FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 11, 2000

BLADES CONSTRUCTION PRODUCTS,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. YORK 98-81-RM
	:	Citation No. 7714696; 8/4/98
v.	:	
	:	Docket No. YORK 98-82-RM
	:	Citation No. 7714697; 8/4/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. YORK 98-83-RM
ADMINISTRATION (MSHA),	:	Citation No. 7714698; 8/5/98
Respondent	:	
	:	Steuben Crushed Stone-Div./
	:	Blades Construction Products
	:	Mine ID No. 30-00214
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-58-M
Petitioner	:	A.C. No. 30-00214-05512
v.	:	
	:	Docket No. YORK 99-4-M
BLADES CONSTRUCTION PRODUCTS,	:	A. C. No. 30-00214-05514
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Docket No. YORK 99-56-M
MINE SAFETY AND HEALTH	:	A. C. No. 30-00214-05516 A
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. YORK 99-57-M
v.	:	A. C. No. 30-00214-05517 A
	:	
RONALD G. THURSTON &	:	
JAMES P. EMO, employed by	:	
BLADES CONSTRUCTION PRODUCTS,	:	
Respondents	:	Steuben Crushed Stone-Div./
	:	Blades Construction Products

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Dept. of Labor, New York, New York, on behalf of the Secretary of Labor; L. Joseph Ferrara, Esq., Jackson & Kelly, Washington, D.C., and John F. Klucsik, Esq., Devorsetz, Stinziano, Gilberti, Heintz & Smith, P.C., Syracuse, NY, on behalf of Blades Construction Products, Ronald G. Thurston and James P. Emo.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging Blades Construction Products (Blades) and James P. Emo and Ronald G. Thurston as agents of Blades, with violations of mandatory standards. The general issue before me is whether there were violations of the cited standards. Other issues include whether certain violations were "significant and substantial," whether certain violations were caused by the "unwarrantable failure" of Blades and whether certain violations were "knowing" violations committed by Emo and/or Thurston as agents of a corporate mine operator within the meaning of Section 110(c) of the Act. If violations are found to have been committed and if those violations are found to have been "knowingly" committed by Emo and/or Thurston as agents of a corporate operator, then appropriate civil penalties must also be assessed utilizing the relevant criteria under Section 110(i) of the Act.

Before and during hearings the parties reached partial settlements and Blades agreed to pay the proposed civil penalties with respect to Citation Nos. 7707523, 7707524, 4432879, 7714696, 7714697 and 7714698. Without objection, the Secretary also amended her petition for civil penalty in Docket No. York 98-58-M, by including therein Citation No. 4288449. The parties thereafter also agreed to a settlement of that citation and Blades agreed to pay the proposed penalty in full. Considering the representations and documentation submitted in these cases, I conclude that the proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act. Accordingly an order directing payment of the agreed penalties will be incorporated in this decision. The Secretary has also unilaterally vacated Citation Nos. 4432875 and 4432880, and has modified Citation No. 4432873 to delete the "significant and substantial" finding originally made therein.

Citation No. 4432873

This citation, as modified, alleges a violation of the standard at 30 C.F.R. § 58.620, without "significant and substantial" findings, and charges as follows:

> The Joy air track drill operator was drilling dry on the northside upper bench. Water was available but not being used. There were no other effective dust control measures being used as required. Heavy dust concentrations were observed extending above the drill mast head. The drill operator was wearing a Moldex 2200 dust mask that was not properly fit tested.

The cited standard, 30 C.F.R. § 58.620, provides as relevant hereto that "holes shall be collared and drilled wet, or other effective dust control measures shall be used, when drilling non-water-soluble material."

Inspector William Korbel of the Department of Labor's Mine Safety and Health Administration (MSHA) visited the Steuben Crushed Stone Mine on February 19, 1998, in response to a miner's hazard complaint. Korbel initially met with quarry foreman Ronald Thurston at the scale house. From that location Korbel observed drilling in progress above the north face. There was heavy dust around the drilling mast and, after approaching the drill at the top of the bench he found that the operator had been drilling "dry."

The driller told Korbel that this was only his second day on this drill, that he had never been told not to drill dry and that he had never been told to use water. According to Korbel, Thurston also admitted that he did not warn the driller about the need to use water while drilling and told Korbel that water would freeze if he used it.

