

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041  
February 26, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 95-467  
Petitioner : A.C. No. 36-07172-05513  
v. :  
: Gentzel Quarry  
BELLEFONTE LIME CO., INC., :  
Respondent :

## DECISION

Appearances: Allison Anderson Acevedo, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner;  
John Snyder, Esq., McQuaide, Blasko, Schwartz, Fleming & Faulkner, Inc., State College, Pennsylvania, for the Respondent.

Before: Judge Weisberger

### I. Statement of the Case

At issue in this civil penalty proceeding, is the validity of a citation issued under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (The Act) alleging a violation on March 17, 1995, by Bellefonte Lime Company, Inc. (Respondent) of 30 C.F.R. ' 56.3200 at two locations at its Gentzel quarry.

Pursuant to notice, the case was heard in Harrisburg, Pennsylvania, on September 25 and 26, 1996, and October 2, 1996. Respondent filed Proposed Findings of Fact and Conclusions of Law on November 26, 1996. The Secretary (Petitioner) filed a Post-Hearing Brief on November 27, 1996. On December 17, 1996, Petitioner filed a Reply Brief, and Respondent filed a Reply to Petitioner's Post-Hearing Brief.

### II. Findings of Fact

1. Bellefonte Lime Company mines Valentine limestone at the Gentzel Quarry.

2. A spoil pile located in the northwest portion of the quarry was created on or after 1982 as overburden. It was

drilled, blasted, excavated, and transported from other areas of the quarry.

3. The haul trucks that hauled the overburden dumped it on top of the surface area of the pile which was accessed by use of haul road networks which were created over and about the spoil pile as part of its construction process.

4. The last time spoil was added to the pile prior to the March 17, 1995, was late 1991 or 1992. It remained undisturbed between late 1991/1992, and the time it was stripped for the mining in question.

5. The spoil pile contained lenses of compacted, interlocking, and angular limestone boulders, among other materials.

6. Pennsylvania Geological Survey aerial photographs taken in 1989 and 1994, reveal that the pile was in a stable condition, and was without any evidence of impending slope failures.

7. The northwest cut area was stripped of its overburden in preparation for mining beginning on November 9, 1994.

8. Valentine limestone was first removed from the northwest cut area on February 2, 1995.

9. As of February 21, 1995, there remained approximately 9,000 tons of Valentine limestone remaining in the northwest cut area. Under normal working conditions, approximately 3,000 tons of limestone could be extracted from an area per shift. As of March 17, 1995, only one shift's worth of limestone remained in the northwest cut area.

10. MSHA inspector Edward F. Skvarch arrived at the Gentzel Quarry at 4:00 a.m., on March 17, 1995, and inspected the northwest corner of the quarry.

11. Skvarch inspected the right bank of the spoil pile near the working area and concluded that it had a steep slope, that there were rocks near the top and the face of the pile, that there was no bench in the area, and that the cut in the area was narrow.

12. Skvarch estimated that the right bank of the spoil pile near the working area was 70 feet high, and its slope was at least 60 degrees.

13. Skvarch estimated that the second cited area, located near a turn on a haul road leading to the northwest cut, was

50 feet high, and that its slope was at least 60 degrees. The slope of the toe of this portion of the spoil bank was at a higher angle with the ground compared to the portion of the pile located above the toe. No actual measurements of the slopes' steepness, or the heights or widths of the cited areas were made by Skvarch.

14. At no point in time prior to his leaving the Gentzel Quarry on March 17, 1995, did Skvarch observe any materials falling or rolling off the areas in question.

15. At no point in time did Skvarch note the existence of any precursors to a major slope failure, such as a bulging of the pile of cracks along the bank of the pile.

16. Skvarch testified that he asked Theodore Michael Lesniak, the foreman at the quarry, whether the right bank and haul road areas were safe, and Lesniak replied "not really" (Tr. 508). Lesniak testified, in essence, that he was not being truthful with Skvarch, as he did not want to argue with him. Lesniak testified that he did not believe that the cited areas were unsafe.

