FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 26, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 99-353-M A. C. No. 45-03334-05508
v.	:	
NORTHWEST AGGREGATES, Respondent	:	DuPont Pit
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2000-481-M A. C. No. 45-03334-05518 A
v.	:	
RICHARD INWARDS, employed by, NORTHWEST AGGREGATES, d/b/a, GLACIER NORTHWEST, Respondent	:	DuPont Pit

DECISION

Appearances: Deia W. Peters, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of Petitioner;
John M. Payne, Esq., Davis, Grimm & Payne, Marra & Berry, Seattle, Washington, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Northwest Aggregates and Richard Inwards pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. §§ 815 and 820(c). The petitions allege that the corporate operator and individual agent of the operator are each liable for two violations of mandatory safety and health standards. The Secretary proposes civil penalties totaling $10,000.00 as to Northwest and $6,500.00 as to Inwards. A hearing was held in Tacoma, Washington on June 12-13, 2001. Following receipt of the transcript, the parties submitted briefs.

For the reasons set forth below, I find that Northwest committed the violations alleged and impose civil penalties totaling $3,250.00. I further find that the Secretary failed to prove that Inwards was liable for the violations in his individual capacity and vacate the citations issued to him.

Background

On or about February 10, 1999, MSHA was notified by phone that an accident had occurred on February 5, 1999 at Northwest Aggregates' mine, the DuPont pit. It was reported that a front end loader had been partially covered by a slide of material down the pit wall and that the operator had been pinned in the cab. On February 11, 1999, Herbert Bilbrey, an MSHA inspector, went to the DuPont pit to investigate the accident. After conversing with witnesses and observing the scene, he issued citations to Northwest Aggregates alleging violations of mandatory health and safety regulations for failure to inspect and test ground conditions and using unsafe mining methods. Subsequently, a special investigation was conducted, which resulted in identical violations being charged against Northwest's superintendent, Richard Inwards, in his individual capacity. Those same charges were also made against Mark Snyder, the excavation crew foreman. However, the Secretary elected not to proceed against Snyder and the petition filed against him was dismissed on her motion.

Findings of Fact

Northwest Aggregates mines sand and gravel in the area around Tacoma, Washington. Mining operations were conducted for many years at two locations, the Steilacoom pit and the DuPont pit, which are located 7-8 miles apart. The minerals were deposited by glacier movement approximately 10,000 years ago and are very clean, i.e., there are minimal amounts of fines, or foreign material. The materials at the Steilacoom pit had approximately 1% fines and at the DuPont pit 3-4% fines. Deposits with less than 5% fines are classified as free draining granular deposits. The Steilacoom pit has been in operation since 1977 and the DuPont pit, comprising some 600 acres, opened formally in 1996. The DuPont pit operates under a permit that allows only 30 acres to be actively worked at one time, 10 acres being cleared, 10 acres being mined and 10 acres being reclaimed. The excavation portion of the operation, the pit, is located about one mile from the mine's offices.

The first step in the mining process involves clearing of the overburden using a bulldozer. The underlying sand and gravel is then scooped up with large front end loaders, CAT model 992's, and dumped onto a conveyor belt that transports the material from the pit area. The 992 loaders are very large machines. Northwest ordered the loaders with oversized, 23 foot wide, buckets. The buckets are 8 feet deep at the throat and 7 feet nine inches high. The distance from the teeth of the bucket to the front of the 8 foot diameter rear wheels is 23 feet. The operator sits about 13 feet above ground level. Two 992's are operated on two shifts and one dozer operates at the top of the pit, clearing overburden and pushing sand and gravel down the pit wall to the loaders. The material is generally free running, that is, it readily slides down the slope of the pit wall to its natural angle of repose. This movement is referred to as sloughing

and the loose material lying at the base of the wall is referred to as "the slough."

