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

September 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-68-M
Petitioner	:	A. C. No. 54-00297-11648
v.	:	
	:	
MASTER AGGREGATES TOA BAJA CORP.,	:	Cantera Master Aggregates Mine
Respondent	:	

DECISION

Appearances: Suzanne Demetrio, Esq. and Donyell Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of the Petitioner;
Willa Perlmutter, Esq. and Mark Savit, Esq., Patton Boggs, LLP, Washington, D.C., 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 *et seq.*, the "Act," charging Master Aggregates Toa Baja Incorporated (Master Aggregates) with two violations of mandatory standards and proposing civil penalties of $70,000.00 for the violations. The general issue before me is whether Master Aggregates violated the cited standards 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.

Master Aggregates owns and operates Cantera Isabela, a crushed limestone quarry located in Isabela, Puerto Rico. The quarry operates two overlapping shifts with a total of twenty employees. The first shift is from 6:00 a.m. to 3:00 p.m. and the second is from 8:00 a.m. to 5:00 p.m. In November 2002, the daily operations of this facility were directed by Plant Manager Jeffrey Albrecht and Plant Supervisor Otoniel Acevedo. Messrs. Albrecht and Acevedo were also responsible for the mine inspections.

On November 13, 2002, Mr. Acevedo arrived at 6:00 a.m. At approximately 7:00 a.m., Acevedo assigned Julio Rios-Beauchamp, along with three others, to work near a highwall approximately 27 feet high. Mr. Rios-Beauchamp was assigned the task of operating a bulldozer parallel to the highwall. He was piling and pushing shot material along the face of the highwall to be picked up by a front-end loader. Mr. Rios-Beauchamp performed this assigned task from 7:00 a.m. to 11:00 a.m. before he left to relieve the dispatcher.

At approximately 1:00 p.m., Acevedo drove Rios-Beauchamp back to the highwall and told him to resume the work he had been performing in the morning. At approximately 1:45 p.m., part of the highwall collapsed onto the bulldozer, crushing Mr. Rios-Beauchamp to death.

Citation No. 7798760

Citation No. 7798760, as modified, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3401 and charges as follows:

> On November 13, 2002, a bulldozer operator was fatally injured when he was stockpilling [sic] material from a previously blasted area in the quarry. Unconslidated [sic] material containing large boulders struck the bulldozer causing two columns of the ROPS structure and roof of the dozer to collapse crushing the victim. Persons experience [sic] in examining and testing for loose ground had not adequately inspected the area prior to work being performed.

The cited standard provides as follows:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

The Secretary's argument is straightforward. She contends that Plant Manager Jeffrey Albrecht and Plant Supervisor Otoniel Acevedo, the persons responsible for conducting inspections on November 13, 2002, simply failed to do so (Secty. Brief p. 10).

In this regard it is undisputed that work commenced at the highwall at 7:00 a.m. on November 13, 2002, when the deceased, Mr. Rios-Beauchamp, began pushing material with the bulldozer at the highwall base. Plant Manager Albrecht admitted in a taped interview given on November 14, 2002, the day after the fatal accident, that he did not perform the mine inspection on November 13 (Gov't. Exh.30 p.5). He thought that Plant Supervisor Acevedo had performed that inspection, that they kept documents of such inspections and that Acevedo had documented it (Gov't. Exh. 30 p.5).

In a taped statement also given on November 14, 2002, Plant Supervisor Acevedo disputed Albrecht's claim that they documented their inspections and also admitted that he did not conduct the mine inspection on the morning of November 13 (Gov't. Ext. 31 pp.7-8). He also claimed, at one point in the interview, that he could not then remember whether he had conducted an inspection even later that day (Gov't. Exh. 31 pp. 7-8). He later acknowledged that he "did not look at the walls" that day (Gov't. Exh. 31 p.12).

While the Respondent attempts to discredit its witnesses' statements, noted above, by citing their subsequent testimony in depositions taken two and one-half years later, in May 2005, and more than three years later at trial on March 9, 2006, it is clear that the best recollection of the witnesses and their most credible testimony would come on the day after the highwall failure rather than years later and after the witnesses have become aware of the consequences of their prior admissions. Under the circumstances, I find the subsequent deposition and trial testimony of these witnesses unpersuasive.