In its post-hearing brief Blades admits to the violation and now questions only the issue of negligence and the appropriate penalty. The Secretary did not address these issues in her post-hearing brief so that neither her theories of negligence nor the amount of penalty she now proposes, based on her modified citation, are known. I nevertheless find that the violation was the result of high negligence. Indeed, Blades now acknowledges that Thurston knew he was drilling dry but in an attempt to mitigate its negligence Blades argues that water could not have been used because of freezing temperatures. This argument provides no justification for the violation however, since, as Inspector Korbel observed, anti-freeze could have been utilized to prevent freezing. Moreover, according to former Blades drill operator Darrell Rice, Blades had on past occasions used a 50/50 mixture of methanol and water to keep the water from freezing. Blades also argues that the drillers were told to remove themselves from the drill rig while drilling. While this evidence could serve to reduce the dust exposure to miners and therefore, reduce the gravity of the violation, it provides no mitigation of Blades' negligence in committing the violation herein. Under these circumstances it is clear that an agent of the operator, Ron Thurston, intentionally violated the cited standard.

As noted, the Secretary has modified this citation to delete her "significant and substantial" findings and to allege that an "injury or illness" was "unlikely." While the Secretary has not addressed the issue of gravity in her brief, in light of the above modifications and thereby the implicit discrediting of her own evidence on this issue, I conclude that the violation was of low gravity.

Citation No. 4432874

Neither the violation charged in Citation No. 4432874 nor the Secretary's "significant and substantial" findings relating thereto are now challenged. In its post-hearing brief Blades now questions only the negligence findings and the appropriate penalty. The citation at issue alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.15005 and

charges as follows:[1]

> The joy driller was observed changing steel standing about 3 ½ feet from a 37 ft. dropoff. He then went to the edge (standing within 1 ft. of the edge/dropoff) and picked up a stone. He was brought back from the edge and stated his safety belt and line was back at the plant. When persons work where there is a danger of falling and are not using a safety belt and line, it is considered an imminent danger condition.

The cited standard, 30 C.F.R. § 56.15005, provides as relevant hereto that "safety belts and lines shall be worn when persons work where there is danger of falling."

From a position below the highwall Inspector Korbel observed the driller standing within a body length of the edge of the wall without a safety belt. At that location the wall had a 37-foot drop-off. Proceeding to the top of the bench, Inspector Korbel observed what he deemed to be the driller's footprints only 3 ½ feet from the edge. From that location Korbel also observed the driller pick up a rock from within one foot of the edge. In the presence of Thurston, Korbel asked the driller if he had been told to wear a safety belt near the edge and the driller responded in the negative. Blades now acknowledges that the standard was violated when the drill operator approached to within one foot of the highwall without wearing fall protection. I find that the standard was also violated when the drill operator also approached to within 3 ½ feet of the highwall, as alleged.

Korbel opined that this admitted violation was "significant and substantial." While this finding is no longer challenged it is appropriate to nevertheless review the basis for such a finding. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the 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.

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[1] A "Section 107(a)" imminent danger order was also issued in conjunction with this citation. The order was not however contested within the time frame set forth in Section 107(e)(1) of the Act and the validity of that order is therefore not before me in this civil penalty proceeding. In any event Blades noted in its post-hearing brief that it no longer disputes the imminent danger finding therein.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Clearly, the presence of the drill operator within 3 ½ feet and one foot of the edge of a 37-foot highwall without a safety belt constitutes a "significant and substantial" violation of the cited standard and a violation of high gravity. I disagree with the Secretary, however, that the violation was the result of high negligence. The Secretary bases her argument in this regard on purported admissions by Quarry Foreman Thurston that the drill operator was required to drill holes within seven feet of the edge of the highwall but had not been given instructions to wear a safety belt while drilling nor warned against approaching the edge of the highwall without a safety belt. The Secretary further argues that the drill operator had limited experience of two days drilling with only brief instructions and was working alone on a surface that was uneven and wet with moisture.

The drill operator, Robert Clark, stated to an MSHA investigator however that he had in fact been trained in the use of a safety belt and line and had in fact been warned by Mine Superintendent James Emo not to work near the edge. Thurston testified moreover that he had trained Clark for about nine hours and that he and Emo had both warned Clark to stay away from the highwall. In addition, Thurston provided Clark with a seven foot pipe to measure the placement of drill holes and to keep him from approaching closer than seven feet from the edge of the highwall. I further find credible the evidence that Clark had not in fact been changing the drill steel manually.