17. Richard Moerschbacher operated the front-end loader during the day shift for at least two weeks in February 1995. Prior to March 17, 1995, Rickey Confer operated the front end loader on day shift at the quarry. Prior to March 17, 1995, Michael Boone was the truck driver on day shift at the quarry.

18. There was no benching in either of the cited areas on March 17, 1995, the date of the inspection.

19. In order to prepare the cut area for mining operations, the cited spoil pile was stripped, and the limestone was drilled and blasted.

20. Prior to March 17, 1995, and as late as March 16, 1995, employees operated equipment in the working area within approximately 15 feet of the spoil pile. The working cut where the loader operator and truck driver worked, was approximately 30 to 40 feet wide, but widened near the working face.

21. Rocks, dirt and sand fell from the right bank of the spoil pile prior to March 17, 1995.

22. A few weeks prior to March 17, 1995, rocks fell onto the working area from the left side of the pile at issue.

23. Prior to March 17, 1995, rocks fell near the working area onto the haul road at a location where the loader operator would have to back out.

24. At the time of the March 17, 1995 citation, there was no evidence of any precursors to a circular or rotational slope failure.

25. Under continued normal mining operations, as of March 17, 1995, Respondent would have left the northwest cut area after only one more shift.

26. Haul truck operators, and front end loader operators were working in or around the cited areas during the time period in issue. The operators of haul trucks and front end loaders were seated at a height of 12 to 15 feet off the ground while operating those vehicles.

27. An optical compactor measurement of the slopes of the two cited areas, as depicted in a video tape filmed on March 1, 1995, (Exh. G-6), revealed slopes of approximately 45 degrees in the two cited areas. The tape did not reveal any precursors or indicators of slope instability.

28. Brunton compass inclinometer measurements of the haul road slope in question on September 5, 1996, revealed that the bottom portion of the slope had an angle of 53 degrees up to a height of 15 to 20 feet, and the upper portion of the slope had an angle of 45 degrees up to a height of 55 feet.

29. I find that the time of the issuance of the citation at issue, the cited areas had a slope of 53 degrees existing to a vertical height of 15 to 20 feet, and had a slope of 45 degrees from the point of slope change to the top of the spoil pile.

30. The video tape footage did not reveal any materials falling from either of the cited areas or any of the other piles shown on the video tape.

31. The spoil pile at issue consisted of soil and rock materials varying in size from coarse sand to boulders the size of refrigerators.

32. Examination of the spoil pile revealed compaction as evidenced by the embedding of the finer materials within the larger course materials. The pile also contained lenses of blocky, angular boulders.

33. By 1989, as evidenced in the oblique aerial photograph admitted as Exhibit R-3, the Gentzel Quarry had become active, and spoil materials had been placed in the area of the spoil pile in question.

34. Stereoscopic review of photographs of the quarry taken on April 15, 1994, revealed that the area of the spoil pile, the haul road area, and the northwest cut area were stable and without precursors.

### III. Additional Findings and Discussion

#### A. Violation of 30 C.F.R. ' 56.3200.

MSHA Inspector Edward Skvarch testified that on March 17, 1995, when he inspected the subject site he observed rocks on the face of the subject pile, and rocks near the top of the pile. Skvarch also indicated that the slope of the pile was steep, and that the toe of the pile along the haul road was at a steeper angle than the remaining portion of the pile. He concluded that these conditions were hazardous, and issued a citation alleging a violation of 30 C.F.R. ' 56.3200 which provides, as pertinent, as follows: AGround conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area@.

Theodore M. Lesniak, Respondent's shift foreman, who was present during Skvarch's inspection, testified that he did not believe that the cited areas were unsafe. However, he did not specifically contradict the testimony of Skvarch regarding his above observations. Similarly, Robert Allan Biggans, who accompanied Skvarch at the haul road site, did not contradict this aspect of Skvarch's testimony. Nor did any other of Respondent's witnesses contradict Skvarch's testimony in these regards.

