

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 13, 1999

DUMBARTON QUARRY ASSOCIATES,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 98-32-RM
	:	Citation No. 7709068; 10/31/97
v.	:	Dumbarton Quarry
	:	
	:	Docket No. WEST 98-69-RM
SECRETARY OF LABOR,	:	Citation No. 7709045; 10/28/97
MINE SAFETY AND HEALTH	:	La Vista Quarry
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 98-70-RM
	:	Citation No. 7709046; 10/28/97
	:	La Vista Quarry
	:	
	:	CIVIL PENALTY PROCEEDINGS
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 98-246-M
ADMINISTRATION (MSHA),	:	A.C. No. 04-00097-05526
Petitioner	:	La Vista Quarry
	:	
v.	:	
	:	Docket No. WEST 99-88-M
DUMBARTON QUARRY ASSOCIATES,	:	A.C. No. 04-02380-05537
Respondent	:	Dumbarton Quarry

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary of Labor;
David W. Donnell, Esq., Peterson Law Corporation, Rocklin, California, for Dumbarton Quarry Associates.

Before: Judge Manning

These cases are before me on notices of contest filed by Dumbarton Quarry Associates (“Dumbarton”) and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Oakland, California, on September 14, 1999.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Dumbarton Quarry and the La Vista Quarry are operated by Dumbarton in Alameda County, California. In October 1997 MSHA Inspector James Goodale inspected both quarries. During the inspection, he issued a number of citations and orders including the three at issue in these proceedings.

A. Dumbarton Quarry

On October 31, 1997, Inspector Goodale inspected the Dumbarton Quarry. During his inspection he issued Citation No. 7709068 alleging a violation of 30 C.F.R. § 56.18002(a), as follows:

An adequate examination of work places [was] not being conducted by the mine operator. Several violations were cited relating to examining work areas.

Inspector Goodale determined that the violation was of a significant and substantial nature (“S&S”) and was the result of Dumbarton’s moderate negligence. Section 56.18002(a) provides, in part, that a “competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health.” The standard further states that the operator “shall promptly initiate appropriate action to correct such condition.” The Secretary proposes a penalty of \$267 for this alleged violation.

During his inspection, Inspector Goodale inspected both the pit and the crushing plant. Inspector Goodale noted that equipment in the pit was in excellent condition. (Tr. 52). He testified that he observed a number of violations at the crushing plant. (Tr. 52-64). He issued seven citations for these violations. (Ex. G-4). He testified that each of these violations was obvious. (Tr. 64). The inspector believed that these violations could have been prevented if adequate examinations of the workplaces were conducted. *Id.* He concluded that these violations would not have existed if adequate on-shift examinations were conducted because the violations were very obvious. He issued the citation on that basis.

The citations that Inspector Goodale relied upon to support this citation allege violations of various safety standards. The inspector issued two S&S citations alleging violations of 30 C.F.R. § 56.12025. In each case, the citation states that electrical extension cords being used in the crusher area were not grounded. (Tr. 58-60, 63-64). He was concerned that ungrounded electrical circuits created a shock hazard. He also issued two citations alleging violations of the Secretary’s guarding standard at section 56.14107(a). The other citations allege violations of sections 56.12008 (fittings for power wires), 56.16005 (securing gas cylinders), and 56.4603(b) (closure of valves). (Ex. G-4). Only the two violations of section 56.12025 were designated as S&S by the inspector. Dumbarton paid the penalties proposed by the Secretary for all seven of these citations.

Inspector Goodale testified that Dumbarton kept records of its examinations of working places. The records indicated that “everything was okay” throughout the crusher area. (Tr. 68). The inspector stated that he issued the citation because the examinations were not adequate under the safety standard. (Tr. 67-68). He determined that the citation was S&S based on the fact that two of the citations he issued in the crusher area were S&S. (Tr. 66).