The mining method used by Northwest involves the use of loaders to mine the slough, i.e., scoop up the loose material that has sloughed down to the base of the pit wall. The loader operators were to "fan out," mining as wide an area as they could. Under normal conditions, the free running material would continue to slough to its natural angle of repose, and by the time they returned to an area newly sloughed material would be available. If, for some reason, the material in a particular area did not slough readily, or overhangs or ridges of unsloughed material appeared on the pit wall, the operators were supposed to avoid that area until it sloughed or call for the dozer to push material off the top and down the face of the pit wall, essentially forcing the material to slough. The loader and dozer operators, as well as the excavation foreman, Mark Snyder, and other employees had radios and could contact each other at will. The loaders dug downhill at an approximately 5 degree angle and as progress was made the pit wall became increasingly high. At the time of the accident on February 5, 1999, the wall was about 100 feet high. One of the dangers posed by a wall that high is that there is a large area of the slope in which hangups of material may occur. That material will eventually break loose, or slough, and can cause other material to slough resulting in a large amount of material sliding down the face of the wall to where the loader operators are working.

To avoid such dangers the loader operators were to fan out and mine the slough over a wide area at the base of the wall, thereby allowing time for the material to slough naturally, such that overhangs and hung up material would be eliminated by the time they returned to an area. In addition, the loader operators were to watch the high wall for such developments and avoid working below those areas until the material sloughed. They could also use their radios to contact the dozer operator or the excavation foreman to request that the dozer push material off the top of the wall, which would generate a slough. This mining method was used at the Steilacoom pit and also at other sand and gravel mines in the same area where the materials were similar to those being mined by Northwest. Stephen Dmytriw, a licensed civil engineer, certified MSHA safety instructor, an instructor at the Colorado School of Mines and a retired MSHA inspector, testified as an expert witness in civil engineering, mining techniques, slope stability and rock mechanics. He described the nature of the materials being mined and the mining method used by Northwest and several other sand and gravel mines in the area. In his opinion, the mining method used by Northwest was appropriate and safe and was identical to that used by other mines in that area.

On the morning of Friday, February 5, 1999, the day shift loader operators, William Wallace and Jack Zinski, reported for work at their normal time, approximately 6:00 a.m. It was raining and they commenced mining in the DuPont pit. About 7:00 a.m., they took a break to attend a weekly safety meeting of the excavation crew conducted by foreman Snyder. Following the meeting they returned to work. Zinski was mining on the left side of the approximately 400 yard wide pit wall and Wallace was mining on the right. Snyder had directed him to mine in that area earlier in the week, Tuesday or Wednesday, because the material there had a higher sand content and the mine needed more sand. As Wallace mined the area, he did not fan out widely. Rather he mined an area only about 2-3 buckets, i.e. approximately 60 feet wide. He

removed the loose slough at the bottom of the wall and used his bucket to remove some of the consolidated material at the base of the wall. A large slough occurred, burying the bucket of his loader and engulfing the front wheels. He tried to back the loader out, but was unable to do so, and called Zinski on his radio requesting help in digging his loader out of the slough. Zinski, who had just scooped a load of material, responded immediately, dumping his load as he proceeded toward Wallace. In the short time it took Zinski to reach Wallace a second major slough occurred that engulfed Wallace's loader and forced the windshield of the loader out of its frame pressing Wallace's chest against the back of the seat. Wallace could not breath. Fortunately, Zinski reached him quickly and was able to pull the windshield out of the material, which relieved the pressure enough for Wallace to breath. Zinski, other crew members, Snyder and Inwards, all of whom responded to radio calls for help, were able to extricate Wallace and his loader. Wallace was taken to a medical facility to see if he suffered any treatable injury.

While this was the first incident in which an loader operator had suffered an injury because of sloughing material, it was not the first time a loader had been partially engulfed. Wallace's loader had been partially engulfed in the summer of 1998. He had mined a fairly narrow area, creating a pocket, and material sloughed over his bucket and down around the front wheels of his loader, which had to be freed by the other loader. On other occasions, Snyder and Inwards had each seen Wallace mining too narrow an area, i.e., failing to fan out sufficiently, and had cautioned him and instructed him to mine a wider area. A loader operator on the second shift had also had his equipment partially engulfed on two occasions. He also had mined in a narrow area, creating a pocket. Snyder was not informed about those incidents until the second had occurred. Management officials and miners characterized the practice of mining in too narrow an area as digging into a "death trap." The danger created by that technique was that greater instability of the bank would be created and material could slough down around the sides of the loader as well as from the face, or front.