Within the framework of the witnesses' admissions in their November 14, 2002, statements, I have no difficulty in concluding (1) that Plant Manager Jeffrey Albrecht did not conduct an inspection of the ground conditions at the highwall, prior to the accident before work commenced at that location on November 13, 2002, and (2) that Plant Supervisor Otoniel Acevedo failed to conduct an inspection of the ground conditions at the highwall before work commenced at that location on the morning of November 13, 2002. Based on Acevedo's statement of November 14, 2002, I also conclude that, in fact, he also failed to conduct any inspection of the highwall on November 13, 2002, before the accident. Under the circumstances, and considering that Messrs. Albrecht and Acevedo were the persons responsible for performing the inspection, I find that the violation is proven as charged.

In reaching these conclusions, I have not disregarded the somewhat confused trial testimony of Mr. Torres-Aponte, an investigator for the Department of Labor's Mine Safety and Health Administration, that, in his deposition he stated that, in his notes, he reported that Mr. Acevedo had in fact "made these inspections" and that "[h]e did the inspection but in an inadequate manner" (Tr. I-104-105). Mr. Torres-Aponte also testified however that Mr. Acevedo told him in his "deposition" that he did not make an inspection on the day of the accident (Tr. I-105). [1] Under all the circumstances, I give the direct recorded statement of Mr. Acevedo himself the persuasive weight (Gov't . Exh. 31).

The Secretary also alleges that the violation was "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 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 injury in question will be of a reasonably serious nature.

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[1] Mr. Torres-Aponte is presumably here referring to Mr. Acevedo's taped statement of November 14, 2002 (Gov't. Exh. 31).

See also Austin Power Co. 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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *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, 916-917 (June 1991).

The Secretary argues in this regard that if Master Aggregates had inspected the highwall as required, it would have reduced or eliminated the hazard of the rock fall which killed Mr. Rios-Beauchamp. While it is certainly speculative that even a thorough inspection of the highwall in this case would have prevented this particular rock fall, it is clear that the failure to conduct appropriate highwall inspections, particularly following the observation of cracks after blasting the week before, is reasonably likely to result in serious and fatal injuries. Accordingly, the violation was "significant and substantial" and of high gravity.

The Secretary also alleges that the violation was the result of high operator negligence. She notes in this regard that Plant Manager Albrecht had knowledge that cracks were on top of the highwall a week before the accident (Tr. II-64-65). Clearly, knowledge on the part of the operator's agent that the area above the highwall indeed showed some cracking, combined with his failure to have inspected the highwall before work commenced on the day of the accident, constitutes gross negligence.

Even assuming, *arguendo*, that credit could be given to Mr. Acevedo's testimony at hearing that he did conduct an inspection of the highwall after lunch on November 13, 2002, but before the accident, the evidence is clear from his statement of November 14, 2002, that he failed to conduct an inspection before work commenced that morning and I would nevertheless find that there was still a violation which was "significant and substantial", of high gravity and the result of gross negligence even though not perhaps a direct causative factor in the fatality in this case.

Citation No. 7798761

Citation No. 7798761 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3200 and charges as follows:

> On November 13, 2002, a bulldozer operator was fatally injured when he was stockpilling [sic] material from a previously blasted area in the quarry. Unconslidated [sic] material containing large boulders struck the bulldozer causing two columns of the ROPS structure and roof of the dozer to collapse crushing the victim. Loose ground had not been taken down or supported before work was permitted in the area.

The cited standard, 30 C.F.R. § 56.3200, 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.

In her post-hearing brief the Secretary alleges that the citation was issued "because Respondent failed to address the cracks that appeared on the top of the highwall prior to the fatal accident" (Secty. Brief p. 15).[2] That allegation does not however, in itself charge a violation of the cited standard. Within the framework of the cited standard, the issue is whether the Secretary has sustained her burden of proving that the ground conditions on the highwall before work was permitted adjacent to the highwall on November 13, 2002, created a hazard to persons.

