FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 95-112-M
	:	A.C. No. 30-00610-05515
v.	:	
	:	No. 2 Mine
GOUVERNEUR TALC CO., INC. Respondent	:	

DECISION

Appearances: James A. Magenheimer, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York, for the Petitioner;
Sanders D. Heller, Esq., Gouverneur, New York, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by the Gouverneur Talc Co., Inc. (Gouverneur) of 30 C.F.R. §§ 56.3130 and 56.3200. Subsequent to notice, the case was heard in Watertown, New York, on December 5-7, 1995, and in Syracuse, New York, on March 26, 1996.

The parties filed post hearing briefs on June 7, 1996. Gouverneur's reply brief was received on June 24, 1996.

Findings of Fact and Discussion

I. Introduction

The subject surface talc mine operated by Gouverneur consists of a series of benches located at various elevations. Each bench consists of a floor or travelway, and a vertical highwall. In April 1995, the Pioneer Bench was the highest bench, the 617 was below it, and the No. 4 was below that. Four other benches were located below the No. 4 bench. The No. 617 and 4 benches were created by a contractor sometime between the fall of 1992, and the spring of 1993. In normal mining operations, muck, or loose material resulting for the blasting

of the highwall, was removed by a loader or backhoe.

II. Citation No. 4288343

A. Violation of 30 C.F.R. § 56.3130

On April 4, 1995, William L. Korbel, Jr., an MSHA Inspector, inspected Gouverneur's operation. At about 7:30 a.m., while standing on top of the No. 617 bench, he looked down at the No. 4 bench, and observed a number of large loose pieces of material above where a 996D Caterpillar front-end loader ("loader") was loading muck. Korbel went down to the No. 4 bench. From a position about thirty-five to forty feet away from the highwall, he observed a piece of loose material, ("chunck") ten feet by twelve feet by eight feet, approximately thirty feet above the floor of the bench. Korbel stated the chunck piece was resting on loose material, and that the area below the loose material was, "nearly vertical" (Tr. 24). Korbel indicated that this chunk was larger than the bucket of the loader, and was above the reach of the loader.[1]

According to Korbel, the highwall of the bench extended vertically from the floor a variable distance of approximately thirty to forty feet, and then extended diagonally a linear distance of approximately eighteen feet.

Korbel issued a Section 104(d)(1) citation alleging a violation of 30 C.F.R. § 56.3130 which provides as follows:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling or walls, banks, and slopes.

1. Whether Gouverneur was using "mining methods" that will maintain wall and slope stability

Korbel testified that he observed Mark Trombley digging into a muck pile with the loader. According to Korbel, digging into the muck pile with the loader was not a safe mining method, because it did not maintain wall stability of the muck pile. He opined that this method was exposing Trombley to the danger of being injured or killed by falling rock. In this connection, Petitioner argues that Trombley was exposed to the danger of

[1] The maximum reach of the loader is eighteen feet.

being crushed by the chunk, located above him on a vertical wall, and that this piece could not have been controlled by the loader.

Although Trombley might have been exposed to the hazard of the large chunk in the pile, there is no empirical evidence that Gouverneur's method of removing material from the muck pile had any detrimental effect on the stability of the pile, wall, or slope. Neither party presented any substantial, convincing evidence regarding how the term "stability" is commonly understood in the mining industry. A Dictionary of Mining, Mineral and Related Terms (1968) ("DMMRT"), defines "stability," as pertinent, as follows: "The resistance of a . . . spoil heap . . . to sliding, over terming, or collapsing . . . *See also*, angle of repose:" . . . "angle of repose" is defined in the DMMRT as follows: "The maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope." There is no evidence that the muck pile was not at rest. Accordingly, I find that when cited, the pile was stable.

Korbel explained Gouverneur's mining method as follows:

> A. Yes. There was more loose. This whole area had started at what we would call an angle of repose from the cast off of the shot that cascaded down over the sides; had a pretty good angle. The problems came when they started digging in . . . This material would not come down that easy, and they were getting fairly vertical heights where they were mucking. And that was what created the exposure; because in order to be there and to clean this, as you're raising your bucket loader your loader has to come in underneath. It's just the way it functions. And that was bringing the operator into very close proximity of this loose, and the proximity was almost -- nearly vertical, which is just a very bad situation (sic.)
> (Tr. 27-28).

Korbel did not specifically explain how Gouverneur's method of mining would not maintain stability of the muck pile. Nor did Petitioner adduce any other evidence on this point. I thus conclude that Petitioner has not established that Gouverneur's mining method would not maintain stability of the muck pile or the wall.

