

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 11, 1998

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 COMPANY, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

On November 30, 1998, the Commission issued a decision in the above captioned case remanding it for consideration of whether the violation had been caused by Bellefonte's unwarrantable failure to comply with the standard, and for the reassessment of the civil penalty if appropriate (slip op., p.2, 20 FMSHRC ___).

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.¹

¹/ 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: "I told him that I thought it would be smart to try to bench that to try to make it safer (sic) (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 Peters' demeanor, and find his testimony credible on this point.

Also, I note 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 areas 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. Hence, it might be inferred that Peters was aware of the possibility that the cited area was hazardous. There is no evidence that Respondent took any specific precautions to mitigate the possible hazards. In addition, 5 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, and reached the level of aggravated conduct. I thus conclude that the violation resulted from its unwarrantable failure.

Since this conclusion is based on the same factors previously set forth in my initial decision in discussing the level of Bellefonte's negligence for purpose of assessing a penalty, I find that it is not appropriate herein to reassess the penalty I previously assessed.

Avram Weisberger
Administrative Law Judge

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