Dumbarton maintains that Citation No. 7709068 should be vacated and, in the alternative, that it should be modified to a non-S&S citation. It argues that the citations relied upon by the inspector to establish that the examinations were inadequate did not cite conditions that adversely affected safety or health and the conditions were not obvious, in any event, including the two S&S citations. (Tr. 153). Citation No. 7709064 alleges that the ground lug was missing from the plug of an extension cord. Dumbarton argues that the only way for an examiner to detect such a condition would be to remove and inspect each plug at the mine. It contends that the on-shift examiner is not required to take such an action during his inspection. Further, it argues that there is no evidence concerning how long this condition had existed. (Tr. 154). It believes that the lug could have broken off the plug the day before the inspection.

Dumbarton argues that the guarding violation alleged in Citation No. 7709061 is not obvious because a gate was present to protect persons from contacting the pinch point. It contends that a reasonable person could assume that this gate complied with the safety standard. (Tr. 154-55; Ex. G-5). It believes that because the alleged guarding violation did not create a safety hazard to employees, the examiner’s failure to note the condition does not violate section 56.18002(a).

In order to determine whether a violation occurred, the requirements of the standard must be examined. The Commission has identified three requirements of section 56.18002 as follows: (1) ... workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator.” *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1988). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defined a competent person as “a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned.” 30 C.F.R. § 56.2.

There is no dispute that the citations issued by the inspector used to support the instant citation were issued in “working places,” as that term is defined in section 56.2. Inspector Goodale also admitted that Dumbarton had conducted examinations of the working places. He examined the records kept by Dumbarton that “indicated that they had done their examination of workplaces; they’d checked off that they’d done it.” (Tr. 67). He testified that he issued the citation despite the fact that examinations were being made and recorded because he believed that the examinations were inadequate. (Tr. 68). The identity of the individual who performed the examinations is not disclosed in the record.

The Secretary did not introduce any evidence as to the competency of Dumbarton's examiner. The Commission held that the term "competent person" within the meaning of the standard "must contemplate a person capable of recognizing hazards that are known by the operator to be present in the work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming* 1629. In *FMC Wyoming*, the Commission determined that the examiner was not competent because he had no training or experience in asbestos recognition and was assigned to examine areas in which asbestos was being removed without his knowledge. In the present case, there is no evidence that Dumbarton's examiner was not familiar with and could not recognize safety hazards that are typically present in a quarry and crusher environment.

In the present case, the Secretary attempts to prove a violation by showing that the examiner was not competent or, if competent, his examinations were inadequate because seven citations alleging safety hazards were issued in the crusher area during the MSHA inspection. There have not been any Commission or administrative law judge decisions that address this issue in a comprehensive way. In most cases, the Secretary presented direct proof that the examinations were not conducted or that the examinations were not recorded. Former Commission Judge Arthur Amchan vacated a citation alleging a violation of section 56.18002(a) where testimony established that the required examinations were done. Judge Amchan concluded that the fact that the MSHA inspector "found a number of violative conditions may be the result of [the operator's] belief that the conditions cited were not violations, rather than an indication that workplace examinations were not performed." *Higman Sand & Gravel, Inc.* 18 FMSHRC 951, 962-63 (June 1996).

The Secretary's Program Policy Manual on section 56.18002 provides, in part:

Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken will result in a citation for violation of §§ 56/57.18002(a) or (c). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found. Although the presence of hazards covered by other standards may indicate a failure to comply with this standard, MSHA does not intend to cite §§ 56/57.18002 automatically when the Agency finds an imminent danger or a violation of another standard.

(*Program Policy Manual*, Volume IV, Subpart Q <<http://www.msha.gov/regs/complian/ppm/pmvol4e.htm#77>>). Although the language of this manual is not binding on the Secretary, I note that it indicates that evidence in support of a violation "may include information which demonstrates that safety or health hazards existed prior to the working shift in which they are found." (Emphasis added). In this case, the only evidence presented to support the violation is the fact that Inspector Goodale issued seven citations during his inspection of the crusher area.