2. The width and height of the bench based on the 996D

loader used for cleaning of benches or scaling of slopes

In essence, Petitioner next argues that Gouverneur violated the second sentence of Section 56.3130 supra which provides as follows: "When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks and slopes."

a. Scaling of Walls, Banks, and Slopes

Neither party presented any evidence as to whether the operations at issue constituted "scaling" as that term is commonly understood in the mining industry. The DMMRT, defines "scaling," as pertinent, as follows: "a. The plucking down of loose stones or coal adhering to the solid face after a shot or a round of shots has been fired . . . (b) removal of loose rocks from the roof or walls . . . " Based on this definition, I conclude that there is no evidence that Trombley was performing any scaling, or that any scaling was being performed at the specific area cited.

b. Cleaning of benches

Similarly, there is no evidence in the record as to whether Gouverneur's mucking operation is within the meaning of the term "cleaning of benches", as commonly understood in the mining industry. However, Gouverneur has not asserted this point in its defense. Accordingly, it is assumed that this is no disagreement that the operation performed by Trombley was within the purview of the term "cleaning of benches".

c. Height of the bench relative to the operation of the loader

Petitioner argues that since, according to the testimony of Korbel, the height of the bench was more than double the maximum reach of the front end loader, it was not based upon the type of equipment used. Petitioner cites Korbel's testimony that as a result there was no way to safely bring the large chunk down by way of the loader. Petitioner also relies on the testimony of Harold vonColln, Gouverneur's Mining Superintendent, who indicated that he would not assign a 966D loader to a muck pile if it is "substantially" above the loader, as "that would constitute a hazard" (Tr. 671).

In essence, Gouverneur argues, inter alia, that as part of its operation, only the lower portion of the muck pile was being mucked with the 966D loader, and that it had planned to bring in another piece of equipment of handle the elevated Section of the muck pile. However, even should these steps be taken some time

in the future, it does not negate the fact that, when cited, the height of the bench was well beyond the capacity of the 996D loader. I thus find that the height of the pile was not based on the equipment being used i.e., the 996D loader, and as such Gouverneur did violate Section 56.3130, supra.

B. Significant and Substantial

According to Petitioner the violation herein is significant and substantial.

A "significant and substantial" 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 coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the 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 its interpretation of the term "significant and substantial" as follows:

> 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 reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, 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., 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 Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Applying the Mathies, supra, holding to the instant case, due to the fact that the large chunk was beyond the reach of the loader, I find that the violative condition contributed to the hazard of the chunk falling and injuring Trombley or some other miner in the area. The question to be resolved is the likelihood of an injury producing event i.e., the chunk or some other hazardous object falling and causing injuries. According to Korbel, the chunk was unpredictable and unmanageable. However, on cross-examination, he recognized that a number of rocks under the chunk were "doing a certain amount of support" (Tr. 146). He was asked whether the chunk can move, and he indicated as follows: "As long as everything stays right there, you would be good (sic)" (Tr. 146). He elaborated as follows: "As long as the face is left this would fairly stay there, unless you had different changes, such as your weather, or vibrations, or something thats going to effect it" (sic) (Tr. 147).

Although the chunk could have become dislodged, there is an absence of specific evidence in the record to base a conclusion that this event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

C. Unwarrantable Failure

As discussed above, (I (A) infra), the essence of the violative condition was that the height of the muck pile was not based on the reach of the loader. It is incumbent upon Petitioner to establish that this violation resulted from Gouveneur's aggravated conduct which is more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997 (1987)). In his brief, Petitioner argues, in essence, that aggravated conduct is predicated upon Gouverneur's management refusing to take action knowing that the nature of Trombley's work was unsafe. Specifically, Petitioner refers to Trombley's testimony that he had previously complained to his foreman, Craig Woodard, and to the Safety Director, Terry Jacobs that he "didn't like the looks of that chunk" (Tr. 399), but that Woodard did not take care of it.

Petitioner also refers to Trombley's testimony that when he was mucking the day prior to the issuance of the order at issue,

Leonard Zeller, told him that where I was mucking "it was -- it was similar -- like the same type of inciden that it was when -- when the stuff come down on his loader" (sic) (Tr. 415). Trombley told this to Jacobs who told him to take it up with his foreman, Woodard. According to Trombley, when he spoke to Woodard the next day. " . . . he gave me an ultimatum: If you want to go down to the other bench, if you felt more comfortable, go down there" (sic.) (Tr. 416).

I find that the incident referred to by Zeller, and Woodard's reaction to Trombley's concerns, cannot form the basis of any aggravated conduct. As noted above, (I (A) infra), the specific violative condition found herein was that the height of the bench was not based on the reach of the 996D loader. In contrast, Trombley's expressed concerns related to the hazards associated with the chunk.[2] Also, the Zeller incident in February 1995 related to the collapse of a sidewall. There is no evidence that the Zeller incident related to the cited condition herein i.e., the height of a bench/muck pile as it related to the 996D loader.