However, while I conclude that Clark was not strictly required by his job duties to approach closer than seven feet of the highwall, he was nevertheless within sufficient proximity of the highwall to warrant the need for fall protection. It is reasonably foreseeable that the driller could trip or stumble from a distance of seven feet from the edge of the highwall thereby placing him in danger of falling. This evidence is weighed in conjunction with the credible evidence that Blades had provided Clark with fall protection training and that Clark had been issued a safety belt and line which he wore on a daily basis in his normal job of crusher operator, where there were fall hazards. In addition, on February 18 and February 19, Emo and Thurston provided more than nine hours of task and safety training to Clark and Clark was told to "stay away from the face." Within this framework of evidence I find Blades chargeable with only moderate negligence.

Citation No. 4432876

This citation, issued pursuant to Section 104(d)(1) of the Act,[2] alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3130 and, as modified, charges as follows:

> Mining methods used on the pit northwest upper bench exceeded the capacity of the equipment being used. The 62 to 65 foot high face is fractured with a large amount of loose visible along the entire height and 410 foot length. On April 30, 1996, a similar condition on a 43 foot high face resulted in a lost time accident. This is an unwarrantable failure.

The cited standard, 30 C.F.R. § 56.3130, 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 task. 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.

The Commission has held that the standard at issue incorporates a "performance-oriented" approach so that it is "broad enough to apply to the wide variety of conditions encountered." The Commission further explained that the appropriate test in interpreting and applying such broadly worded standards is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Secretary v. Cyprus Tonopah Mining Corp.*, 15

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[2] Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

FMSHRC 367 (March 1993).

The Secretary appears to argue that there was a violation of the cited standard under either of two theories. The Secretary argues under her first theory, that the large amount of loose material found by Inspector Korbel on the bench below the upper west highwall and Korbel's observations that the face was fractured and unconsolidated, corroborated by the testimony of expert Terry Hoch that the wall was unstable, is in itself evidence that the mining methods were inadequate to maintain wall stability. Under her second theory, the Secretary maintains that the benches were not suitable for the available maintenance equipment at the mine property.

I find that the Secretary has met her burden of proving a violation under her first theory and in light of these findings it is not necessary to reach her second theory. It is undisputed that the upper west face was 62 to 65 feet high and 410 feet long and that the adjacent bench was approximately 40 feet wide. Inspector Korbel testified credibly that he found a large amount of loose unconsolidated material on the bench and heard material falling during his inspection. He also observed that the face was severely fractured. Terry Hoch, a mining engineer and chief of MSHA's roof control division, visited the subject quarry on July 13, 1999, accompanied by a technician and Inspector Korbel. Based on his firsthand observations of the material and strata in the west highwall at that time, photographs of various portions of the highwall taken in February of 1998, the testimony of Inspector Korbel that material had been falling off the highwall and evidence that a freeze-thaw cycle was then occurring, Hoch concluded that the highwall was unstable on February 19, 1998. Hoch concluded that the presence of tension cracks at the brow, falling material and the height of the benches in relation to the overall structure indicated its instability. He noted in particular that such tension cracks are a precursor to failure. Because of Hoch's particular expertise I give his testimony significant weight and I therefore conclude that mining methods had not been used to maintain the stability of the cited highwall.

In light of the credible evidence that miners traveled and worked along the bench below the cited highwall, i.e., Rice prepared to drill there and Emo traversed the bench to examine the highwall, I find that they were thereby exposed, and others would continue to be exposed, to the potentially fatal hazard of falling rocks. It is clear therefore that the violation is proven as charged and was "significant and substantial" and of high gravity.

The Secretary also alleges that the violation was the result of Blades' "unwarrantable failure" to comply with the cited standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

In addition, in *Mullins and Sons Coal Company*, 16 FMSRHC 192, 195 (February 1994), the Commission set forth number of factors indicative of unwarrantability, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order.

In this regard I give particular weight to the testimony of former drill operator Darrell Rice. Rice began working at the Steuben Crushed Stone Quarry in May 1968. He was primarily a driller but also worked with loaders and crushers and performed some maintenance. On February 16, 1998, only three days before the citation herein was issued, Rice was told by foreman Thurston to drill a shot below the west face. Rice testified that "he did not like the looks of the face." The bench there was only 40 feet wide and because of the freezing and thawing he did not want to work in that area. He asked Thurston if he could work in another area but Thurston refused the request stating that there was no other work. Presumably rather than work under conditions he considered hazardous, Rice then told Thurston that he was sick with the flu, went home and never returned. Rice also testified that he frequently observed stress fractures at other highwalls after shots had been fired. The photographs in evidence also clearly show the obvious nature of the stress fractures above the west wall.

