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

November 1, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-136-M
Petitioner	:	A. C. No. 38-00016-21326
v.	:	
	:	Cayce Quarry
MARTIN MARIETTA AGGREGATES,	:	
Respondent	:	

DECISION

Appearances: Melody S. Wesson, Conference & Litigation Representative, U.S. Department of Labor, Birmingham, Alabama, on behalf of the Petitioner; Justin Patchan, Manager Safety and Employee Relations, Martin Marietta Aggregates, Augusta, 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 Martin Marietta Aggregates (Martin Marietta) with one violation of the mandatory standard at 30 C.F.R. § 56.3131 and proposing a civil penalty of $324.00 for the alleged violation. The general issue before me is whether Martin Marietta 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.

Citation No. 6112053 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3131 and charges as follows:

> The 992 Cat pit loader was partially engulfed by a fall of material from the #2 Bench where it was mucking shot rock loading out haul trucks. Other areas, in front of the loader and to the left, appeared to be loose or unconsolidated as well as a couple areas along the upper edge of the #1 Bench directly above where the loader was working. This condition created a fall of material hazard to persons working or traveling in these areas. The pit foreman stated that the work place examination was done at

> 0545, and that the loader started loading trucks at 0630.

The cited standard, 30 C.F.R. § 56.3131, provides as follows:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated materials shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

The Secretary alleges that the second sentence of the standard was violated herein. As with many standards, the language of section 56.3131 is simple and brief in order to be broadly adaptable to myriad circumstances. Such a broadly written standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Alabama By-Products Corp*, 4 FMSHRC 2128, 2130 (December 1992). The mine operator need not have actual notice of a specific requirement, but the standard must provide adequate notice of prohibited or required conduct. *Lanham Coal Company, 13* FMSHRC 1341, 1343 (September 1991*)*. The Commission developed the "reasonably prudent person test" to be applied in such circumstances. The test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Id.*

Accordingly, the issue is whether such a reasonably prudent person would have recognized that the condition of the highwall before its failure created a fall-of-material hazard. In determining whether the mythical objective "reasonably prudent person" would have found that the conditions of the highwall were such as would have created such a hazard the testimony of experienced observers is relevant. *Ideal Cement Co.,* 12 FMSHRC 1409, 2416 (November 1990).

In this regard, Juan Ornelas, a loader operator with 15 years experience and who was operating the subject loader at the time of the collapse, testified that although he felt it was safe in the immediate area where he was then working, he considered the highwall to the right of him (the area that actually failed) to be unsafe (Tr. 27). In this regard, he recognized that he was working within range of a potential collapse from that area - - an area having known cracks and an area deemed too dangerous to work near (Tr. 22-23). Indeed Ornelas had told Pit Foreman Teddy Jackson that conditions in the area to the right of where he was working were "terrible" and that they "shouldn't be working under [those] conditions" (Tr. 27). According to Ornelas, "rocks and stuff always fell there," water was coming out of the highwall and they "always had problems with that section (Tr. 32-33). The dangerous area beneath the highwall had not been barricaded or blocked off to prevent persons from exposure to the hazard (Tr. 30,58-59). Indeed, Plant Manager David Risner testified that Ornelas had been working beneath that area earlier on the same shift and Risner considered that to be an active work area (Tr. 128).

In addition, sometime shortly before the highwall collapse (Ornelas could not provide "exact dates"), Ornelas and one of the truck drivers had seen cracks on the bench next to the highwall that were "getting real big" (Tr.17-18). According to Ornelas, he reported these cracks to his supervisor, Pit Foreman Jackson, who then directed Ornelas to block off the road on the bench above the cracked area. Ornelas then proceeded to block off the haul road as instructed and cut a new road 20 to 30 feet from the edge of the highwall (Tr. 19). Ornelas' testimony is not disputed in this regard and indeed is corroborated by admissions of the operator's agents (Tr. 58-60).

Ornelas also testified credibly that before the highwall collapsed, 100 ton haul trucks were operating on the haul road on the bench above the highwall some 20 to 30 feet from the edge (Tr. 24-25, 28). Ornelas thought that was an unsafe practice and testified credibly that he told Pit Foreman Jackson that "we needed to get off that bench, and that until we did something with it we shouldn't be hauling out of there" (Tr. 30-31). Ornelas was injured as a result of the highwall collapse, suffered neck and back pain and was taken to a hospital.

