating that "substantial hard-toed footwear" is considered the minimum protection acceptable for most mining applications, and that there may be instances where special purpose foot protection is need or, conversely, where heavy leather shoes or boots will provide adequate safety for the feet. *MSHA Program Policy Manual*, *Volume IV, Part 56/57, Subpart N* (07/01/88). It follows, then, that what constitutes suitable protective footwear is determined on a case-by case basis and requires a situational analysis of the tasks the miner is performing and could be performing during the course of his shift (Tr. 50-52, 62-63, 133-34).

Reviewing the circumstances at the mine giving rise to the citation at issue herein, Inspector Ellis observed a front-end loader and haul truck being operated upon his arrival, and despite his determination that four workers were not wearing suitable protective footwear necessary for protection against hazards, he determined that none of the men were currently working in areas where hard-toed footwear was needed, and prohibited them from entering those areas (Tr. 17, 21-23, 59, 68, 76, 144-46; Ex. P-2). I credit Williams' testimony that when he arrived on-site in leather workboots, Ellis prohibited him from accompanying him on the inspection (Tr. 97). Ellis testified that he considered Williams to be wearing soft-toed boots (Tr. 77). Indeed, the inspection did not proceed until Rodriguez overrode Ellis and authorized Williams to accompany Ellis in his leather workboots (Tr. 97-100, 103-04, 144-46). Considering that the miners were under the impression that the mine had been shut down, and Ellis and Williams had locked horns as to the suitability of the miners' footwear, it is apparent that the inspection proceeded in an emotionally charged environment (Tr. 75, 97, 104, 134-35). I credit Ollie Joe Conely's testimony that he overheard heated discussion between Ellis and Williams at the time of the alleged violation (Tr. 91), and discredit Ellis's testimony that he was not agitated (Tr. 56-57, 65). Because I am convinced that discussion of the belt idler arose while tempers flared, I credit Williams' testimony that his action, motivated by extreme frustration, was spontaneous and not premeditated (Tr. 105-107). In so finding, I discredit Inspector Ellis's testimony that beforehand, he specifically directed Williams not to pick up the belt idler (Tr. 31-32, 36, 65-69, 108). A more likely scenario, viewing the evidence in its entirety, is that Ellis told Williams not to pick up the belt idler <u>as</u> it was being lifted.

Although Inspector Ellis testified that he issued the citation because Williams was engaging in activity that required hard-toed footwear (Tr. 33), it is clear that MSHA determined

Williams' footwear suitable for accompanying Ellis on inspection, consistent with its own policy that leather boots provide adequate safety under some circumstances. Ellis testified that the location of the belt idler posed no hazard of falling objects (Tr. 155-56). It is also evident that Williams was not performing any work when he lifted the belt idler, but illustrating a point during the course of the inspection, and at all times maintained control of the object. In explaining how he happened to "snatch up" the belt idler, Williams testified credibly that he had been picking up 100 pound bags since he was 12 ½ years old, which he considered "not much weight" (Tr. 106-08). Moreover, Ellis testified that he had no indication that Williams would drop the belt idler (64-65). Ellis even conceded, as pointed out by Williams, that the top-heavy configuration of the belt idler substantially reduced the possibility of it dropping straight down onto the feet (Tr. 124-25, 146-47). Consequently, having found that Williams' leather workboots were suitable protective footwear for accompanying the inspector, and having found that Williams was not in an area or performing a task that would subject him to hazards that would cause foot injury, I conclude that the standard was not violated. Accordingly, Citation No. 7889528 is vacated.

B. 107(a) Order No. 7889528

Section 3(j) of the Mine Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Mine Act provides, in pertinent part, for imminent danger orders, as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(a)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Considering that an inspector must act quickly in the face of a perceived dangerous condition, the Commission and the courts have held that an inspector's findings and decision to issue an imminent danger order should be supported unless there is an abuse of discretion or authority. *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (March 1993); *Utah Power & Light Co.,* 13 FMSHRC 1617, 1627 (October 1991); *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2164 (November 1989); *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (1975).

There are several cases in which the Commission has held that there must be some degree of imminence to support an imminent danger order and has defined "imminent" as "ready to take place[;] near at hand[;] impending...[;] hanging threateningly over one's head[;] amazingly near." *Island Creek Coal Co.* at 345; *Utah Power & Light Co.* at 1621. In *Utah Power & Light Co.,* the Commission stated that "where an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required." 13 FMSHRC at 1622. In *Rochester & Pittsburgh Coal Co.,* the Commission recognized that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 11 FMSHRC 2163 (quoting *Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974)); *Island Creek Coal Co.* at 345. Finally, the Commission has held that an inspector, albeit acting in good faith, abuses his discretion, in the sense of making a decision that is not in accordance with the law, if he issues a 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. *Island Creek Coal Co.* at 345; *Utah Power & Light Co.* at 1622-23.

Inspector Ellis testified that he issued an oral imminent danger order the minute Williams picked up the 25-35 pound belt idler, because if he were to drop it on his feet, it was more than likely that he would have sustained broken bones (Tr. 32-33). Ellis further testified that his order indicated that "Williams did something at that time that could immediately result in a serious injury to him or to someone else" and that the effect of the order was "for him to cease and desist what he was doing" (Tr. 61; see 143-44, 146-47).

The instant imminent danger order was issued under circumstances where there was no likelihood of injury and no degree of imminence necessitating Williams' withdrawal. Williams' testimony that he was in control of the belt idler and Ellis's acknowledgment that Williams was in no danger of dropping it established that no dangerous situation existed. Moreover, considering the order in light of a perceived dangerous condition leads to the same conclusion, i.e., that Williams' withdrawal was not required to avert the danger. Indeed, Inspector Ellis was able to put a stop to Williams' actions by directing him to put the belt idler down, thereby ending the perceived danger immediately. I am convinced that Inspector Ellis's judgement was affected by the antagonistic atmosphere attendant the inspection, and because he failed to make a determination that the perceived hazard was impending, it is my finding that he abused his discretion in issuing an imminent danger order. Accordingly, Order No. 7889528 is vacated.

ORDER

Combined 104(a)Citation/107(a) Order No. 7889528 is hereby **VACATED**, and this civil penalty proceeding is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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