When Bilbrey conducted his investigation on February 11, 1999, six days after the incident, he spoke with management employees, including Inwards and Snyder, the loader operators, Wallace and Zinski, and visited the pit. The equipment was not there at the time and no mining was being done, ostensibly because there was an abundance of material. He was told that the area had been altered somewhat, in that the floor of the pit had been filled in such that the bank, then approximately 90 feet high, was slightly lower than it had been at the time of the accident. He took pictures of the pit area, including the location of the accident. He concluded that the bank, or high wall, was not in a stable condition because there were portions of the face that were not at the angle of repose. Conflicting statements were made that the dozer had been unavailable to push material down to the loaders from one to several weeks prior to the accident. He was told by Snyder that the mine had no policy on designating persons to inspect and test ground conditions and that no one had been specifically designated to do so.

He concluded that Northwest had violated two mandatory health and safety standards and issued citations for each. Following a special investigation, those violations were also issued against Inwards in his personal capacity.

Conclusions of Law — Further Factual Findings

Citation No. 4531826

Citation No. 4531826 alleged a violation of 30 C.F.R. § 56.3130, which requires the use of mining methods "that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks." The conditions he observed were noted on the citation as:

> Mining methods were not used that would maintain the wall, bank and slope stability in the pit where two 992 Cat front-end-loaders work daily on two shifts. An about 90 [foot tall] wall of sand and gravel was being mined single bench and the ground could not be controlled. On 2/5/99 an employee was engulfed in his 992 from the wall, pushing the windshield in his lap and burying him chest high in cab in material. The mine operator knew the ground conditions were bad and used a dozer to push material over until about 2-3 weeks ago. This is not the first time a front end loader has been covered up by the high wall. This violation is an unwarrantable failure to comply with a mandatory standard and presents a high degree of risk to miners in the pit. [The citation was modified on March 17, 1999 to add the following language.] Dick Inwards and Mark Snyder engaged in aggravated conduct constituting more than ordinary negligence in that they did not implement mining methods that maintained wall, bank and slope stability.

He determined that as a result of the violation it was highly likely that a fatal injury would occur, that one person would be affected, that the violation was significant and substantial, and, that the operator's negligence was high.

The Violation

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

Bilbrey issued the citation because he concluded that Northwest was not following its mining method on February 5, 1999.[1] His primary consideration was that the dozer had not been available to push material down to the loaders for at least a week and as a result the bank had become unstable and collapsed around Wallace's loader. He based his determination on his observations of the high wall on February 11, 1999 and conflicting statements made during the course of his investigation that the dozer had not been used to push material to the loaders for 1-2 weeks or 4-6 weeks prior to the accident. It is somewhat unclear who made these statements, but one source relied upon was Victor Ghilerghi, the assistant superintendent. Ghilerghi was a young college graduate who had been working for Respondent for approximately one year and was "learning the mining business." There is no evidence that he had any significant contact with the excavation operation.

Bilbrey observed the high wall on February 11, 1999, and thought that it was unstable. He noted some hangups and concluded that most of the sloughed material had come down naturally as opposed to having been pushed down by a dozer. He felt that the conditions verified statements to the effect that the dozer had not been used to push material for weeks prior to the accident. However, there was some evidence that the condition of the wall on February 11, 1999, had been altered since February 5, 1999. The loader operators, who were present during Bilbrey's inspection, stated that the bottom had been filled, in raising the elevation of the floor some 15 feet. It was unclear whether there had been material pushed off the top of the wall. There were relatively fresh dozer tracks on the top of the bank, but they were parallel to the wall, not perpendicular as they would have been for the pushing of material. Notably, the area identified as having been where the accident occurred was, in Bilbrey's opinion, in a safe condition with material at or near its angle of repose.

Zinski, Wallace and Snyder, however, testified that the dozer was working near the top of the bank around the time of the accident and had been pushing material to Zinski the day before the collapse. While there was some disagreement, it is apparent that a dozer can push material down the bank at a considerably faster rate than a loader can remove it. Consequently, Zinski was satisfied that the natural slough, augmented by the material pushed down the bank by the dozer the day before, had produced enough sloughed material for him to mine on the day of the accident. Wallace also testified that he had called for a dozer on prior occasions and that

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[1] There seems to be little question that the mining method ostensibly used by Northwest was appropriate. Bilbrey so testified. Dmytriw also offered expert opinion that, given the nature of the material, using front end loaders to mine the slough, fanning out and pushing material from the top of the bank with a bulldozer when necessary, was a perfectly safe mining method. That mining method was employed not only by Northwest, but also by several other surface sand and gravel mines in the area. Northwest's management personnel testified that its mining method had been used for decades without serious incident and that it had never been cited by MSHA for using an improper mining method in any of the once or twice yearly inspections of its operations.

material had been pushed to him in response, but that he had not called for a dozer to push material to him on February 5, 1999. It should be noted that Wallace had filed a lawsuit against Northwest as a result of the incident. The status of the case at the time of the hearing was that it had been dismissed without prejudice to its re-filing.