Richard D. Moerschbacher, who filled in as a front end loader operator at the subject site for two weeks in February 19, 1995, observed rocks falling from the left side of the pile, but did not see any rocks fall from the right side, which is at issue, or the haul road. Michael L. Boone, who was employed as a truck driver on the dates in issue, did not see any rocks fall from the pile in the area of the haul road. However, he testified that he observed rocks as large as a foot in diameter fall from the right bank of the area in issue prior to March 17. He also indicated that he saw material falling that was like dirt or sand. He was asked to indicate when he saw rocks falling. His response is as follows:

Like I said, we would sit there, and the loader had to back beside us and turn. The motors are in the back end of them. It blows exhaust and then the fan out through the radiators, and would disturb some of the stuff behind because it was close (sic) (Tr. 230).

Rickey Confer, who operated a front end loader for Respondent for 15 years, testified that on a daily basis he had observed a mixture of mud and stone and rocks falling from the areas at issue. He also had observed rocks on the floor near the base of the pile.

It appears to be Respondent's argument, in essence, that Confer's testimony should be discounted, since he never brought up any safety concerns at safety meetings in spite of the fact that Respondent's employees were requested by Biggans to report their safety concerns. I observed Confer's demeanor and found him to be a credible witness. I find that his failure to report safety concerns to Biggans has some relevance regarding Confer's reactions to being exposed to the hazard of falling rocks. However, it is insufficient, to impeach Confer's testimony regarding his observations.

Respondent also argues that a finding should be made that rocks have not fallen off the pile inasmuch as the seventeen minute video tape of various areas of Respondent's operation did not depict any materials falling from any pile. Respondent also cites the fact that Skvarch, in the more than four and a half hours that he was at various locations at the quarry, did not observe any material falling from any pile. I find these facts to be insufficient to impeach eyewitness testimony of Boone and Confer who worked in the areas in question, and observed rocks falling from the pile. James E. Peters, the quarry superintendent, indicated that he did not ever observe any hazardous conditions in the cited areas. I find that this generalized statement is insufficient to rebut the specific testimony of Boone and Confer regarding their observations. I also note Biggans' testimony that on occasions he preshifted the areas in question, and that he never observed material falling from the cited areas; nor did anyone ever tell him that they observed falling material. However, is no evidence that the preshift examinations coincided to the times falling rocks were observed by eyewitnesses. Further, in contrast to Biggans, Confer, a front end loader, actually worked in the areas in question. Thus, I place more weight on Confer's testimony regarding his observations. Based on all the above, I conclude that it has been established that it was more likely than not

that rocks and other material had fallen off the cited areas prior to the inspection at issue.

Respondent did not impeach or contradict the testimony of Moerschbacher and Boone, in essence, that the work area was narrow in width in relation to the front end loader, and that the loader operated at times about ten feet away from the pile. I therefore accept their testimony and find that the work area was confined. I am cognizant of the testimony of Respondent's expert Dr. Lawrence A. Beck, who theorized that a rock falling off the pile and taking flight like a projectile, would be seven foot three inches high when it would enter the airspace over the haul road, and thus would not be able to hit the operator of a vehicle working in the area who sits in a cab, twelve to fifteen feet from the ground. I reject this testimony and find it to be too speculative, as it is clear that the path of a rock falling off the slope could be erratic, and its height over the roadway would depend upon other factors such as whether any other objects were in its path of travel that could effect its flight through the air. Hence, the generalized theory of Beck is not accorded much probative value.

I find that the weight of the evidence establishes that rocks did fall off the pile in question at points in time not significantly remote from the cited date, and that miners working in the adjacent confined work area and haul road were exposed, in some degree, to the hazard of being hit by material falling off the slope. Also, falling material could have contributed to a vehicular accident causing an injury to a miner. Since miners were allowed to work and travel in the area on the date cited by Skvarch, and the spoil pile was not supported or taken down to prevent rocks from falling down, I find that Respondent did violate Section 56.3200, supra.<sup>1</sup>