The Secretary relies in this regard, on the contradictory statements of Plant Manager Albrecht that the cracks he had seen on top of the highwall a week before the accident were similar to the cracks he saw in that area after the accident and that "if" he had seen the cracks before the accident he "probably would have taken some corrective action" (Secty. Brief p. 15; Tr. II-64,65,77-80). The Secretary herself acknowledges that this contradictory testimony is curious. In any event, because of this contradiction, I find that I cannot give the testimony in this context any probative weight.

Under the circumstances, there is no probative direct evidence in this case that the ground conditions on the highwall before the work of bulldozer operator Rios-Beauchamp was permitted on November 13, 2002, were hazardous to persons. Significantly, the credible testimony from the Secretary's expert, Donald Kirkwood, a licensed professional civil engineer and expert in soil and rock mechanics, is that cracks appearing above a highwall do not necessarily indicate that a highwall is about to fail and that Mr. Rios-Beauchamp may have caused the ground failure himself by undercutting the highwall (Tr. I-181, 182).

Both Kirkwood and Plant Manager, Albrecht, testified that the cracks they observed following the fatal rock fall were likely the same as before the rock fall (Tr. I-148, Tr. II-78-80). In addition, according to the Respondent's, witness, David West, an expert in rock mechanics and the micro seismic monitoring of mine sites, three "catastrophic" events (i.e. the ground fall itself, rainfall that occurred in the area of the rock fall on the evening of November 13, and an earthquake measuring 4.7 on the Richter scale 190 miles from the mine site) occurred after the rock fall and before Mr. Kirkwood observed cracks on November 15th, which affected the ground and influenced the presence, or visual size, of the cracks (Tr. II-152). I find Mr. West highly credentialed and his testimony entitled to persuasive weight. Accordingly, I find that the cracks observed after the rock fall, if anything, would likely have appeared larger than before the rock fall and, would therefore have appeared more hazardous after the rock fall.

In light of the credible evidence, cited below, that the cracks above the highwall after the

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[2] The Secretary does not assert that the failure of the highwall *per se* establishes a violation of the cited standard.

accident did not, in fact, present a hazard to persons, it may reasonably be inferred that the cracks appearing before the rock fall likewise did not appear to present a hazard to persons. In this regard I have again considered the testimony of the Secretary's expert, Donald Kirkwood, that cracks appearing above a highwall do not necessarily indicate that a highwall is about to fail, that the cracks he observed after the accident on November 15, 2002, did not present a danger of imminent failure and that Mr. Rios might have caused the ground failure himself by undercutting the highwall (Tr. I-159-160,172, 181).

In addition, MSHA inspector Armondo Peña testified that, after the accident, he examined the highwall and that once the boulder was taken off the bulldozer there was, in essence, no danger to persons working below the highwall. MSHA investigator Torres-Aponte also acknowledged that, after the accident, he observed Mr. Albrecht standing one or two feet from the edge of the highwall, between a crack and the edge of the highwall without being in any kind of danger. Finally, Messrs. Albrecht and Acevedo testified that when they inspected the top of the highwall after blasting (apparently a week before the accident) they, in effect, saw nothing hazardous (Tr. II-65, 100).

Under all the circumstances then, I cannot find that the Secretary has proven by a preponderance of the evidence that there has been a violation of the cited standard as alleged.

Civil Penalties - Citation No. 779860

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the operator is small in size with a not insignificant history of violations. There is no dispute that the violation was abated in a timely and good faith manner and no evidence has been presented as to the effect the penalty would have on the operator's ability to continue in business. The negligence and gravity findings have previously been discussed in the instant decision. Under the circumstances, I find that the Secretary's proposed penalty of $35,000.00 is appropriate for the violation found in Citation No. 779860.

ORDER

Citation No. 779861 is vacated. Citation No. 779860 is affirmed and Master Aggregates Toa Baja Corporation is directed to pay a civil penalty of $35,000.00 for the violation charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
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