Within this framework of evidence it is apparent that a number of the factors set forth in the *Mullins* case were extent herein including evidence that the violative conditions extended over a large area, that the operator's agent Ron Thurston was given specific notice of the hazard three days before the order was issued, that, in light of the narrow width of the bench, the conditions were particularly dangerous, and that the operator made no effort to abate the hazardous conditions after it was specifically notified of them by drill operator Darrell Rice. Accordingly there can be no question that the violation was the result of unwarrantable failure and high negligence.

In reaching these conclusions I have not disregarded Blades' argument that, because MSHA had not previously cited the upper west face in spite of its many inspections over the 13-years preceding the instant citation, it had not been placed on official notice that MSHA had any problems with its mining methods on the upper west face. I cannot agree however with Blades' premise that the upper west face had not changed since the MSHA inspections. Indeed, the credible evidence shows that such a highwall is dynamic and constantly changing from the cycles of freezing and thawing, from loose material falling off the face, from the development and expansion of tension cracks and from other disturbances such as explosions.

Order No. 4432877

This order, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3200, and charges as follows:

> Ground conitions*[sic]* on the pit northwest upper bench create a fall of material hazard to persons. The 62 to 65 foot highface is fractured with a large amount of loose visible along the entire length (410 ft.) and height (62 - 65 ft.).

> The area had been mucked using a Caterpillar 988 and fallen loose was now present near the toe as was loose observed falling. Most loose ranged from about 6" X 6" X 4" to about 12" X 10" X 8". There were fresh pickup tire tracks nearby and on April 30, 1996, a lost time accident occurred near a 43 ft. face. This is an unwarrantable failure.

The cited standard, 30 C.F.R. § 56.3200, provides as follows:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The evidence supporting this order is largely the same as previously discussed in support of Citation No. 4432876. It is based in large part again upon the testimony of Inspector Korbel and expert witness Terry Hoch, and corroborated by the photographs in evidence. Korbel testified credibly that the citation was issued because of the amount of loose material and the presence of pillars/chimneys along the west face and tension cracks along the brow of the highwall. Korbel testified that he also found loose material along the brow which also presented a hazard to workers below. Mining engineer Terry Hoch also testified that tension cracks at the brow of the highwall were a red flag and a sign of impending failure. According to Hoch the tension cracks could have been caused by overblasting and backbrake which would loosen the natural joints in the rock. In addition, Hoch testified that such cracks indicate both vertical and horizontal movement of the material. It was Hoch's opinion that the area of such tension cracks should be dangered off until an assessment of the cracks can be made and before any further mining activity. Clearly the failure of Blades to have taken down or supported such hazardous conditions constituted a violation of the standard as charged.

The rationale for sustaining the "significant and substantial" findings with respect to Citation No. 4432876 also apply equally hereto. Accordingly I find that the instant violation was also "significant and substantial" and of high gravity. The rationale for sustaining the unwarrantability findings with respect to Citation No. 4432876 also applies equally to this Order. Under the circumstances I find that this violation was similarly caused by unwarrantable failure and high negligence.

Citation No. 4432878

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3401, and charges as follows:

> While a person was visually checking ground conditions in the pit, there was no testing for loose ground being conducted. A 62 to 65 foot face on the northwest upper bench contains a large amount of loose that was observed working with some falling. Testing ground conditions would present an

imminent danger for the person conducting the examination as most loose on the bench ranged from about 6" X 6" X 4" to about 12" X 10" X 8". There were fresh pickup tire tracks in this area.

The cited standard, 30 C.F.R. § 56.3401, provides as follows:

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

Because the cited standard is broadly worded the standard of review is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. *Cyprus Tonapah Mining Co.*, 12 FMSHRC 2409 (November 1990). The instant citation was issued by Inspector Korbel based on Thurston's admission on February 19, 2000, that no testing had been performed and that he did not know how to conduct testing to determine the presence of loose material. In addition, the existence of loose unconsolidated material, the fact that Korbel heard loose material falling and observed chimneys and tension cracks at the brow of the highwall indicate that proper testing had not in fact been performed. Mining engineer Terry Hoch testified that the appearance of tension cracks indicated the need for monitoring to determine the extent of any ground movement.