Donald Fuller, Governeur's General Mine Foreman indicated that a front-end loader mucks from the bottom of the pile; that Gouvernor did not intend for the loader to be used to muck the top of the pile, and that other equipment would be used for that task.

In discussions with Korbel subsequent to the Zeller incident regarding avoiding another similar situation, Fuller stated that "We said we would try to cut down the height of the benches that we were working on, on the - starting with the upper benches" (sic.) (Tr. 589).

According to Fuller, normally, in lowering the benches, one starts with the highest bench. He indicated that the approximately 200 feet of the top 617 bench had been lowered down to thirty four feet. He indicated that it would take probably a couple of years before the No. four bench, would be lowered.

Randy Gadway, an MSHA supervisor, testified that on February 9, he met with Harold vonColln, Governeur's Mine Superintendent, and observed the bench where the Zeller incident had occurred. Gadway indicated that vonColln explained the corrective measures that Gouverneur was going to take. He

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[2]In response to Trembley's concerns about the chunk, Woodard told Tremble to place berm rocks approximately 15 feet from the face of the wall, and to munk to the left side of the chunk.

indicated that vonColln told him that Gouverneur intended to replace the front-end loader with a Caterpillar 235 excavator ("235 excavator") to load and scale. This excavator has a longer reach than the loader at issue.

VonColln testified later on at the hearing, and did not rebut Gadway's testimony regarding the conversations between the two of them. Accordingly, Gadway's testimony on this point is accepted.

Michael Anthony Guida Jr., a mining engineer employed by Gouverneur, opined that the 996D loader was safer than a 235 excavator, as the latter is slower, and requires the building of a barrier for protection before it can be used to remove materials located above it. He also indicated that, in general, in the normal operation of the 235 excavator, its operator would face away from the muck pile. According to Guida, it would have been dangerous to have used the 235 excavator to muck the pile at issue. He explained that the operator would have to place the 235 excavator close to the toe of the muck pile to reach the keystones that were supporting the chunk. According to Guida, once the keystones would be removed, the chunk would probably come down and "if he had his bucket in a manner that that rock would roll over the back of his bucket, it could -- slide down the stick of the boom and right into his cab. That is completely the wrong way to approach those, that chunk" (sic.)(Tr. 767). In the same fashion, Woodard explained that the 235 excavator would not have been the proper piece of equipment for use on the bench at issue as "you would have been working over your head with no protection in front of you" (Tr. 495).

Although there was conflict in the testimony between Woodward and Guida on one hand, and vonColln on the other regarding the use of a 235 excavator with a larger reach rather than the 996D loader, it can be inferred, that vonColln, was aware of the relationship between the equipment in use ie., the 996D loader, and the height of the pile. In opting for the use of the 235 excavator with a larger reach, it can be inferred that vonColln realized that the height of the bench, as constituted on the date at issue, was too high at a point in time when the cleaning or mucking was being performed by the 996D loader.

Within the context of the above evidence, I conclude that the level of Gouverneur's negligence reached the point of aggravated conduct, and would be considered to constitute an unwarrantable failure. (See, Emery, supra). As such, this finding would properly be included in a citation issued under Section 104(d)(1) of The Federal Mine Safety and Health Act of

1977 (“the Act”) only if the violation would also have been found to have been significant and substantial. Since I have decided that the evidence has failed to establish that the violation was significant and substantial, (See, (I)(B) infra), I conclude that the 104(d)(1) citation at issue should be amended to a Section 104(a) citation.

D. Penalty

For the reasons set forth above, (I (C), infra.), I find that the level of Gouverneur’s negligence reached the level of aggravated conduct. I find that the gravity of the violation was moderately high because any type of rock fall associated with this violation could result in a serious injury, or death. Considering the remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $2,000 is appropriate.

II. Order No. 4288344

A. Violation of 30 C.F.R. § 56.3200.

Korbel indicated that in the course of his inspection he observed “a large amount of loose” (Tr. 65) dispersed throughout a 500 foot area above the travelway on the No. 4 bench. He said that the largest pieces were two feet by four feet by four feet, and that ten of these were dispersed through the area. He indicated that most were lying on loose material. Korbel said that a number of loose rocks were approximately three feet by three feet by one foot. Korbel noted that he also saw pebbles, and fist sized material. Korbel stated that there were loose rocks about two feet back from the face or top of the vertical wall.

Korbel indicated that two trucks travel on the thirty to forty foot wide roadway directly below the loose material. Korbel also observed truck tracks within five feet of the wall.

Korbel described the wall of the bench as being vertical, and forty feet high. According to Korbel, the loose material was above the vertical wall on a slope that was eighteen feet long, and at a forty to fifty degree angle. According to Korbel, the largest concentration of material was located in an area whose slope was forty to forty-five degrees.