I credit the testimony of Snyder and Zinski, which was consistent with that of Wallace, likely an adverse witness, that the dozer was active in the area and had pushed material down the day before. Consequently, I reject Bilbrey's conclusion, perhaps justifiable in light of the conflicting statements made on the day of his inspection, that the dozer had not been available for weeks prior to the accident.

Although not noted by Bilbrey in the citation, the Secretary contends that Wallace was instructed to mine in a narrow area and his ability to fan out was restricted. The evidence on whether Wallace's ability to fan out was restricted and whether he raised concerns about it was in direct conflict. I decline to accept that argument as a cause of the accident. Wallace's testimony was somewhat inconsistent with respect to his mining efforts on and around the date of the accident. He testified that the area he had been instructed to mine in was narrow, restricting his ability to fan out until he dug down to Zinski's level and reached the base of the high wall. He testified further that the wall collapsed before he reached the base of the wall, but also admitted that he had gotten into the base of the wall before the collapse. The descriptions of the scene provided by those who rescued him indicated that he had dug into the high wall, beyond the natural slough line. Even if he had been instructed to mine in a relatively narrow area, the critical inquiry would still center on Wallace's ability to recognize unstable conditions and call for the dozer to push material down the bank to alleviate them.

Wallace also testified that the dozer was unavailable to push material to him that week. However, it is apparent from his testimony as a whole that his reference to "unavailability" described any situation where the dozer operator was doing something other than pushing material to Wallace, not that the dozer would or could not have responded had Wallace requested that material be pushed to alleviate unstable conditions where he was working. For example, Wallace stated that the dozer was pushing material to Zinski, a few hundred yards away, on the day before the accident and, presumably, could easily have responded to a request for assistance. However, Wallace claimed that the dozer had been "unavailable" to push material to him for about a week. Significantly, there is no evidence that he requested that the dozer push material to him that week and he testified that, on February 5, 1999, he did not request that a dozer push material to remedy unstable conditions in the area where he was mining and, in fact, stated that he did not observe any unstable conditions prior to his loader being engulfed.[2]

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[2] Wallace did testify that he had told Snyder earlier that week that the bank was too high and should be lowered by the dozer. Snyder denied that Wallace had raised any concerns with him. The height of the bank, in itself, would not present a dangerous or unstable condition. Witnesses described mining significantly higher banks at other sites without incident. Raising a

Despite my rejection of the Secretary's contentions, it is clear that unsafe mining methods were being used on February 5, 1999 and that a violation was proven. However, the violation was attributable to Wallace's disregard of Northwest's established mining method, not the systemic unavailability of a dozer.

As Respondents themselves vigorously argue, Wallace was mining in a relatively narrow area. Unstable conditions developed because the wet material did not readily slough to its angle of repose. He failed to note the development of the instability, or mistakenly thought that the conditions did not pose a hazard. He did not raise the issue at the safety meeting. He did not cease mining in that area until the material sloughed naturally. Rather, he continued to mine the narrow area, did not use his radio to request that the dozer operator push material down to him, and actually worked into the consolidated material at the toe of the bank. He mined into a pocket and created unstable conditions that resulted in an extensive collapse of material around his loader that could easily have killed him.

It is well settled that under the Act mine operators are subject to a strict liability standard, i.e., an operator is liable for a civil penalty even though its supervisory employees are without fault with respect to the violation of a mandatory health and safety standard. *ASARCO, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989) (*aff'g* 8 FMSHRC 1632) and cases cited therein. That the violation was the result of an individual miner's actions does not absolve Northwest of liability for the violation. It does, however, affect the unwarrantable failure analysis. Northwest is, therefore, liable for the violation cited in Citation No. 4531826.