Under the circumstances the violation is clearly proven as charged and was also clearly "significant and substantial." Korbel's credible testimony that injury from the cited conditions was reasonably likely in the event of falling material and that such injury could be fatal (to persons working or travelling on the relatively narrow bench below) is entitled to significant weight. The violation was accordingly also of high gravity.

I find that operator negligence should appropriately be characterized as high. The operator had been placed on notice of the potentially hazardous conditions by Darrell Rice only three days before the citation was issued, no efforts were made to correct these conditions and the condition was quite serious. See *Mullins and Sons Coal Company*, 16 FMSHRC at 195.

Civil Penalty Criteria

Operator's History of Previous Violations:

The record shows that Blades had a history of 14 violations between January 28, 1996 and January 27, 1998, and eleven of those violations were without a "significant and substantial" designation and with minimal $50.00 penalties (Government Exhibit No. 14). I find this to be a low to moderate history.

Appropriateness of the Penalty to the Size of the Business of the Operator

It has been stipulated that the size of Blades is "26,513 hours worked per year" and that the size of the subject mine is "15,908 hours worked per year." The operator and the subject mine are therefore small in size.

Whether the Operator was Negligent

This criteria has been discussed separately with respect to each charging document.

The Gravity of the Violation

This criteria has been discussed separately with respect to each charging document.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

It is not disputed that the operator demonstrated good faith in attempting to achieve rapid compliance.

The Effect on the Operator's Ability to Continue in Business

It has been stipulated that payment of the assessed penalties will not affect the operators ability to continue in business.

Alleged Section "110(c) violations"

Section 110(c) of the Act provides that whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 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 (January 1982), *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 knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly when he is " in a position to protect employee safety and health and 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 (August 1992).

There is no dispute in these cases that Ronald Thurston and James Emo were agents of corporate operator, Blades Construction Products. Thurston was first charged herein with

committing a knowing violation of the standard at 30 C.F.R. § 56.15005, the same violation discussed previously under Citation No. 4432874. That citation charged as follows:

> The joy driller was observed changing steel standing about 3 ½ feet from a 37 feet dropoff. He then went to the edge (standing within 1 feet of the edge/dropoff) and picked up a stone. He was brought back from the edge and stated his safety belt and line was back at the plant. When persons work where there is a danger of falling and are not using a safety belt and line, it is considered an imminent danger condition.

The credible evidence demonstrates however that Thurston had not anticipated that driller operator Clark would have approached as close to the edge of the highwall as alleged. Thurston credibly explained his belief that there was no reason for Clark to have been closer than seven feet from the edge of the highwall. Moreover, Thurston spent some nine hours personally task training and overseeing Clark on February 18 and 19. Thurston also told Mr. Clark "to stay away from the wall," and was present when Emo instructed him never to stand with his back to the wall. Both supervisors also instructed Clark how to set up his drilling equipment in relation to the five-by-seven shot pattern and where to position himself. Thurston also provided Clark with a seven foot pipe to enable him to measure the placement of the drill holes without approaching close to the highwall. Moreover, Thurston credibly testified that by the morning of February 19, he was satisfied that Clark was exhibiting basic competence in drilling and had understood his warning to stay away from the wall.

Under all the circumstances I find that the Secretary has not sustained her burden of proving that this was a "knowing" violation. Accordingly, the charges in this regard against Thurston must be vacated.

Ronald Thurston and James Emo are charged in Docket Nos. York 99-56-M and York 99-57-M, respectively, with "knowing" violations on February 19, 1998, of the standard at 30 C.F.R. § 56.3130 as charged in Citation No. 4432876. As modified, that citation charges as follows:

> Mining methods used on the pit northwest upper bench exceeded the capacity of the equipment being used. The 62 to 65 foot high face is fractured with a large amount of loose visible along the entire height and 410 foot length. On April 30, 1996, a similar condition on a 43 foot high face resulted in a lost time accident. This is an unwarrantable failure.

On the facts of this case I find that Thurston, but not Emo, acted "knowingly" within the meaning of Section 110(c) of the Act. As previously stated, the applicable test is whether the person in a position to protect 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.

