

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

February 9, 1996

APG LIME CORP., : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. VA 94-5-RM  
: Citation No. 4288981; 9/12/93  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Kimballton Mine  
ADMINISTRATION (MSHA), : Mine ID 44-00082  
Respondent :  
: :  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. VA 95-8-M  
Petitioner : A. C. No. 44-00082-05552  
v. :  
: Kimballton Mine  
APG LIME CORP., :  
Respondent :

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Timothy M. Biddle, Esq., and Thomas A. Stock, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on a notice of contest and a petition for assessment of civil penalty filed by APG Lime Corp. (APG) against the Secretary of Labor, and by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against APG, respectively, pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests Citation No. 4288981 issued on September 12, 1993. The Secretary seeks a penalty of \$50,000.00 for the violation of his mandatory health and safety standards set out in the citation. For the reasons set forth below, I grant the contest, vacate the citation and dismiss the petition.

A hearing was held on September 19 and 20, 1995, in

Pearisburg, Virginia. MSHA officials Richard L. Duncan, Joseph M. Denk, Michael A. Evanto and Joseph A. Cybulski, and APG employees Chester J. Tabor, David T. Epperly, Stacey E. Lucas, Lawrence B. Hayes and Ivan L. Blevins testified for the Secretary. Former Mine Superintendent Walter H. Paulson and Dr. James J. Scott testified on behalf of APG. The parties also submitted briefs which I have considered in my disposition of these cases.

### **FACTUAL SETTING**

APG's Kimballton Mine is a medium-size, underground limestone mine in Giles County, Virginia. Limestone from the mine is kilned to produce lime. Entries are developed and limestone is mined by blasting. The entries are approximately 26 feet high and 42 feet wide and are connected by crosscuts and vertical ventilation tunnels called "raises." In addition, entries called "windows" are driven off the main heading until the "hanging wall" (the limestone formation overlying the formation being mined) is contacted.

Ground is controlled by manual scaling of the roof, face and ribs in the face area after each round of blasting. Roof bolts are used only in the underground mine shop area.

On September 9, 1993, a slab of rock, measuring approximately 122 feet long by 22 feet wide by 9.5 feet thick, fell from the roof in the 14 East Main entry near the No. 11 crosscut and crushed two miners operating a Tamrock twin boom jumbo drill. The accident was investigated by Richard Duncan, at the time a supervisory inspector, and Joseph Denk, a mine safety and health specialist.

As a result of their inquiries, the investigators issued Citation No. 4288981 on September 12, 1993. The citation alleges a violation of Section 57.3360 of the Regulations, 30 C.F.R. § 57.3360, stating that:

On Thursday, September 9, 1993, at approximately 4:00 p.m., an accident occurred underground at the mine in which two employees (Timothy Wayne Francis and Brian Ratcliffe) were fatally injured. The two men were operating a Tamrock Supermatic HS205T twin boom jumbo drill in the 14th level east main heading when a slab of rock fell from the roof and crushed the machine. At that time, an effective ground support system was not being utilized at the mine.

(Govt. Ex. 5.) On October 7, the citation was modified to increase the level of negligence alleged from "moderate" to "high" and to allege an "unwarrantable failure" on the part of APG by changing the section of the Act under which the citation was issued from 104(a), 30 U.S.C. § 814(a), to 104(d)(1), 30 U.S.C. § 814(d)(1).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Section 57.3360 provides, in pertinent part, that: "Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary." It is the Secretary's position that ground conditions prior to the roof fall should have indicated that ground support was necessary.

The Secretary argues that a calcite<sup>1</sup> seam in the roof, approximately one-eighth to a quarter of an inch wide, running from where the No. 11 window intersected the main heading to about halfway across the main heading should have put the company on notice that further action was necessary. Specifically, "[t]he Secretary contends that mine management deliberately failed to properly assess the above conditions in the 14 East entry between September 7, 1993 and September 9, 1993, and as a result, failed to implement appropriate action to support or remove the ground after hand scaling proved ineffective." (Sec. Br. at 9.)