Inspector James Enochs of the Department of Labor's Mine Safety and Health Administration (MSHA), opined that the cracks in the highwall had been present for some time before the collapse on March 1, 2003. He based this testimony on the admissions to him from both pit foreman Teddy Jackson and plant manager David Risner (Tr. 58-60). They both told Enochs that, because of their concerns about these cracks, they had barricaded the corresponding area on the bench above the highwall. According to Enochs, Jackson also admitted that he had been aware of the cracks depicted in photograph Exhibit D-3. Enochs testified that the whole area to the right and left of the collapsed area had fissures and overhanging rock and that the upper bench near the edge had cracks showing separation.

I also note that Inspector Enochs credibly opined that the conditions depicted in the photographic evidence, showing significant fissures above the subject highwall and overhanging rock on the face of the highwall, were hazardous. I also find that the conditions depicted in the photographs in evidence of fissures and overhanging material would certainly lead the objective "reasonably prudent person" to conclude that a fall-of-material hazard existed in those locations. There is no dispute that the same conditions also existed before the highwall failure at issue and there is no evidence that adequate corrective action was taken to protect workers below the highwall.

In reaching my conclusions herein, I have not disregarded the testimony of Pit Foreman Teddy Jackson. Jackson had 37 years' of industry experience but had been pit foreman for only about six months before the accident. He acknowledged that he had noticed cracks in the highwall following blasting about a week or so before the collapse and identified those cracks in a photograph in evidence (Exhibit D-3) (Tr. 101-102). Jackson claimed the cracks that he observed on the morning of the accident did not show instability in the highwall. He visited that area several times before the collapse and claims that he saw nothing that was unsafe or dangerous. (Tr. 103-105). I find, however, that the more detailed testimony of Ornelas, who was in the best position as loader operator to have closely observed the highwall conditions, is the most credible. The observations of this experienced observer are clearly relevant and persuasive

in determining what the "reasonably prudent person" would have found, i.e. that the condition of the highwall created a fall-of-material hazard.

The violation was also designated as "significant and substantial". 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).

I have no difficulty concluding that the existence of the conditions described by Ornelas made it reasonably likely for a fall-of-material to occur. There can be no dispute that such a fall of material could result in fatal injuries to persons either inspecting, working or passing in range of that part of the highwall.

In determining operator negligence I have considered the fact that pit foreman Jackson was admittedly aware of fissures and cracks in the highwall shortly before its failure(Tr. 101-102,58-60). Indeed in light of these dangerous conditions he had Ornelas block off the haul road on the bench above the cracks and had him create a new haul road 20 to 30 feet from the edge of the highwall (Tr. 19). Loader operator Ornelas testified that, as a result of his discussion with Jackson, he blocked off an area on the top, closed down the haul road near the cracks and created another haul road some 20 to 30 feet away from the highwall. This credible and essentially undisputed evidence demonstrates knowledge on the part of the pit foreman that the cracked areas constituted a hazard that needed remedial action. Accordingly, I find that the pit foreman was highly negligent in failing to take remedial action to protect workers in the area below the highwall. Since the pit foreman was an agent of the operator, his high negligence is imputable to

the operator for civil penalty purposes. *Whayne Supply Co.*, 19 FMSHRC 447, 451 (March 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194-197 (February 1991).

Civil Penalty Analysis

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 effect 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 compliance after notification of the violation. According to the documents attached to the pleadings, Martin Marietta does not have a serious history of violations and is a medium size business. There is no dispute that it achieved appropriate compliance after notice of the violations herein. Gravity and negligence have been previously discussed. There is no evidence that the penalties herein would affect the operator's ability to continue in business. I have considered the above statutory factors and conclude that the civil penalties assessed herein are appropriate. This penalty reflects, *inter alia*, a much higher degree of negligence than initially alleged by the Secretary.

ORDER

Citation No. 6112053 is affirmed and Martin Marietta Aggregates is hereby directed to pay a civil penalty of $500.00 for the violation charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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