Significant and Substantial

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other 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." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co*, 6 FMSHRC 1, 3-4 (Jan. 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 of Labor 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

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general complaint about the height of the bank is markedly different than requesting a dozer to remedy an unstable condition.

reasonably serious nature. (footnote omitted)

See also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

> We have explained further that 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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

The violation was S&S. The use of an unsafe mining method contributed to creation of a hazard, an unstable high wall, that resulted in a reasonable likelihood that an injury would occur and that the injury would be serious. While the Secretary need not prove that the hazard contributed to resulted in an accident or actually will result in an injury causing event, *Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998), the hazard contributed to here actually did result in a serious, life threatening, injury to Wallace.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure.

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. 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, 194 (Feb. 1991);

see also Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized 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 violative condition, 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 & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

I do not find that the violation was the result of an unwarrantable failure by Northwest. The primary bases for Bilbrey's determination that the operator's negligence was high and that the violation was an unwarrantable failure were his conclusions that the dozer had not been available to push material to the loaders for a period of weeks prior to Wallace's accident and that other similar events had occurred in the past. The availability of a dozer was an important component of Northwest's mining method. While the material tended to slough naturally, it was often necessary to push material down the bank to eliminate unstable hangups of material and augment the natural slough. The unavailability of the dozer for an extended period of time would, indeed, be evidence of high negligence. However, as noted above, I have found that the dozer was, in fact, available to push material and had been used the day before the accident. Wallace also admitted that he had not called for a dozer to push material to him. With the availability of the dozer, Northwest's mining method was appropriate.

The fact that there had been past instances where loaders had been partially engulfed does not alter this conclusion. The weight of the evidence as to the cause of those incidents was that the operators had deviated from Northwest's established mining method, i.e., had mined in too narrow an area creating an unsafe pocket.[3] Those incidents had been appropriately dealt

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[3] There was evidence that the dozer was "unavailable" at the time of some of the prior incidents. However, as with Wallace's testimony, the references to unavailability reflect only that the dozer and/or the dozer operator were doing things other than pushing material to the involved loader operator at the time. There was no evidence that the loader operators had called

with by Northwest. While the miners were not formally disciplined for their actions, they were, in essence, reprimanded. It would also have been reasonable to assume that the occurrences would have impressed upon the involved operators the very real dangers posed by deviations from the established mining method. Northwest was on notice that Wallace had, on two prior occasions, mined in too narrow an area. At least in retrospect, it could be faulted for not taking more aggressive actions to deter such conduct. However, its failure to do so does not amount to high negligence or aggravated conduct.[4]

It is significant that Northwest, which had used the same mining method for decades, had not been cited by MSHA for unsafe mining methods in any prior inspection. Lack of prior enforcement is not relevant to the determination of a violation but is relevant evidence on the issue of negligence. *See, U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1547-47 (Aug. 1993). I find that Northwest's negligence was low to moderate and that the violation was not the result of its unwarrantable failure.

Citation No. 4531825

Citation No. 4531825 alleged a violation of 30 C.F.R. § 56.3401, which provides, in pertinent part:

> § 56.3401 Examination of ground conditions.
>
> 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

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for a dozer to push material to alleviate an unstable condition, or that such requests were not honored.

[4] Bilbrey also placed weight on the fact that the loader operators had made complaints about the operation several months before and occasionally thereafter. The conditions complained of, however, were related to the purchase of the new CAT 992's with the oversized buckets. When operated on a slight downgrade, i.e., digging down at 4-5 degrees, the rear wheels would hop when the loader was backed upgrade with its bucket full, jarring the machine and operator and requiring travel at a lower speed. The rear wheels also lost traction more easily and the machine was unable to back quickly away from the slough. In response, calcium chloride and water were put into the rear tires, creating more weight at that end of the loader. The operators were not entirely satisfied with that solution, however, and preferred to work on flat or level ground. Continued complaints about mining "downhill" were rejected, because there was nothing else that could be done about the problem and mining downhill was necessary to efficiently extract the material. While safety may have been a concern, it appears that the operators' complaints were grounded on performance issues, i.e., the uncomfortable bouncing and related increases in cycle time -- the time required to scoop a bucket of material, travel to the conveyor, dump it and return to get another load.

