FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 21, 1995

SPRINGFIELD UNDERGROUND, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 94-109-RM
	:	Citation No. 4321784; 1/11/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 94-110-RM
	:	Citation No. 4321786; 1/12/94
	:	Docket No. CENT 94-111-RM
	:	Order No. 4321787; 1/12/94
	:	
	:	Plant No. 1 Mine & Mill
	:	Mine ID 23-00094
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 94-131-M
	:	A. C. No. 23-00094-05543
v.	:	
	:	Docket No. CENT 94-201-M
SPRINGFIELD UNDERGROUND, INC., Respondent	:	A. C. No. 23-00094-05546
	:	Plant No. 1 Mine & Mill
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 94-91-M
	:	A. C. No. 23-00094-05542
v.	:	
	:	Plant No. 1 Mine & Mill
GRIESEMER STONE COMPANY, (n/k/a SPRINGFIELD UNDERGROUND, INC.), Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Bradley S. Hiles, Esq., Peper, Martin, Jensen, Maichel & Hetlage, St. Louis, Missouri, for Contestant/Respondent.

Before: Judge Maurer

These consolidated proceedings concern a proposal for assessment of civil penalty filed by the Secretary of Labor (Secretary), against the mine operator (Springfield Underground, Inc., hereinafter referred to as Springfield), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 820(a), seeking a combined civil penalty of $2,772, for four alleged violations of the mandatory safety standard found at 30 C.F.R. ' 57.3200.[1] The various issues presented in the civil penalty cases include the fact of violation, and if so found, whether the violation(s) were "significant and substantial", whether some of the violation(s) were "unwarrantable failures", and the appropriate civil penalty assessments to be made for the violations, should any be found. The contest cases filed by Springfield challenge the legality and propriety of the cited violations.

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[1]30 C.F.R. ' 57.3200 provides as follows:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Pursuant to notice, the cases were heard at Springfield, Missouri, on January 4-5, 1995. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

STIPULATIONS

The parties agreed to the following (Tr. 14-17):

1. Springfield is engaged in mining and selling of crushed and broken limestone in the United States, and its mining operations affect interstate commerce.

2. Springfield is the owner and operator of Plant No. 1 Mine & Mill, MSHA ID No. 23-00094.

3. Springfield is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. ("the Act").

4. The administrative law judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements asserted therein.

6. The proposed penalty will not affect respondent's ability to continue in business.

7. The operator demonstrated good faith in abating the violation(s).

8. Springfield is a small mine operator with 78,118 hours of production in 1992.

The "Loose Ground" Issue

As a general matter central to all four of the violations alleged by the Secretary in these cases, I note that the terms "hazardous ground conditions" and "loose ground" or "loose material" are not specifically defined in the regulations.

"Loose" is defined as "not rigidly fastened or securely attached." Webster's Third World New International Dictionary (Unabridged) 1335 (1966). The term "loose ground" is defined as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough. . . . As used by miners, rock that must be barred down to make an underground workplace safe. . . ." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms 658 (1968). In Amax Chemical Company, 8 FMSHRC 1146, 1148 (August 1986), the Commission interpreted the term "loose ground" to refer "generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling."

For the operator's employees who testified concerning the terminology, their working definition of "loose ground" was "any material that would fall on its own." The operator's position at trial and in their post-trial brief would add to that definition "any material that could be 'barred down' using a hand scaling bar."

For the MSHA inspector who testified on behalf of the Secretary, the paramount factor he used to determine "loose ground" was more or less a hindsight test. If the material, once tentatively identified as "loose," could be brought down by any means necessary, then that demonstrated it was "loose."

In a somewhat related case involving the roof in an underground potash mine, Amax Chemical Corp., supra, 8 FMSHRC at 1149, the Commission stated that a variety of factors should be considered in determining whether loose ground is present, including but not limited to the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, "popping" and "snapping" sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas. In this case, however, as a practical matter the Secretary's evidence was largely limited to the results of a visual inspection of the cited areas and the subsequent scaling operations. The inspector admitted he did not consider the operating experience of the mine with respect to loose ground, the presence or absence of sloughed material, or popping or snapping sounds in the ground. He also admittedly is not familiar with the rock formation of the mine.

With that general outline in mind, I proceed to the individual matters at bar.

DISCUSSION, FINDINGS, AND CONCLUSIONS

I. Docket No. CENT 94-91-M

Citation No. 4111868 was issued by MSHA Inspector Michael R. Roderman on October 13, 1993 under section 104(a) of the Mine Act, and alleges a violation of the mandatory safety standard found at 30 C.F.R. ' 57.3200. The condition or practice cited by the inspector is described as follows:

> The operator of the Tamrock Drill was observed drilling in a heading in the underground mine area known as the "Southwest Corner." There were large pieces of loose material on the rib directly behind and to the left of the driller. A person could not safely walk around the drill without being exposed to possible "fall of ground." The back height in this area is about 30 feet high. The fall of the amount of rock observed from these heights could easily result in death. The drill was immediately removed from the area, and scaling started.