I find that many of the conditions cited by Inspector Goodale were either not obvious or they arguably did not present serious safety hazards. Because Dumbarton paid the penalties for the underlying citations, I assume that the conditions described therein existed and that they violated the cited safety standards. In Citation No. 7709061, a gate was used in lieu of a guard at a tail pulley. The gate was not locked at the time the citation was issued, but a lock was present. (Ex. G-5). An examiner might have concluded that this condition did not present a safety hazard, especially if the gate was locked. In Citation No. 7709064, the grounding prong on the plug of the cited extension cord was plugged into a wall socket. The violation was not obvious. I credit Inspector Goodale's testimony concerning the nature of the other five violations. The conditions described in these five citations should have been recorded by the examiner because they presented obvious safety hazards.

Although I appreciate Inspector Goodale's concern that the examinations were not discovering safety problems, I find the fact that five citations were issued citing visible safety problems is too slender of a reed on which to hang a violation of section 56.18002(a) in this case. The examinations were being made and recorded. There has been no showing that the examiner was not competent. Moreover, it is not uncommon for an MSHA inspector to issue multiple citations at a mine that cite conditions which should have been detected by the operator's examiner. Citations under section 56.18002 are generally not issued under such circumstances. The Secretary may be able to establish a violation of the safety standard by proving that obvious conditions were not being corrected. In this case, however, I find that such proof is insufficient to establish a violation. Accordingly, Citation No. 7709068 is VACATED.

B. La Vista Quarry

1. Citation No. 7709045

On October 28, 1997, Inspector Goodale inspected the La Vista Quarry. During his inspection he issued Citation No. 7709045 alleging a violation of 30 C.F.R. § 56.11001, as follows:

Safe access was not provided on the elevated platform leading to the 5100 Symons crusher. A buildup of spilled materials, old parts, belting, etc. [was] observed [on] the walkway where an employee must travel daily to check the crusher for plug-ups. The walkway was approximately five foot above ground level, if any more materials would accumulate, the handrails provided would be ineffective. This condition was recorded and reported to the General Manager on the back of the time cards. The time cards were reviewed. The General Manager stated he neglected this condition, didn't think it was serious enough to correct right away.

Inspector Goodale determined that the violation was of a significant and substantial nature (“S&S”) and was the result of Dumbarton’s high negligence. He issued the citation under section 104(d)(1) because he believed that the violation was the result of the operator’s unwarrantable failure. Section 56.11001 provides that a “[s]afe means of access shall be provided and maintained to all working places.” The Secretary proposes a penalty of \$400 for this alleged violation.

Inspector Goodale testified that he observed spilled material, belting, and some old parts along the elevated platform leading to the Symons crusher at the crushing plant. (Tr. 19-20). He determined that it was heavily traveled because he observed footprints in the material. The inspector stated that the platform is the sole travelway to the Symons crusher. (Tr. 22). He also stated that the examiner would be required to travel through this area when conducting his on-shift examination. The elevated platform is shown on a photograph that he took during his inspection. (Ex. G-2, p. 1).

Inspector Goodale considered the accumulated material to present a tripping and stumbling hazard. He also stated that the accumulations create a slipping hazard. The inspector stated that because the accumulations of spilled material were very fine, they would become extremely slippery when wet.

Inspector Goodale asked the miners’ representative about the material present along the elevated platform. The inspector testified that the representative told him that the conditions existed for some time and that the plant operator was reporting the condition to the quarry manager on the back of his time cards. (Tr. 24).

Following his inspection, Inspector Goodale asked Rick Case, the quarry manager, about the accumulation of material along the elevated platform and asked to see the records of on-shift examinations that are required to be kept under section 56.18002(b). The inspector determined that Dumbarton complied with the record-keeping requirements of that section by having the examiner report safety problems on the back of his time card. (Tr. 29-30). Inspector Goodale reviewed the time cards for the plant operator and saw that he reported the spillage on the elevated platform on the back of his time card for at least the previous three or four days. (Tr. 31).