> where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. * * *

The conditions he observed were noted on the citation as:

> The mine operator failed to designate a person or persons experienced in examining and testing for loose ground conditions at the pit. The pit foreman, Mark Snyder, stated that he was in charge of the pit and he did no such exam nor did he assign these duties. The ground conditions change rapidly with the heavy rains this time of year. The pit was not examined prior to work commencing and as ground conditions warrant. An employee was covered up with material from the wall operating a 992 front end loader on 2/5/99. This violation is an unwarrantable failure to comply with a mandatory standard. Mine pit runs two shifts. Failure to comply with this standard presents a high degree of risk to miners. [The citation was modified on March 17, 1999 to add the following language.] Pit foreman, Mark Snyder, engaged in aggravated conduct constituting more than ordinary negligence in that he was in charge of the pit and did not assign these duties of inspecting the ground conditions to anyone nor did he do the inspections himself.

He determined that as a result of the violation it was highly likely that a fatal injury would occur, that one person was affected, that the violation was significant and substantial, and, that the operator's negligence was high.

The Violation

Northwest had no formal policy, written or unwritten, of designating individuals to conduct examinations and testing of ground conditions either prior to the commencement of work or as conditions warranted during the work shift. Snyder was generally at the pit once a day or more, but there is no claim that his visits were made prior to work commencing or as dictated by changing ground conditions and he had not gone to the pit on February 5, 1999, prior to the accident.

Northwest's defense to this charge is that, by virtue of their job descriptions, the loader operators were supposed to continuously survey the high wall for unsafe conditions and, if the natural slough of material was insufficient, move to another area and call for the dozer to push material to eliminate the instability. This duty to keep an eye on the high wall was periodically reinforced at safety meetings. Consequently, Northwest argues, the loader operators had been designated to examine ground conditions and were doing so at the time.

This is clearly an after-the-fact justification, and an inadequate one. It is apparent that Northwest had made essentially no effort to comply with the regulation. Inwards and Snyder initially told Bilbrey that such examinations were not being done and that no one had been

designated to do them, including the loader operators.[5] Inwards admitted to Bilbrey that he was unaware of the specific regulation prior to the inspection, though he was aware of a regulation requiring miners to examine their workplace before beginning work. Bilbrey described a proper ground conditions examination as involving visual inspection of the entire high wall from the top and bottom to detect separations and other unsafe conditions, such as overhangs. No evidence was introduced to challenge Bilbrey's description of a proper examination. Assuming that the loader operators visually observed the high wall in the area they were removing material from, something they would presumably do in any event for their own safety, it is clear that Northwest had not designated anyone to conduct a proper ground conditions examination prior to work commencing and as conditions indicated and that such examinations and testing were not being done at the time of the accident.

Northwest argues that the loader operators were knowledgeable as to slough patterns, wind and weather conditions, ground conditions, break-offs, aggregate composition and excavation techniques and that they were appropriately designated by Snyder. However, while they had experience as miners in observing high walls as they worked, it is questionable that they had sufficient training or experience in conducting proper examinations of ground conditions, and testing them as indicated, to satisfy the standard. Dmytriw, an expert in the field of civil engineering and slope stability, testified that the material would slough naturally under most conditions, but, that it would slough less readily when it was wet. If it was saturated to the point that water would come off the wall, he opined that it would be very unstable and should not be mined. Wallace, one of the individuals Northwest relies upon as having been qualified to examine and test ground conditions, thought that the material sloughed *more* readily when wet. Bilbrey's notes also indicate that Wallace told him that it was raining heavily when the shift started on February 5, 1999, such that water was coming off the wall. Yet this unsafe condition was apparently not recognized or mentioned at the safety meeting.

Northwest could have achieved compliance with the regulation by designating all members of the crew to examine and test ground conditions, if they possessed the requisite qualifications.[6] However, it is apparent that the loader operators had not been designated to conduct proper examinations of ground conditions as required by the regulation and were not, in fact, conducting such examinations. While Northwest does not argue that Snyder had been designated to examine and test ground conditions, the same is true as to him. While he did visit the pit, generally on a daily basis, and would observe conditions there, including the high wall, there is no evidence that he had been designated to examine and test ground conditions as

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[5] Snyder testified that his statement that Northwest had no policy on designating individuals to examine ground conditions was addressed only to formal written policies. I reject that explanation. The statement itself was not qualified in any way and was consistent with other statements made by Snyder.