On the day in question, Inspector Roderman, accompanied by Mr. Tony Brasier, the Safety Director and Mining Engineer for Springfield, observed what he felt to be loose material approximately 20 feet high on a rib in the "Southwest Corner." He described this as large pieces of loose material directly behind and to the left of an area where drilling was taking place. He later observed that this loose material was brought down "quite easily," but does not recall what method was used to bring it down. He testified that the mine used both hand scaling and a mechanical scaler with a hydraulically operated tooth.

In fact, it was brought down by the Gradall 880 mechanical scaler, and according to the employee who actually performed the scaling activity, none too easily.

The Gradall 880 is a large machine weighing 26 1/2 tons and having a reach of 42 feet in the air. The cab of the Gradall sits more than 6 feet high and the operator's eye-level is approximately 10 or 11 feet off the floor. The Gradall 880 also has powerful lighting, with six high intensity lights, plus a spotlight for the operator. The machine is capable of illuminating any rock surface it faces. The lights are evenly distributed from low running lights, to lights on the top and sides of the cab attached to the boom, which can reach to the top of the mine. The Gradall has a single telescopic arm, or boom, with a large tooth on the end. Through the use of a joy stick, the Gradall operator may manipulate the large tooth in the same directions and with the same motions as a person moves his hand. The tooth is capable of delivering enormous force -- 16,000 pounds of curling force. In addition, the boom can deliver up to 19,000 pounds of force when it attacks a rock face. The Gradall is capable of excavating rock with tons of force and enormous leverage.

Mr. Shannon Davis, the employee who operates the Gradall 880, and performed the scaling activity which the inspector witnessed, very credibly testified to the effect that the material in question was not "loose." He is an hourly employee of the company, a member of the Operating Engineers Union, and an experienced scaler. Mr. Davis testified that when he initially positioned his scaler in front of the rib in question, he did not observe any loose ground. He did bring material down from the wall, but only after exerting "full power" with the mechanical scaler. He brought down "a very small rock that was basically excavated off the wall." By his account, the mechanical scaler actually broke the rock away from the other stone on the rib. He also opined that that rock could not have been brought down by hand scaling nor would it have fallen on its own.

This version of events was corroborated by Mr. Brasier. He testified that although material was brought down by the Gradall scaler, it had to be pounded and scraped down. He described the machine as "shaking violently. . . .[y]ou could see the machine sit there and shake and take a lot of abuse."

Based on the preponderance of evidence available on this point of contention, I conclude that the material was not "loose." The testimony of Mr. Davis was very significant on this point. If the material has to be pried off the rib with thousands of pounds of mechanical force, it is not "loose." Accordingly, I find no hazardous ground conditions existed as alleged in Citation No. 4111868 and it will therefore be vacated herein.

II. Docket Nos. CENT 94-109-RM and CENT 94-131-M

Citation No. 4321784 was also issued by Inspector Roderman under section 104(a) of the Act on January 11, 1994. It alleges a violation of 30 C.F.R. ' 57.3200, and states as follows:

> Loose material was observed on the left pillar in "Knob Tunnel" area at Grid 375-550. The mechanical scaler had earlier scaled the face in this area, but had not checked for loose on the pillars before reaching the face. The amount of loose that was scaled down (approximately 2 loader buckets full) and the ease with which it came down indicate that someone could have easily been fatally injured in this area. The driller was the next scheduled person to enter this area after the loader cleaned up the debris.

According to Inspector Roderman, this loose was 25-30 feet above the floor level and filled approximately two full front loader buckets after it was scaled down.

Once again, however, there is a serious difference of opinion concerning the threshold issue of whether the material was "loose" in the first place.

Shannon Davis was again the Gradall operator who scaled the pillar at the inspector's direction. He testified that the material he brought down was "broken" off the pillar by the Gradall. He started with a rock that stuck out from the top of the pillar and, at Mr. Brasier's direction, used the full power of the Gradall to bring it down.

An experienced scaler with the hand bar as well, Mr. Davis opined that the rock could not have been brought down by hand; nor would the vibrations from nearby scaling or drilling have caused the rock to fall. After bringing down the rock at the top, Mr. Davis "hit" the pillar repeatedly with the Gradall tooth, breaking off more rock.

Another discrepancy with this citation involves the amount of rock excavated off the pillar by the Gradall. Inspector Roderman recorded the volume on the citation as "two loader buckets full." Shannon Davis, as it turned out, also operated the loader which picked up the scaled-down stone. He testified that the volume was only about one-third of one bucket, a difference of several tons in volume from Inspector Roderman's estimate. Tony Brasier's recollection supported Mr. Davis.