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<sup>1</sup> Petitioner also alleges, in essence, that the pile itself, was unstable. In this regard, Petitioner relies on the testimony of her expert, George Gardner, that, in essence, the pile was unstable since its slope was equal or more than the angle of repose, and that in the haul road area, additional instability was created as material had been removed from the toe of the pile. However, Gardner's measurement of the angle of repose was based not upon measurement obtained by a physical examination of the pile at issue, but rather upon measurements taken by freezing frames of a video tape of the subject area taken, at times, through the windshield of a truck. The person who took the tape did not testify, and there is no indication in the record of the angle of the video camera to the horizontal which might affect the measurement of vertical slope. Further, not much weight is

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accorded Gardner's opinion that in evaluating the stability of a pile, the most critical factor is the relationship between its slope, and the angle of repose. Gardner testified that in addition to the slope of a pile the following factors influence its stability: the composition of the material in the pile, whether the material is layered, whether the material is compact, the level of water saturation, the presence of shock waves from nearby blasting, and the removal of the toe. Gardner did not proffer any detailed explanation as to specifically why slope is the most critical factor compared to these other factors. Further, Petitioner has not adduced any evidence, based upon examination of the type of material in the pile, whether it was

footnote 1 cont-d.

layered, whether it was compact, the level of saturation, or the presence of shock waves from blasting. Hence, I conclude that Petitioner has not adduced sufficient reliable evidence to establish that the pile at issue was so unstable as to create a hazardous ground condition.



## B. Significant and Substantial

According to Skvarch, the violation was significant and substantial. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation 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. (6 FMSHRC, supra, at 3-4.)

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, 1336 (August 1984).

The record establishes a violation of a mandatory standard i.e., Section 56.3200, supra (III, (A) infra). Also, since rocks have fallen off the pile at issue (III (A) infra), the violation clearly contributed to the hazard of a rock fall. Hence, the first two elements of the Mathies formula have been met. At issue is the third element of the Mathies formula, the likelihood of an injury producing event, i.e., a rock fall.

Essentially, it is Petitioner's position that, accepting the testimony of Petitioner's witnesses that rocks have fallen from the pile, A . . . makes it likely that the rocks would have continued to fall in and from the pile.@<sup>2</sup>

Skvarch, in explaining the factors that led him to determine that the violation was significant and substantial testified as

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<sup>2</sup>Petitioner's Post-Hearing Brief, p. 45.

follows:

On the condition itself, the steepness of the slope stability. Also rocks could roll, fall or bounce down. It was stated to me prior to going into the cut that, in fact, rocks had come off the wall and had to be cleaned up prior to going into the cut sometimes. (Tr. 62-63).

Skvarch continued his explanation as follows:

In addition to the likelihood of the events and the severity of the injury, because the cut was narrow and there was no bench in either area and their close proximity to the right bank--this is when the loader is loading out the cut--and the haul truck driver's close proximity to the cut, it would make it reasonably likely that they would get struck, their equipment would get struck. And if it was a sizable rock, it could crash through the window and strike the operator, could go onto the haul road and cause the operator to react by veering the vehicle and possibly crashing or even striking the stone and suffering the type of injury that would include fractures, abrasions, bruises, injuries serious enough to lose time.

The operators, again because of their close proximity of operation to both banks which had been trimmed, if a slide occurred and it was a massive slide, it could even result in a fatality (sic) (Tr. 63-64).

Hence, according to Skvarch, the S & S character of the violation at issue is based upon the occurrence of rock falls. In this connection, Skvarch testified that there were loose rocks in, and towards the top of the pile. However, he did not testify with any specificity as to the conditions he observed that led him to conclude that rocks were loose. Nor did he or any other witness testify as to the number, size, or location of any loose material.

Gardner opined that it was **A**very likely<sup>@</sup> that rocks would fall from the pile. He indicated that his conclusion was based upon the video tape, and the testimony of witnesses who observed rocks falling off the pile. It opined that a rock sliding off the pile would take flight like a projectile from the point on the pile where the slope steepened at the toe.