[6] The Secretary argues that designating all of the miners to conduct examinations and testing of ground conditions is, in essence, designating no one.

required by the regulation. There was no claim that he visited the pit prior to work commencing and he had not been to the pit on February 5, 1999, prior to the accident. Northwest violated the regulation.

Significant and Substantial

The violation was S&S. Failure to conduct a proper examination of ground conditions, and test where indicated, prior to work commencing and as conditions warrant, under continued normal mining operations would contribute to a hazard, the development of unstable conditions in the high wall. Particularly as the high wall reached heights of 100 feet, there was a considerable area over which hangups or other unstable conditions could develop. Bilbrey noted several such conditions when he observed the high wall on February 11, 1999. Weather conditions, most importantly the amount of rainfall, varied considerably and would affect the development of unstable conditions as the natural sloughing property of the material varied. The development of unstable conditions on a high wall would pose a reasonable likelihood that an injury would result and that the injury would be of a reasonably serious nature.

Northwest argues that the February 5, 1999, accident was entirely the result of Wallace's improper mining actions and that there is no evidence that a proper examination of ground conditions would have disclosed those unstable conditions. That argument misses the mark. As noted above, the Secretary need not prove that the hazard contributed to resulted in an accident or actually will result in an injury causing event. *Arch of Kentucky*, *supra*. Wallace's accident, aside from confirming the obvious — that an injury resulting from the hazard of unstable ground conditions in the high wall would likely be serious — has minimal bearing on whether the violation was S&S.[7]

Northwest also argues that the absence of any prior injuries from unstable ground conditions precludes a conclusion that an injury would be reasonably likely to occur as a result of the hazard contributed to. However, the absence of prior injuries is only one factor in the evaluation. The determination of whether a violation was S&S must be made assuming continued normal mining operations and I am convinced that the hazard contributed to by the

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[7] In any event, it is not at all clear that Northwest's assertion is correct. There is evidence of unusually heavy rainfall on the morning of February 5, 1999, such that water was coming off the high wall, an unstable condition. Even though the scene of the accident had been altered somewhat by the time of Bilbrey's February 11, 1999 inspection, he did observe several conditions that indicated instability in the high wall. The fact that the area where the accident occurred appeared to be at the angle of repose is hardly remarkable. It was material sloughing to its angle of repose that engulfed Wallace's loader. Even though Wallace's continued digging into the face of the wall no doubt exacerbated any unstable conditions, it is entirely possible that a proper examination and, if indicated, testing of ground conditions on the morning of February 5, 1999, would have identified unstable conditions and avoided the subsequent accident.

violation posed a reasonable likelihood of a reasonably serious injury occurring.

Unwarrantable Failure

Northwest and its managers, particularly Snyder and Inwards, should have been aware of the regulation and taken steps to comply with it. While the operator's negligence was at least moderate, I cannot agree with Bilbrey's conclusion that the violation was a result of Northwest's unwarrantable failure. The violation was longstanding, but, it had not been the subject of prior enforcement action and was not, in itself, a highly dangerous condition. The observations by the loader operators, foreman and superintendent were not sufficient to satisfy the requirements of the regulation. However, they did partially address the goal of inspecting for dangerous conditions. The prior instances of sloughs partially engulfing loaders were reasonably thought by Northwest to have been attributable to miners' deviations from established mining methods, not to any failure to examine ground conditions. The absence of enforcement action over a period of several years is a significant mitigating factor. Compare the facts in this case with those in *Wiser Construction*, 18 FMSHRC 1641 (Sept. 1996) (ALJ), where a similar violation was held to be the result of an unwarrantable failure where the operator had violated an imminent danger order issued some six months earlier and had had prior discussions with MSHA officials identifying the violative practice subsequently cited.