The Secretary bears the burden of proving these violations by a preponderance of the evidence and in this instance it just is not here. Once again, I made the critical credibility choice in favor of Mr. Davis and find that the material brought down by the Gradall was not "loose," does not constitute a hazardous ground condition under the standard cited, and is therefore not a violation of that standard. Determining material is "loose" based on the fact that it can be brought down by such tremendous force goes well beyond what can reasonably be contemplated by the standard at bar. Accordingly, Citation No. 4321784 will be vacated herein.

III. Docket No. CENT 94-110-RM (Citation No. 4321786 assesse

Citation No. 4321786 was issued by Inspector Roderman on January 12, 1994, under section 104(d)(1) of the Act. Like the others, this citation alleges a violation of 30 C.F.R. ' 57.3200. The condition or practice alleged by the inspector is as follows:

> Loose material was observed on the ribs and pillars in the "Skinny Pillar" area of the mine. A front-end loader and two haul trucks were mucking a heading in this area. The trucks were traveling directly by large amounts of loose. The loose measured about 3 foot diameter to about 6 foot by 12 foot by 1 foot thick, in some locations. Even though all persons observed were in their vehicles, if a fall of ground did occur, they could still be seriously
>
> injured. It was determined that the company did not take all steps necessary to prevent this occurrence, as they did not insure that the area was properly checked for loose after blasting and prior to mucking. This is

an unwarrantable failure.

The inspector testified that numerous factors might cause what he considered to be loose material to fall, including vibrations from equipment or equipment bumping against the ribs or pillars.

The scaling in this instance was done by hand, with scaling bars in a highlift to reach the affected area. The inspector was not present. However, the hand scalers abating the citation admittedly brought down several "fist-size" pieces of loose material. This is considerably less than the inspector described but is still sufficient to create a "hazard to persons" and violate the cited standard. Employees were working in the area and were exposed to the hazard presented by this "loose."

The inspector also marked the citation "significant and substantial" ("S&S").

A "significant and substantial" violation is described in section 104(d)(1) of the Mine 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." 30 C.F.R. ' 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, 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 in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The violation of the cited standard has been proven to my satisfaction. Furthermore, I find that if the condition were left unabated, continued vibrations from further blasting could adversely effect the status of the loose material. It would likely continue to deteriorate over time. The rock, which was already loose, was not going to get any tighter over time; it would only get looser. Assuming no one corrected the condition, it would eventually fall, and I concur with the inspector that a fist-size rock falling from overhead would be reasonably likely to cause a serious injury to a person or persons below. I therefore find that the violation was "S&S" and serious.

The Secretary also argues that the violation was the result of Springfield's unwarrantable failure to comply with the standard at bar.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct

as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993).

The evidence does not support any "indifference, willful intent or serious lack of reasonable care" on the part of the operator with regard to the "loose material" in the "Skinny Pillar" area.

First, I found the previously issued citations (October 13, 1993 and January 11, 1994) citing "loose ground" as a hazardous ground condition were not violations. Therefore, these previous citations cannot serve as a basis for the Secretary's contention that respondent was "indifferent" (i.e., that respondent was aware of the violative conditions yet failed to correct them).

Secondly, Inspector Roderman testified that the mine foreman, Mr. Vandenburg, had inspected the area the morning the citation was written but failed to correct obvious "loose." However, the operator provided credible testimony that the scalers could not readily identify the "loose" and questioned whether they were even in the correct area. I find that there is at least a good faith, honest difference of opinion concerning what constitutes loose material. I do not believe it was as "obvious" as the inspector thinks it was. In this particular instance I am giving the inspector the benefit of the doubt in a close factual case that the material was in fact "loose" and apt to fall. I also find that the operator is chargeable with but ordinary or moderate negligence in this instance.

Therefore, I conclude that the violation of the cited standard due to the presence of "loose" in the "Skinny Pillar" area was not an unwarrantable failure, and the section (d)(1) citation will be modified to an "S&S" citation issued under section 104(a) of the Mine Act.

After considering the statutory criteria contained in section 110(i) of the Act, I assess a civil penalty of $100 for the violation found herein.

IV. Docket No. CENT 94-111-RM (Order No. 4321787 assessed in Docket No. CENT 94-201-M)

Section 104(d)(1) Order No. 4321787 was issued on January 12, 1994, by Inspector Roderman, and alleges a violation of the mandatory standard found at 30 C.F.R. ' 57.3200. The condition or practice alleged by the inspector is as follows:

> Loose material was observed on the ribs and pillars in the "Sump Run" area of the mine. A front-end loader and two haul trucks were mucking a heading in this area. The mucking crew had been sent to this area after the area they had been in earlier had been "shut down" due to loose in that area also. Management was notified of the loose problem in the mine and the need to change the current mining cycle to include scaling prior to mucking commencing. The loose that was observed in this area varied in size and was from about l0 feet above ground level near the back (about 30 feet) and although all persons were in their vehicles, they still could be seriously injured. This is an unwarrantable failure.