Not much weight is accorded Gardner's opinion regarding the likelihood of rocks falling from the pile, as it is based upon his observations of a video, rather than upon a physical examination of the site. Also, although two witnesses testified

to observations of rock falls, the likelihood of further rock falls depends not only on the slope of the pile. It also depends upon the amount of loose rocks on the pile. The record does not contain any evidence regarding the numbers, or extent of loose rocks in the pile. Aside from Skvarch's conclusion that there was loose material in and on top of the pile, the record does not set forth with particularity the facts taken into account by Skvarch that led him to conclude that certain material was loose.

On the other hand, I take cognizance of the uncontradicted testimony of Peters that there was only approximately one shift's worth of limestone remaining in the northwest cut area to be mined. There is no evidence that, in normal operations, miners would be present in the area after the removal of the remaining material. Thus, the likelihood of an injury causing event, given continued mining, would have been mitigated to a great degree. Accordingly I find that the third element of Mathies, supra, has not been met, in that it has not been established that an injury producing event was reasonably likely to have occurred. I conclude that the violation was not significant and substantial.

### C. Unwarrantable Failure

Skvarch opined that the violation herein was as the result of Respondent's unwarrantable failure. Accordingly, he issued a citation under Section 104(d)(1) of the Act. The first sentence of Section 104(d)(1) supra, provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act (Emphasis added).

Based on the wording of the first sentence of Section 104(d)(1) supra, the finding of an unwarrantable failure shall be included by a representative of the Secretary, i.e., an Inspector, only if the Inspector finds a violation of a safety standard and if he also finds that the violation is significant and substantial. Accordingly, in the absence of a finding that the violation was significant and substantial, the inclusion of a finding of unwarrantable failure in a citation is not proper. In the instant case, the record fails to establish that the violation at issue was significant and substantial (III(B) infra). The Inspector's contrary finding is not supported, and

shall be vacated. Accordingly, a finding of unwarrantable failure cannot be included in the citation at issue herein.

#### D. Penalty

I accept the basically uncontradicted testimony of Petitioner's witnesses that a rock fall resulting from the violation found herein could have resulted in a fatality. I find that the violation was of a high level of gravity.

In analyzing the level of Respondent's negligence, I note that none of Petitioner's witnesses who observed falling rocks brought this hazard to the attention of Respondent.<sup>3</sup>

Also I note, as set forth in Respondent's Reply, that none of Respondent's witnesses observed materials falling from the cited areas, no reports concerning falling materials were ever made by the employees, no precursors to a slope failure were visible prior to the issuance of the citation, and that Respondent expected that miners would be out of the area in about one shift's time.

On the other hand, Peters indicated that it was company policy that miners not work in the cited areas when it rained. According to Peters, one of the reasons for this policy was the possibility that rain could loosen material on the pile. In addition, five months prior to the inspection at issue, a Section 107(a) imminent danger order was issued to Respondent citing Respondent for violating Section 56.3200, supra in another part of the quarry at issue. Within this framework of evidence, I find that the level of Respondent's negligence to have been more than ordinary.

Respondent has not offered any argument that any penalty to be imposed is to be mitigated by its size, history of violations, or ability to continue in business.

For all the above reasons, I find that a penalty of \$2,500

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<sup>3</sup> Moerschbacher was asked whether he told his supervisor about rocks that fell down, and he said that he did. However his testimony regarding what he specifically told his supervisor Jim Peters is as follows: AI told him that I thought it would be smart to try to bench that to try to make it safer@ (Tr. 173). His testimony is thus somewhat ambiguous as to whether he explicitly told Peters about rocks that had fallen down. I note that Peters who acknowledged that he sent a bulldozer into the cited area at the suggestion of an employee, denied that any employee informed him that the cited areas were unsafe. I observed Peter's demeanor, and found his testimony credible on this point.

is appropriate.

IV. Order

It is ORDERED that Citation No. 4294703 be amended to a Section 104(a) citation that is not S & S. It is further ORDERED that, within 30 days of this decision, Respondent shall pay a civil penalty of \$2,500.

Avram Weisberger  
Administrative Law Judge

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