FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 26, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-214-M
Petitioner	:	A.C. No. 41-00070-05529
	:	
v.	:	
	:	
COLD SPRING GRANITE CO.,	:	
Respondent	:	Sunset Quarries

DECISION

Appearances: Lindsay A. McCleskey, Esq., and Danielle L. Jaberg, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Cold Spring Granite Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of $242.00. A hearing was held in Austin, Texas. For the reasons set forth below, I affirm the citation and assess the penalty proposed.

Background

Cold Spring Granite Company operates an open-pit granite quarry, known as Sunset Quarries, near Marble Falls, Texas. Granite is mined by blasting large pieces of granite called "loaves" from the natural granite bed. A "loaf" weighs between 200 and 600 tons, is between 8 and 25 feet tall and is 12 to 15 feet in length. The loaves are then broken into smaller pieces, called "blocks," by use of drills and wedges, and the blocks are moved to another location to be further broken up. A block normally weighs 20 to 22 tons, is between 5 and 51/2 half feet high and is no longer than 11 feet. A block is broken up into milling size by drilling holes in it and then driving wedges into the holes so that the granite splits along the line of holes. Finally, the milling-sized pieces are machine milled to various customers' requirements.

On February 5, 2003, MSHA Inspector James R. Fitch, Jr., was conducting an inspection of Sunset Quarries when he observed a miner operating a drill while standing on top of a five foot high block of granite. The miner was standing within a foot of the edge of the block and was not wearing any type of fall protection. Believing this to be a violation of the Secretary's mandatory safety standards, the inspector issued a citation to the company.

The citation, No. 6226687, alleges a violation of section 56.15005, 30 C.F.R. § 56.15005, because:

> A miner was observed standing within 1 foot of the edge (to the side and behind the miner) of a 5 foot high granite block. The miner was not wearing any form of fall protection while drilling. The miner could miss-step [*sic*] and fall from the block to the ground below. The surface of the block appeared to be dry and relatively free of tripping hazards. The fall could result in spinal injuries to the miner. It is common practice at this mine for miners to stand on blocks without fall protection.

(Govt. Ex. 2.) Section 56.15005 provides, in pertinent part, that: "Safety belts and lines shall be worn when persons work where there is danger of falling . . . ."

Findings of Fact and Conclusions of Law

The company does not dispute that the block of granite was five feet high or that the miner was standing near its edge without fall protection. It argues, however, that the regulation was not violated because: (a) in a previous citation, MSHA had approved Cold Springs fall protection policy and the miner in this case was in compliance with that policy; (b) regulations of the Occupational Safety and Health Administration (OSHA) for the construction industry do not require the use of fall protection unless the height is six feet; (c) it is not industry practice to use fall protection on a five foot block and MSHA had observed company employees working on such blocks for years and had not cited them; and (d) there are no reported cases requiring fall protection for a height of five feet. None of these arguments is persuasive.

In construing 30 C.F.R. § 57.15-5, a regulation worded almost exactly the same as the instant regulation, the Commission noted that it was the kind of regulation "made simple and brief in order to be broadly adaptable to myriad circumstances."[1] *Kerr-McGee Corporation*, 3 FMSHRC 2496, 2497 (November 1981). The Commission has further held, with regard to this language, that the applicability of the standard to a specific situation is whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard "would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). The company's arguments do not address this standard.

With regard to the previous citation, on February 23, 2001, the operator was cited for a violation of section 56.15005 at its Bear Mountain Quarry because an employee was standing on a "boulder" operating a drill without fall protection. (Govt. Ex. 9.) The citation was modified at

[1] The only difference in the two regulations is the word "men" where "persons" is in section 56.15005.

an informal conference with Ralph Rodriguez, the San Antonio Field Office Supervisor, by deleting the "significant and substantial" designation and reducing the level of negligence from "moderate" to "low." The reason given for the modification was that: "The company has [a] policy on tying off and will evaluate each driller." (Govt Ex. 9 at 3.) Based on this language, the company argues that "MSHA specifically incorporated and approved Respondent's shoulder height fall policy."[2] (Resp. Br. at 5.)

