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

July 16, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-40-M
Petitioner	:	A. C. No. 09-00076-05533
v.	:	
	:	
WORLEY BLUE QUARRY, INC.,	:	
Respondent	:	Worley Blue Quarry

DECISION

Appearances: Dana L. Ferguson, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner;
Eric Higginbotham, Elberton, Georgia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," charging Worley Blue Quarry Inc. (Quarry) with one violation of the mandatory standard at 30 C.F.R. § 56.15005, and proposing a civil penalty of $14,000.00, for that violation. The general issue before me is whether the Quarry violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at bar, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the noted standard and charges as follows:[1]

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[1] Section 104(d)(1) of the Act 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. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds

> At 13:15 pm, January 14, 2002, James R, Thornton, Ledge Foreman, sustained several broken bones (leg, shoulder, ribs) and massive head trauma when he fell twenty-eight feet from the edge of the working ledge and landed on the quarry floor. At the time of the accident, the victim was not wearing fall protection and other means of fall protection, such handrails, were not provided. Other employees stated that they were not required and did not wear or use fall protection at anytime when they worked on the quarry ledges.
>
> The owner / operator Eric Higginbotham engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that his employees worked in areas with potential fall hazards without wearing and using the necessary fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

The citation was modified on February 7, 2002, to note the that the victim of the accident, James R. Thornton, died on February 1, 2002, as a result of the injuries sustained in the January 14, 2002 accident.

It is undisputed that ledge foreman James Thornton, suffered fatal injuries when he fell 28 feet from the edge of the working ledge of the quarry and landed on the quarry floor. It is further undisputed that, at the time of the accident, Thornton was not wearing fall protection and that other means of fall protection such as handrails were not provided at the site of the fall.

Frederick Moore, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) investigated the accident beginning on January 15, 2002, the day after the accident. The mine is a dimensional stone quarry where blocks of granite are removed and made into monuments. Photographs taken in the presence of Inspector Moore depict the accident scene (Petitioner's Exhibits 2 thru 6). According to Moore's investigation, ledge foreman Thornton and four other miners had been working on the ledge since seven that morning and none were wearing fall protection. The surviving employees purportedly told Moore that they had not had fall protection for the entire preceding week while working on that ledge. At the time of the accident, at around 1:30 p.m., they were in the process of cleaning up loose rock. There were no handrails at the edge of the ledge at the time of the accident.

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another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Ledge worker, Anthony Pass, testified that just before the accident, a pan had been moved into position and that they began cleaning rocks off the ledge and tossing them into the pan. The handrails had been removed prior to beginning that work and neither he nor any of the other workers had been provided any personal fall protection that day. According to Pass, in the four months he had been working at the quarry he had never been provided any personal fall protection. Pass also testified that the two safety belts that appeared in one of the photographs taken in the presence of inspector Moore on January 15, were not present when they were working on January 14. Pass also testified that he had never seen safety belts in the tool box depicted in that photograph. Pass surmised that Thornton was attempting to go down the ladder situated near the pan when he fell. The pan had been in position for about ten or fifteen minutes.

The cited standard, 30 C.F.R. § 56.15005, provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling . . . ." The reasonably prudent person test for this standard is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Secretary of Labor v. Great Western Electric Company*, 5 FMSHRC 840, 842 (May 1983). Under 30 C.F.R. § 77.1710(g), a standard similar to 30 C.F.R. § 56.15005, the Commission also explained that the standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Secretary of Labor v. Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

A reasonably prudent person would easily recognize a danger of falling while working near the edge of a 28-foot quarry ledge lacking handrails or other means of fall protection. The credible record shows that Respondent's employees were not wearing safety belts and indeed, were not even provided safety belts while working at a height of 28 feet (Tr. 68, 69, 98, 99, 161). While two safety belts were found on a nearby toolbox the day after the accident, the credible evidence shows that they were not present on the day of the accident and would, in any event, have been of no value without safety lines or lanyards which were not present (Tr. 50-52, 69, 98). Furthermore, Higginbotham himself acknowledged that he had not seen belts (harnesses) in the toolbox for about three and a half weeks (Tr. 138), and had not seen lanyards in the toolbox for six months (Tr. 139). Within the above framework of evidence I find that the Secretary has proven the violation as charged.