The evidence, however, does not support this position. The calcite seam was first noticed by the roof scalers on September 7. After scaling away all of the removable pieces of rock from the seam, they attempted to insert their pry bars into the seam to determine if they could pry anything further down. They were unable to. Still concerned, they advised their foreman of the situation at lunch.

Ivan Blevins, the foreman, examined the seam and he and five scalers, together, attempted to pry something down with their bars. In all, the scalers worked on this seam for about three hours without being able to scale it any further. Since the roof

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<sup>1</sup> Calcite is "[a] mineral . . . , CaCO<sub>3</sub>, . . . . [That] is the essential constituent of limestone, chalk, and marble, and a minor constituent of many other rocks." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 163 (1968).

showed no signs of water or mud seepage, was not "drummy"<sup>2</sup> or making any sounds of shifting, manifestations normally associated with a dangerous roof, Blevins and the scalers concluded that the roof was safe as it was. Accordingly, the scalers painted their initials on the roof to indicate that it was safe to go under.

Blevins visually examined the entry on the eighth and ninth and foreman Chester Tabor examined it on the ninth and neither observed anything to indicate to them that the situation with the seam had changed. There was no evidence that anyone else noticed anything out of the ordinary either.

It was determined that the fall occurred because the calcite seam was not solid between the rocks, but had gaps in it. (Govt. Ex. 2, Resp. Ex. L, Tr. 550.) The gaps were not visible before the fall.

I conclude that nothing in the ground conditions should have indicated to APG that ground support was necessary. In reaching this conclusion, I have evaluated the company's actions in terms of what a reasonably prudent person, familiar with the mining industry and the protective purpose of Section 57.3360, would have done in order to meet the protection intended by the regulation. See *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987).

It is significant that the only people who observed the calcite seam, the miners, were unanimous in their opinion that it was safe. It is undisputed that calcite seams are numerous throughout the mine and do not, by themselves, indicate an unstable roof. The Secretary has not presented any evidence that there was anything about this particular calcite seam that should have put the company on notice that the ground condition required different actions than those it had followed in 45 years of mining.<sup>3</sup> In this regard, the opinion of the inspectors, who never saw the seam, given after the accident, is unpersuasive.<sup>4</sup>

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<sup>2</sup> Drummy is "[l]oose . . . rock that produces a hollow, loose, open, weak, or dangerous sound when tapped with any hard substance to test condition of strata; said especially of a mine roof." *Id.* at 356.

<sup>3</sup> Needless to say, there is absolutely no evidence to support the Secretary's proposition that APG deliberately, that is purposefully, failed to properly assess the calcite seam.

<sup>4</sup> The inspectors seemed to place great weight on general statements by some of the miners who they interviewed that in the past some areas of suspected bad roof had been blasted down. The

Furthermore, the company's mining experience in similar ground conditions in the mine, contrary to the position of the Secretary, would have indicated, as it apparently did to the scalers, that if there were no visible gaps in the calcite seam, and no other indications of unstable roof, ground control was not necessary. In 45 years of operation, the company had never experienced a fall of this nature or magnitude.

I find that a reasonably prudent person, familiar with the mining industry and the purpose of Section 57.3360 would not have concluded that either the ground condition encountered or mining experience in similar ground conditions indicated the necessity for ground support.<sup>5</sup> Accordingly, I conclude that APG did not violate Section 57.3360.

**ORDER**

It is **ORDERED** that APG Limestone's contest of Citation No. 4288981 is **GRANTED**, Citation No. 4288981 is **VACATED** and the civil penalty petition is **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

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evidence at trial indicated that such instances were rare and did not involve the same situation encountered on September 7. (See e.g. Tr. 316.) Cf. *Asarco Mining Co.*, 15 FMSHRC 1303, 1307-08 (July 1993) (the testimony of the inspectors was credited where they actually observed the conditions cited).

<sup>5</sup> Obviously, this roof fall becomes part of APG's mining experience. Consequently, the actions found reasonable in this case may not be reasonable in future cases. See *Tennessee Chemical, Inc.*, 11 FMSHRC 783, 788 (May 1989).

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