The hazard alleged in this Order is that of a "serious injury" from the fall of loose material onto cabs of a front-end loader and two haul trucks. According to Inspector Roderman's testimony, the mine employee exposed to the greatest risk was the loader operator who, by the inspector's account, was parked under a large rock perched 30 feet high on a pillar "gaped open so seriously, I am not even sure how it was hanging there."

Respondent's witnesses agree that the large rock in question was there and that it came down "easily." Shannon Davis used the Gradall to bring down the rock. By his account, he used "full

throttle" and "basically dragged it off" of a ledge. Tony Brasier recalled that Mr. Davis used the Gradall to break the rock in two before taking it off the ledge. Davis and Brasier also opined that the size and weight of the rock was such that normal vibrations throughout the mine would not have caused it to fall. Whether or not this particular rock was "loose," there remains a question of whether it created a present hazard to persons in the affected area. I will discuss that issue later in this decision.

At the inspector's immediate direction, Davis proceeded to scale other pillars in the vicinity. He moved the Gradall to at least 16 other locations, on the various sides of six other pillars. By the account of witnesses Brasier, Vandenburg, and Davis, Inspector Roderman would direct the Gradall operator to scale a pillar by shining his (Roderman's) mining light on that pillar. When the scaling was done to Inspector Roderman's satisfaction, he would flash his light into the operator's cab as a signal to move on to another area. Mr. Davis testified that he did not observe any loose material in this area and opined that he would not have wasted his time scaling these pillars. Mr. Brasier testified that referring to one of these pillars, the inspector had claimed there was loose and directed it to be scaled down. When Mr. Davis proceeded to scale it with the Gradall and nothing would come down despite Davis' best efforts, the inspector said: "That's tight. Lets go somewhere else." Mine Foreman Marty Vandenburg likewise did not see any loose. He did see a few rocks come down that Davis was able to break loose with the Gradall, but in his opinion, they were not loose to begin with.

It occurs to me that this particular inspector may just have an overly acute sense of what material is "loose." If he is consistently the only one who thinks a rock is loose while everyone else does not think so and the rock ultimately has to be pried off the rib or pillar (essentially excavated) with thousands of pounds of force, I agree that perhaps it was not "loose" in the first place.

Basically, Inspector Roderman's determination of whether material is "loose" seems to depend on whether or not the Gradall can bring the material down. I do not believe that is a reasonable interpretation of the standard.

To prove a violation under 30 C.F.R. ' 57.3200, the Secretary must prove two things: (1) a hazardous ground condition existed in an area, and (2) a person could be expected to work or travel through the area affected by the hazardous ground condition.

With regard to the second item of proof as it relates to the larger rock scaled down first by Mr. Davis in the "Sump Run" area, the preponderance of evidence is to the effect that the loader identified by the inspector as being parked directly under the rock, in fact could not gain access to the pillar in question because shot rock littered the ground surrounding the pillar. Mr. Davis opined that neither the loader or a haul truck could have driven underneath that rock while the scattered stone (shot rock) was on the floor. Mr. Brasier's testimony and computer assisted drawing of the area supports Davis' opinion.

Based on the foregoing facts and circumstances, I conclude that there were no ground conditions in the "Sump Run" area of the mine that created a hazard to persons unless and until the shot rock was cleaned up. The cited standard protects only against presently existing hazardous conditions, not possible future hazardous conditions. Hence, I find no violation of the cited standard and Order No. 4321787 will be vacated herein.

ORDER

On the basis of the foregoing findings and conclusions, **IT IS ORDERED THAT**:

1. Section 104(a) "S&S" Citation No. 4111868, October 13, 1993, citing an alleged violation of 30 C.F.R. ' 57.3200, **IS VACATED**.

2. Section 104(a) "S&S" Citation No. 4321784, January 11, 1994, citing an alleged violation of 30 C.F.R. ' 57.3200, **IS VACATED**.

3. Section 104(d)(1) Citation No. 4321786, January 12, 1994, citing an alleged violation of 30 C.F.R. ' 57.3200, **IS MODIFIED** to an "S&S" citation issued under section 104(a) of the Mine Act.

4. Section 104(d)(1) Order No. 4321787, January 12, 1994, citing an alleged violation of 30 C.F.R. ' 57.3200, **IS VACATED**.

5. Respondent pay the Secretary of Labor $100 as a civil penalty within 30 days of this Decision.

Roy J. Maurer
Administrative Law Judge

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