In reaching this conclusion I have not disregarded Respondent's evidence that the deceased, Mr. Thornton, had marijuana and the controlled substance benzodiazepines, in his system within eight hours of his fall. However, there is no evidence in the record to show that the substances were present in sufficient amounts to significantly impair Thornton. In addition, this Commission has held that such evidence is not a defense to liability for a violation of the standard at issue. See *Secretary v. Mar-Land Industrial Contractors, Inc.*, 14 FMSHRC 754, at 756 (May 1992).

The violation was also clearly "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts

surrounding that 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 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary 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.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Mine owner Eric Higginbotham, while apparently not disputing the violation itself or the seriousness of the violation, argues that he was not negligent in that he had provided training to his employees in the use of personal fall protection. Moreover, Higginbotham claims that Thornton, even though a company foreman, was acting contrary to his training and specific instructions. It appears under the circumstances that Respondent is raising the so-called "Nacco" defense. See *Nacco Mining Co.,* 3 FMSHRC at 849-50. It is, of course, well established law that a supervisor's violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure or negligence purposes. See *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194 (February 1991). In *Nacco,* however, the Commission declined to impute a supervisor's negligence to the operator for the purpose of assessing civil penalties because it had taken reasonable steps to avoid an accident and the supervisor's conduct did not expose other miners to the risk of injury. 3 FMSHRC at 850. In the instant case however, the *Nacco* defense is unavailable because Thornton's violation did indeed expose other miners to a risk of injury - - for example, if another miner had also fallen in an attempt to save Thornton. In addition, mine owner Higginbotham acknowledged that he was aware that lanyards had not been at the work site for six months.

Moreover, independent of Thornton's negligent failure to wear a safety belt himself, he permitted four of his other crew members to work with the same exposure to fall injuries without

providing safety belts and lanyards or other fall protection. Indeed, according to the undisputed testimony of Anthony Pass, the miners had been working on the ledge from 7 a.m. that morning until the accident at about 1:30 p.m., without safety belts - - although during part of that time a fence barrier was provided. Moreover, Pass had never been provided a safety belt over the entire four months he had been working at the quarry. Under the circumstances it is clear that the negligence of ledge foreman Thornton is imputable to the mine operator. Indeed, Thornton's, and, therefore, the operator's negligence was high and may be characterized as reckless disregard, indifference and a serious lack of reasonable care.

For the same reasons the violation herein was the result of "unwarrantable failure." 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). In addition, the violative condition herein was both obvious and posed a high degree of danger, See *Midwest Material Company*, 19 FMSHRC, 30, 34-35 (January 1997). It is also noted that the Commission held in *Secretary v. Capital Cement Corporation*, 21 FMSHRC 883 (August 1999) that it would not extend the *Nacco* defense to violations that are the result of "unwarrantable failure" pursuant to Section 104(d) of the Act. 21 FMSHRC at p. 893.

In reaching my conclusions herein I have not disregarded the copies of training certificates submitted into evidence by the Quarry. It is clear however, that either the training was grossly inadequate or completely ignored by both management and employees over an extended period of time and, accordingly, I can give such evidence but little weight. I have also not disregarded Respondent's apparent claims that the presence of marijuana and benzodiazepines in Thornton's body should mitigate its negligence. There is no evidence in the record, however, to show that the level of these drugs was sufficient to significantly impair Thornton's ability to use a safety belt and lanyard or to properly supervise others in his work crew on their use. The evidence shows, moreover, that at least one member of Thornton's crew had not been provided such safety devices for the four months he had been working at the quarry. Accordingly, I do not find Respondent's negligence to be mitigated in this regard.

Civil Penalties

In assessing a civil penalty under Section 110(i) of the Act, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent,

the affect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Respondent herein has a moderate history of violations. It is a small to medium size business and abated the violation in compliance with the Secretary's directions. As noted, the violation was of high gravity and the operator was grossly negligent in causing the violation. No evidence was presented at the evidentiary hearing to show what affect the penalty would have on Respondent's ability to continue in business. In this regard I cannot lawfully or fairly consider representations of fact made only in Respondent's post-hearing brief and unsupported by the evidentiary record. Under all the circumstances I find that a civil penalty of $10,000.00, is appropriate.

ORDER

Citation No. 6075455 is affirmed and Worley Blue Quarry Inc., is directed to pay a civil penalty of $10,000.00, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

Dana L. Ferguson, Esq., Office of the Solicitor, U.S. Dept. of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Eric Higginbotham, Owner, Worley Blue Quarry, 1276 Ruckersville Road, Elberton, GA 30635

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