Inspector Goodale testified that he asked Mr. Case about the spillage and that Mr. Case told him that he regularly reviews the plant operator’s time cards, that he was aware of the spillage, and that he did not take steps to have the spillage cleaned up because he did not consider it to be a serious problem. (Tr. 32-33, 91). The inspector issued the citation as a section 104(d)(1) unwarrantable failure citation largely because Mr. Case knew of the conditions and did not take any steps to remove the accumulations. He determined that the violation was S&S because he believed that there was a reasonable likelihood that the hazard presented would result in a serious injury. (Tr. 40-1, 83-84, 93-94).

Robert McCarrick, General Manager for Dumbarton, testified that employees are instructed to report serious safety concerns directly to the quarry manager either in person or via radio. (Tr. 105-06). He also stated that employees are authorized to shut down an area at the quarry in order to correct a hazardous condition. In addition, he testified that regular safety meetings are held at the quarry at which employees can raise safety concerns.

Rick Case testified that he was not aware that there was a significant spill on the elevated platform at the time of the inspection. (Tr. 114). He stated that the notation on the time cards indicated that there were "some rocks and spills on catwalks and walkways." *Id.* He stated that there are always some spills on the walkways when the crusher is running and employees go around and clean them up. (Tr. 115). He testified that he interpreted the notations on the time cards to indicate that there was some spillage, but the notations did not state that there was a major spill or that a hazardous condition was present. (Tr. 115-16). Mr. Case testified that, given the size of the spill, the crusher operator should have taken steps to have it cleaned up or, at a minimum, directly notify him of the hazard. (Tr. 115-17). Finally, Mr. Case testified that he does not believe that there were old belts or parts in the spillage and that the inspector was only seeing shadows in the spillage. (Tr. 120, 124).

I find that the Secretary established a violation of the safety standard. A safe means of access to the crusher was not maintained. The elevated platform was used as a travelway to gain access to the crusher, which is a working place as that term is defined in section 56.2. Employees must travel to the crusher from time to time. Indeed, the inspector observed footprints in the area. The spilled material prevented safe travel. The fact that conveyor belts or other old parts may not have been present does not lessen the violation.

I also find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon 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." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature.

The violation presented a significant tripping, stumbling, and slipping hazard. The presence of handrails along the edge of the elevated platform made it less likely that anyone would fall off the platform as a result of the hazard but, assuming continued mining operations, more spillage could have created a falling hazard. Without considering the potential fall hazard, I find that it was reasonably likely that someone would trip, stumble, or slip on the accumulated fine material and suffer a reasonably serious injury such as a twisted ankle, torn ligament, or dislocation of a knee, assuming continued normal mining operations. The violation was serious because a lost workday injury was reasonably likely.

The Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission stated that “a number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

I find that the violation was the result of Dumbarton’s unwarrantable failure to comply with the standard because its failure to clean up the spilled material on the elevated platform constituted a serious lack of reasonable care. The accumulation of spilled material was extensive, it had been present for at least a few days, and no effort had been made to remove it. Dumbarton argues that Mr. Case was not at fault because he reasonably believed that the accumulation did not present a significant hazard. The issue, however, is not Mr. Case’s conduct, but whether Dumbarton exhibited aggravated conduct constituting more than ordinary conduct. A significant amount of spilled material was present on top of the elevated platform that created an obvious hazard to anyone walking through the area. The spillage was duly noted on the crusher operator’s time cards, as was the custom at the mine. The examiner’s notations were being ignored, either because Mr. Case was not giving them due regard or because the crusher operator did not emphasize the hazard in his notes sufficiently.

Mr. Case was a management employee. Although the crusher operator was not a management employee, he was an agent of Dumbarton for the purpose of conducting and recording the required on-shift examinations so his actions and mistakes are fully imputable to Dumbarton. *Rochester & Pittsburgh Coal Co.* 13 FMSHRC 189, 194-96 (February 1991).