Individual Liability

The Act provides that a director, officer or agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability were summarized in a recent Commission decision, *Target Industries, Inc.* 23 FMSHRC 945, 963 (Sept. 2001) (Commissioner Beatty):

> Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C.Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny*

Richardson, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). * * *

I find that the Secretary has failed to prove that Inwards was individually liable for the violations. As to the unsafe mining methods charge, Northwest's mining method was appropriate and safe. It was Wallace's deviation from it that resulted in the violation. The Secretary's theory as to Inwards was based upon allegations that he had instructed Snyder to direct Wallace to mine in a narrow area where his ability to fan out was restricted. However, the only evidence to support that contention was that Inwards had been observed overseeing the pit for a few minutes around the time that Wallace had been directed to mine in that area[8] and statements allegedly made by Snyder to Wallace. Both Snyder and Inwards denied that Inwards had any involvement in directing Wallace where to mine. Snyder testified that it was his determination that Wallace should mine in the area where there was a greater concentration of sand based upon his knowledge from observing the stockpiles that Northwest was low on sand. Even if Wallace had been instructed to work in a narrow area, restricting his ability to fan out, no safety hazard would have been presented as long as the dozer was available to push material augmenting the natural slough.

The Secretary also relies upon statements allegedly made by Snyder to the loader operators that their continued complaints about the loaders and mining downhill had been transmitted to Inwards and that he refused to take further action beyond having calcium chloride put into the rear tires. However, as noted above, those complaints were not prompted by safety concerns and Inwards' failure to further address them was dictated by legitimate business considerations. There was nothing more that could be done about the weight balance of the loaders and switching to smaller buckets would have cut production. Likewise, mining at a slight downward angle of approximately 5 degrees was necessary to effectively mine the deposit. Neither the loaders, nor the practice of mining downhill posed significant safety risks if Northwest's mining method was followed.

The charge that Inwards failed to assure that qualified individuals were designated to properly examine and test ground conditions carries more weight. Inwards should have been aware of the regulation and made sure that it was complied with. However, he had been in a position of authority for many years during which Northwest had conducted operations in essentially the same manner. He was personally aware that MSHA inspectors had inspected Northwest's mines on numerous prior occasions and had never issued a citation for failure to comply with that regulation or otherwise indicated that Northwest's compliance was lacking. Under the circumstances, I do not find that Inwards' failure to assure that qualified individuals had been designated to conduct proper examinations of ground conditions and perform testing

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[8] Inwards had broken his ankle in November of 1998 and began working on a part-time basis in late January, being driven to work by his wife. He was not cleared to return to work full-time until February 11, 1999, the date of Bilbrey's inspection.

where indicated, was due to aggravated conduct. Rather it was due to ordinary negligence.

Accordingly, the citations issued to Inwards in his individual capacity will be vacated.

The Appropriate Civil Penalty

Northwest's DuPont pit is a medium sized mine, with approximately 77,161 hours worked per year and its controlling entity is also a medium sized operation with 1,050,112 hours worked per year. It has a moderate history of violations, with 38 violations having been issued over 32 inspection days in the 24 months preceding the issuance of the subject citations. Respondent did not argue in its brief that payment of the proposed civil penalties would threaten its ability to continue in business. In light of these facts, I find that neither payment of the proposed civil penalties, nor payment of the reduced civil penalties imposed by this decision, will impair Respondent's ability to continue in business. I also find that the civil penalties imposed below are appropriate to the size of Respondent's business.

The proposed civil penalty for Citation No. 4531825 was $4,500.00. The violation was sustained. However, the violation was held to have been the result of low to moderate negligence and not the result of Respondent's unwarrantable failure. Taking into consideration all of the factors required to be assessed under § 110(i) of the Act, I impose a civil penalty of $750.00 for this violation.

The proposed civil penalty for Citation No. 4531826 was $5,500.00. The violation was sustained. However, the violation was held to have been the result of moderate negligence and not the result of Respondent's unwarrantable failure. Taking into consideration all of the factors required to be assessed under § 110(i) of the Act, I impose a civil penalty of $2,500.00 for that violation.

ORDER

The citations issued to Inwards in his individual capacity, Citations No'd. 4531825A and 4531826A, are hereby **VACATED** and the petition in Docket No. WEST 2000-481-M is hereby **DISMISSED**.

Citations No'd. 4531825 and 4531826, issued to Northwest are hereby affirmed, as modified, and Northwest is directed to pay a civil penalty of $3,250.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

Deia W. Peters, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

John M. Payne, Esq., Davis, Grimm & Payne, Marra & Berry, 1111 Third Avenue, Suite 1865, Seattle, WA 98101 (Certified Mail)

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