In this regard the testimony of former Blades employee Darrell Rice is undisputed that on

February 16, 1998, only three days before the citation at bar was issued, he was directed by foreman Ron Thurston to drill a shot below the west face. However, because of the narrow width of the bench and because of the freezing and thawing of material in the highwall Rice found the conditions hazardous and he refused to perform that work. It is further undisputed that he brought these hazardous conditions to the attention of Thurston when he asked for alternate work. Thurston failed to correct these conditions and refused this request for alternate work. It may reasonably be inferred that the conditions of the upper west face remained essentially the same or had further deteriorated from freeze-thaw cycling, until February 19 when the citation was issued.

As previously noted, these conditions were described as including severe fractures along the entire west face at the edge of the west wall brow area and pillars and chimneys leaning out over the face. Inspector Korbel also credibly testified that he heard loose material falling off the highwall. As also previously noted, mining engineer Terry Hoch, after viewing photographs of conditions observed by Inspector Korbel on February 19, 1998, and considering his own observations of materials at the mine site and the testimony of Korbel, confirmed that the upper west face wall was unstable on February 19, 1998. The expert testimony of Hoch is, as previously noted, entitled to significant weight.

Within the above framework of evidence it is clear that Thurston, as quarry foreman, was in a position to protect the safety of persons working and travelling below this highwall and that he failed to act on the basis of information from Mr. Rice that gave him knowledge or reason to know of the existence of violative conditions on the highwall. Accordingly, I find that he acted "knowingly" within the meaning of Section 110(c) of the Act.

In reaching this conclusion, I have not disregarded Thurston's argument that the choice of mining methods was not his responsibility and that therefore he was not a corporate agent for purposes of the charges at issue. Thurston misconstrues the nature of the "Section 110(c)" charges however. It is undisputed that Blades was a corporate mine operator and that, as its quarry foreman, Thurston was an "agent" of that operator. His liability under Section 110(c) is based upon the fact that he was in a position to protect safety and failed to act on the basis of information that gave him knowledge or reason to know of the existence of a violative condition. *See Kenny Richardson*, 3 FMSHRC at 16.

There is no evidence however that James Emo was informed of the complaint Darrell Rice made to Thurston regarding the hazardous condition of the west face on February 16th. Without such specific notice, Emo's judgment concerning the conditions of the cited wall and the mining methods used at that location could very well have been clouded by his knowledge of the past failure, over 13 years of inspections, by MSHA to have cited these mining methods. While it may be true that Emo should nevertheless have known of the hazardous conditions, that standard of proof is insufficient to support a "knowing" violation. *See e.g., Virginia Crews*, 15 FMSHRC 2103 (October 1993).

Civil Penalty - *Ronald Thurston*

Thurston's History of Violations

There is no evidence that Thurston has any previous history of violations.

Appropriateness of the Penalty to the Size of the Business

The Commission held in *Sunny Ridge Mining Co*., 19 FMSHRC 254 (February 1997), that, as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth.

In this regard it has been stipulated that Thurston has an income of $566.00 per week after taxes and that he has no other assets or income (Tr. 963-965). The penalty assessed herein is appropriate considering this evidence.

The Effect on the Ability to Continue in Business

The Commission also held in the *Sunny Ridge Mining Co.*, case that, as applied to an individual, the relevant inquiry is whether the penalty will affect the individual's ability to meet his financial obligations. Referring again to stipulations, there is no evidence that the penalty assessed herein would affect Mr. Thurston's ability to meet his financial obligations.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

It is not disputed that good faith was demonstrated in attempting to achieve rapid compliance.

The Gravity of the Violation

As previously noted, the violation was of high gravity.

Negligence

As previously noted, the violation was the result of high negligence.

ORDER

I. Citation Nos. 4432875 and 4432880, are vacated. Citation Nos. 7707523, 7707524, 7714696, 7714697, 7714698, 4432879 and 4288449, are affirmed and Blades Construction Products is directed to pay the agreed penalties of $535.00, for the violations charged therein within 40 days of the date of this decision. Citation Nos. 4432873, 4432874, 4432876 and 4432878 and Order No. 4432877 are affirmed, and Blades Construction Products is directed to pay civil penalties of $150.00, $337.00, $800.00, $147.00 and $1,000.00, respectively for the violations charged therein within 40 days of the date of this decision.

II. The charges herein against James Emo under Section 110(c) of the Act, are hereby vacated. The charges herein against Ronald Thurston under Section 110(c) of the Act which are based on the violation charged in Citation No. 4432874 are hereby vacated. The charges herein against Ronald Thurston based on the violation charged in Citation No. 4432876 are hereby affirmed and said Ronald Thurston is directed to pay a civil penalty of $350.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

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