The language in the modification of the citation does not indicate that MSHA "incorporated and approved" the company's fall protection policy. In the first place, the granite block in question in the Bear Mountain citation was six feet high. (Tr. 80.) Thus, drilling on it without fall protection violated the company's fall protection requirements as well as MSHA's. Secondly, the fact that the company had a fall protection policy was cited in the citation to justify reducing the gravity and negligence of the violation. It certainly was not intended to incorporate it into the regulation. Furthermore, the Respondent's interpretation ignores the rest of the language in the modification, that the company would "evaluate each driller." As Rodriguez testified, "[t]he company agreed to monitor each situation that came up on drilling these big granite boulders, because they're not all the same conditions." (Tr. 93.)

Moreover, Inspector Rodriguez, in agreeing to the modification of the Bear Mountain citation, obviously did not have the authority to waive the regulation's requirements and bind the Secretary to what would be an amendment of the regulatory language. In this connection, the 10th Circuit Court of Appeals has said:

> Whatever their positions within the agency, the MSHA officials who approved Emery's plan clearly had no authority to waive the Act's requirements and bind the government to what amounts to an amendment of the statutory language. Particularly where mandatory safety standards are concerned, a mine operator must be charged with knowledge of the Act's provisions and has a duty to comply with those provisions. To the extent Emery relied on an interpretation by MSHA officials of the Act's implementing regulations, Emery assumed the risk that that interpretation was in error.

Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) (citations omitted). Similarly, to the extent that Cold Springs relied on what it believed to be Rodriguez' acceptance of its fall protection policy, it assumed the risk that that interpretation was in error.

Finally, it is not at all clear that the company's policy was not violated in this case. Inspector Fitch testified that the miner on the block was "5' 4", 5' 6"" tall. (Tr. 71.) Michael J.

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[2] Cold Spring's fall policy provides that persons operating rock drills will use fall protection on "any block above the operator's shoulder height." (Govt. Ex. 5 at 2.)

Clark, the company's safety manager, testified that he was "five six, five seven." (Tr. 122.) The inspector further testified that "I'd estimate a normal head to be six to eight inches long. That would put his shoulder below the level of five foot." (Tr. 71.) If anything, the inspector's estimate of the length of a head and neck is on the conservative side. Therefore, it appears that the miner was not wearing fall protection in violation of the company's own policy.[3]

The operator's second argument implies that since OSHA construction regulations do not require fall protection unless the work area is six feet or more above the ground, MSHA should adopt a similar standard. While correctly arguing that OSHA standards are not applicable to this case, the Secretary points out that OSHA's General Industry standard for Walking-Working Surfaces requires fall protection to be worn at heights of four feet or greater. (Sec. Br. at 7.) It is not necessary, however, to determine which OSHA standard might be appropriate, since OSHA standards are clearly not applicable to mines.

Turning to the company's third argument, there is no support in the record for its claim that it is not industry practice to require fall protection on a standard sized block of granite and that MSHA has observed such operations for years and not issued citations. Clark did testify that he was not aware of any quarry company that required its employees to use fall protection on five foot blocks. (Tr. 127.) However, no independent evidence was offered to support this assertion. Further, it was contradicted by Inspector Rodriguez who testified that he had inspected other quarries and observed miners wearing fall protection at "[a]nywhere from four, six to ten feet, eight feet" anytime "they were in danger of falling." (Tr. 95-96.) The assertion is also at odds with the company's own fall protection policy which, depending on the height of the miner, could require the use of fall protection at less than five feet.

Furthermore, the Secretary cannot be estopped from citing a violation simply because that same condition was not cited during a previous inspection, or was not cited at another quarry. Collateral estoppel cannot be asserted to prevent the Secretary from carrying out her statutory enforcement responsibilities. *King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1421-22 (June 1981). Consequently, it makes no difference that, with the exception of the Bear Mountain Quarry, the Respondent had never been cited for this violation.