Korbel indicated that at the top of the diagonal portion of the wall he lobbed five to ten pound basketball sized rocks at some rocks located ten to fifteen feet away. Korbel said that the largest of these were approximately one foot by six inches by eight inches, and that they moved when he hit them with the rocks

that he was lobbing. Korbel also threw at other rocks about fourteen inches in diameter and most of these moved. Others were knocked off the edge of the wall.

Korbel said that the loose material can come down as a result of the vibration caused by vehicles traveling on the roadway underneath. Korbel also said that weather conditions such as alternating rain, cold weather, and warm weather, can erode material underneath the loose rocks and can cause the loose material to fall down due to lack friction.

Korbel issued an order under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 56.3200 which 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.

According to Woodward, the day prior to the issuance of the instant order, Trombley had told him that he and other workers were concerned about material in the 500 foot area at issue. In response to these concerns, Woodard walked up to the area in issue. Woodward took with him a four foot long, one and a half inch diameter, aluminum scaling bar that had a steel tip. Using the scaling bar, Woodard attempted to move rocks that were approximately four feet by four feet by three feet. He was unable to move these pieces. However, he was able to move about four or five basketball sized pieces, and send them below the highwall. Woodard indicated that he could not get any material to move in the area that he described as being in a valley. In general, Woodward described the material in the area in question as being at rest. He opined that there was no danger of the loose material moving by itself.

After the issuance of the order at issue, Guida and Korbel walked along the edge of the bench for about a hundred feet. Korbel pointed out some material. Guida opined that there was no danger of the objects falling down without "some large physical force trying to move it" (sic.) (Tr. 792), as these objects were lying at less than their angle of repose.

None of Gouverneur's witnesses rebutted or impeached Korbel's testimony that some of the loose material could have fallen down as a result of exposure to vibration caused by the

trucks operating on the travelway below, or as the result of various weather conditions. Also, Gouverneur did not offer any eyewitness testimony to contradict the testimony of Korbel that he threw rocks at some of the material he cited and that some of the objects moved.[3] I therefore accept Korbel's testimony and find that some of the loose material cited could have fallen below onto the roadway. Accordingly, this condition created a hazard to the men operating the trucks that travel in the roadway below. There is no evidence that the cited area was posted with a warning against entry or that any barriers were installed. I thus find that Gouverneur did violate Section 56.3200 supra.

B. Significant and Substantial

According to Korbel, the presence of the loose material at issue could have resulted in a fatality should some of this material have fallen down and injured the trunk drivers who drive on the roadway below. Clearly this hazard was contributed to by the violative conditions. However, the record is devoid of any evidence to predicate a finding that an injury producing event i.e., some of the material falling on the roadway would have been reasonably likely to have occurred. Korbel indicated that the vibration of the vehicles traveling on the roadway below, and the effect of alternating rain, coal and warm weather can cause the material to fall down. On the other hand, Petitioner did not rebut or impeach the testimony of Woodard and Guida that, in essence, although the rocks were loose, they were at rest and at, or less than, the angle of repose. I thus find that althought the cited loose rocks can fall, there is an absence of evidence in the record that this event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

C. Penalty

I find that in the event of a any of the material falling, a fatality could have resulted. Hence, I find that the violation was of a moderately high level of gravity.

The day prior to the issuance of the citation at issue Trombley had told Woodard that he and other drivers were concerned about a few chunks, four feet by four feet, by five

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[3]Fuller testified that normally when he has thrown rocks at larger objects he had not been able to move the larger objects. I find this testimony insufficient to rebut Korbel's testimony as to what he actually did. In this connection I observed Korbel's demeanor, and I find his testimony credible.

feet, that were thirty to forty feet above the roadway. In response, Woodard went up to the area in question, spent about a half hour there, and tested various loose objects with a scaling bar. Since Woodard inspected and tested the area in response to Trombley's concerns, I find that Gouverneur's negligence herein to have been only moderate.[4] Considering the remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $1,000 is appropriate.

ORDER

It is ORDERED that Citation No. 4288343, and Order No. 4288344 shall be amended to Section 104(a) citations that are not significant and substantial. It is FURTHER ORDERED that Gouverneur shall, within 30 days of this decision, pay a civil penalty of $3,000.

Avram Weisberger
Administrative Law Judge

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[4]The order at issue was issued pursuant to Section 104(d)(1) of the Act. Since Gouverneur's negligence was only of a moderate degree it did not reach the level of aggrevated conduct, and cannot be characterized as an unwarrantable failure. Since the violation also was not significant and substantial (II)(A) infra) the order should be reduced to a Section 104(a) citation that is not significant and substantial.