Thus, between the two of them, Dumbarton had been put on notice that greater efforts were necessary to provide and maintain a safe means of access to the crusher. There is no evidence that the area was being cleaned up on a regular basis and that new spills were occurring. Although I would not necessarily characterize Dumbarton's conduct with respect to this spillage as exhibiting "reckless disregard," "intentional misconduct," or "indifference" to the hazard present, I find that it constituted a serious lack of reasonable care. Consequently, Citation No. 7709045 is AFFIRMED as issued.

2. Order No. 7709046

On October 28, 1997, Inspector Goodale issued Order No. 7709046 alleging a violation of 30 C.F.R. § 56.11001, as follows:

Safe access was not provided on the elevated platform around the 5100 Symons crusher. A buildup of spilled materials, old parts, belting, etc. [was] observed on the walkway where an employee must travel daily to check the crusher. The walkway was approximately nine feet above ground level, if any more materials would accumulate, the handrails provided would be ineffective. This condition was recorded and reported to the General Manager on the back of the time cards. The time cards were reviewed. The General Manager stated he neglected this condition, didn't think it was serious enough to correct right away.

Inspector Goodale determined that the violation was S&S and was the result of Dumbarton's high negligence. He issued the order under section 104(d)(1) because he believed that the violation was the result of the operator's unwarrantable failure. The Secretary proposes a penalty of \$400 for this alleged violation.

The conditions cited by the inspector in this order are very similar to the conditions in the previous citation. The spilled material in this case was on the deck above the area cited in the previous citation and the accumulation was immediately adjacent to the crusher. (Ex. G-2, p. 2). The parties offered testimony and argument with respect to this alleged violation that was entirely consistent with that offered for Citation No. 7709045.

Dumbarton contends that this condition should have been included in the original citation since there is only one travelway to the crusher. I hold that it was within the Secretary's discretion to issue separate citations because the cited conditions were on two different decks. Dumbarton questions whether Inspector Goodale really knew whether there was a hazardous accumulation of spilled material because the cited area was nine feet off the ground and he did not travel to the deck to inspect it. The inspector testified that it would have been hazardous for him to travel to the deck and I credit his testimony that he could see enough to establish that safe access was not provided to the crusher. The same hazards were present on this deck as on the elevated platform cited in the previous citation. In addition, this deck was higher off the ground.

For the reasons discussed above with respect to Citation No 7709045, I find that the Secretary established a violation of the safety standard, the violation was S&S, and it was the result of Dumbarton’s unwarrantable failure to comply with the standard. Consequently, Order No. 7709046 is AFFIRMED as issued.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Because I vacated the citation issued at the Dumbarton Quarry, I have only considered the information provided by the parties with respect to the La Vista Quarry. I find that no citations were issued at the quarry during the two years prior to this inspection. (Tr. 9). The quarry is a relatively small- to medium-sized facility that worked about 36,700 manhours and employed about 12 miners. (Tr. 9, 122). Dumbarton as a whole worked about 83,900 manhours. The violations were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on Dumbarton’s ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 98-246-M		
7709045	56.11001	\$400.00
7709046	56.11001	400.00
WEST 99-88-M		
7709068	56.18002(a)	Vacated

Accordingly, Citation No. 7709068 is **VACATED**; Dumbarton's notice of contest in WEST 98-32-RM is **GRANTED**; and WEST 99-88-M is **DISMISSED**. Citation No. 7709045 and Order No. 7709046 are **AFFIRMED** as written; Dumbarton's notices of contest in WEST 98-69-RM and WEST 98-70-RM are **DISMISSED**; and Dumbarton Quarry Associates is **ORDERED TO PAY** the Secretary of Labor the sum of \$800.00 within 30 days of the date of this decision. Upon payment of the penalty, WEST 98-246-M is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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