The Respondent's final argument is partially correct. There do not appear to be any Commission cases holding that a work place five feet off of the ground required fall protection under the standard. On the other hand, there is only one case that concludes that being five feet off of the ground does not require fall protection and it is distinguishable from this case. In *USX Corp., Minnesota Ore Operations*, 15 FMSHRC 2333 (November 1993), Judge Barbour found that an employee climbing a five to six foot ladder on the outside of the cab of an electric mining shovel did not have to have fall protection. He held that: "The *record does not support* finding

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[3] No evidence was offered of the miner's actual height. In addition, if the company's policy were part of the regulation, each violation would turn on a measurement of the alleged violator's shoulder height and not on whether there was a danger of falling.

that falling from the 5 to 6-foot ladder would have produced an injury. Moreover . . . it was *utterly impractical* to expect the person to tie off while climbing the ladder." *Id.* at 2340 (emphasis added).

In this case, the record supports finding that falling from the five foot block of granite would result in an injury and that it is possible to tie-off while operating a drill on the block. The operator's attempt to argue that tying-off is impractical is undercut by its own requirement that fall protection be used on blocks above shoulder height.[4]

Based on the evidence, I find that a reasonably prudent person would have recognized that the miner was in danger of falling and that use of a safety line was warranted. As Inspector Fitch testified, whether fall protection is required on a five foot block of granite,

> depends upon the circumstance that is found. In this case the miner was standing right next to the edge. He was operating a drill, which meant he was thinking about other things more than likely, such as running the drill. During situations like that it's possible to lose concentration.

(Tr. 30.) Or, as the Commission stated in *Great Western Electric*: "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." 5 FMSHRC at 842.

Indeed, the company did recognize that fall protection was appropriate in this instance. Its requirement that fall protection was to be used on blocks over shoulder height basically would require protection at a few inches above or below five feet. Such a minimal distinction would make no difference as far as the fall is concerned. Accordingly, I conclude that the company violated section 56.15005, as alleged.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard

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[4] The Respondent also argues that the fact that miners performing the wedging operation do not have to use fall protection shows that drillers should not have to tie-off. This argument is without merit. As Inspector Fitch pointed out, the reason wedgers do not use fall protection is that the nature of the wedging function would place them at a greater danger if they used fall protection than if they did not. (Tr. 66-67.)

contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

In this case, whether the violation is S&S depends on the third and fourth *Mathies* elements. I have already found the violation of a safety standard and that the failure to use fall protection created the danger of a fall. With regard to whether the fall would result in an injury and whether injury would be reasonably serious, Inspector Fitch testified that it was reasonably likely that the miner would step off of the edge and fall to the ground suffering anything from bruises, to a permanently disabling spinal injury, to a fatal accident. (Tr. 44-45.) Inspector Rodriquez testified that there was a danger of falling off of the block or into the gap between the block the miner was on and the block next to it, that he believed the violation to be S&S and that they types of injuries that could result from a fall of five feet included broken bones, broken pelvises, back injuries and head and neck injuries, with the most common being broken bones. (Tr. 99-100.)

Based on the above, I find that the violation was “significant and substantial.”

Civil Penalty Assessment

The Secretary has proposed a penalty of $224.00 for this violation. However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, I find that Sunset Quarries is a small to medium operation and that Cold Spring Granite Company is a small company. I find that the company

has a good history of previous violations. (Govt. Ex. 8.) The operator has made no claim that the proposed penalty will adversely affect its ability to remain in business. Therefore, based on that, and the small penalty, I find that payment of the penalty will not adversely affect it. I further find that the record supports a finding that the company demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In addition, I find that the gravity of this violation was not very serious. Finally, I find that the company was moderately negligent in that, even though the operator may have believed that MSHA had approved its shoulder height requirement and even though it may have been mislead by previous non-enforcement, it was put on notice that MSHA was starting to enforce the fall protection requirement by the Bear Mountain citation.

Taking all of these factors into consideration, I conclude that the $224.00 penalty proposed by the Secretary is appropriate.

Order

In view of the above, Citation No. 6226687 is **AFFIRMED** and Cold Spring Granite Company is **ORDERED TO PAY** a civil penalty of **$224.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Lindsay McClesky, Esq., Office of the Solicitor, U. S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202

Steven R. McCown, Esq., Littler Mendelson, 2001 Ross Avenue, Suite 2600, Dallas, TX 75201

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