FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006

October 31, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 95-57-M
	:	A. C. No. 19-00020-05501 E24
v.	:	
	:	Lynn Sand & Stone Quarry
AUSTIN POWDER COMPANY, Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 96-13-M
	:	A. C. No. 19-00020-05502 E24
v.	:	
	:	Lynn Sand & Stone Quarry
BRUCE EATON, EMPLOYED BY AUSTIN POWDER COMPANY, Respondent	:	

DECISION

Appearances: Gail Glick, Esq., Office of the Solicitor
U. S. Department of Labor, Boston, Massachusetts,
for Petitioners;
John T. Bonham, II, Esq., Jackson & Kelly,
Charleston, West Virginia, for Respondents.

Before: Judge Merlin

Statement of the Case

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Austin Powder Company, and Bruce Eaton, employed by Austin Powder, under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on June 4, 1996, and the parties have submitted post hearing briefs.

The penalty petition filed by the Secretary against Austin Powder Company was filed pursuant to section 110(a) of the Act, 30 U.S.C. § 820(a), which provides:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *.

The penalty petition filed by the Secretary against Bruce Eaton was filed pursuant to section 110(c) of the Act, 30 U.S.C. § 820(c), which directs:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The charge of a violation is contained in a citation issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which specifies these requirements:

> 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 a 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.

Where a violation is proved, section 110(i), 30 U.S.C. § 820(i), sets forth the following factors to be considered in determining an appropriate penalty:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The citation alleges a violation of 30 C.F.R. § 56.15005, which sets forth the following mandate:

> Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Citation No. 4424405, dated July 13, 1994, charges a violation for the following condition or practice:

> The foreman and co. helper were observed standing on the edge of an approx. 55 ft highwall within approx. 1½' of the highwall edge overseeing the dewatering procedure of a 4" front line drill hole prior to loading explosives. Employees were not properly equipped with a safety belt and line to prevent them from accidently falling over the highwall edge.

The inspector who issued the citation found the violation was significant and substantial and due to high negligence and unwarrantable failure.

At the hearing the parties agreed to the following stipulations (Tr. 7-9):

> 1. Austin Powder Company is an independent contractor performing work at the subject mine.
>
> 2. The independent contractor is a mine operator under Section 3(d) of the Mine Act and the contractor and the mine are subject to the jurisdiction of the Mine Act of 1977.
>
> 3. Bruce Eaton is employed by the operator as a foreman and is an agent for purposes of section 110(c).
>
> 4. The Administrative Law Judge has jurisdiction in

these proceedings.

5. The inspector who issued the subject citation was a duly authorized representative of the Secretary.

6. A true and correct copy of the subject citation was properly served upon the operator.

7. Payment of any penalty will not affect the operator's or Bruce Eaton's ability to continue in business.

8. The operator and Bruce Eaton demonstrated good faith abatement.

9. The operator has an average history of prior violations for an operator its size.

10. Bruce Eaton has no history of prior violations.

11. The operator is large in size.

12. The employees of the operator referred to in the subject citation were not wearing safety belts or lines.

13. Three of the operator's employees were on site on the day in question and two of them are involved in the subject violation.

14. The names of the three are Jeff Allard, Ron Wilcox, and Bruce Eaton.

15. The two individuals involved in the violation are Bruce Eaton and Jeff Allard.

16. Bruce Eaton had only one safety belt and line in his truck at the time involved in this proceeding.

17. The highwall in question was 55 feet in elevation.

18. The driller was a separate contractor, Bedrock Drilling, and on the day in question Bedrock Drilling was late in arriving at the subject site.

19. There was no time constraint on the crew on the day in question arising from production considerations because the rate of production had been normal for any period that would be relevant to this proceeding.

Statement of Facts

Lynn Sand and Stone Quarry is a large stone quarry consisting of a main plant, primary crusher, and related shop area (Tr. 13). There is an access road leading down into a multi-bench quarry where the material is drilled and blasted and subsequently hauled to the crusher where it is processed (Tr. 13-14). Respondent Austin Powder was conducting drilling and blasting operations pursuant to a contract with Bardon Trimount, a quarry operator (Exh. R-1, Tr. 14, 118). The drilling and blasting used six inch diameter bore holes and electrically initiated explosives (Exh. R-1, Tr. 272).

The events at issue occurred on July 13, 1994. Inspector Dow who issued the subject citation, testified that he and Inspector Constant arrived at the quarry about 7 A.M. At that time Dow was a trainee inspector under Constant's supervision (Tr. 123). The inspectors first went to the quarry office looking for Mr. Gallant, the lead laborer and general labor steward, and were told that he was working at the blast site dewatering holes (Tr. 15, 210, 212). According to Dow, water in some blast holes had to be removed before the shot could proceed and Gallant had gone to the blast area with a pump and forklift to dewater the holes (Tr. 15-16). Dow said that when approaching the blast area by car along the quarry road he saw Gallant and Mr. Eaton, the certified blaster in charge, 1½ feet from the edge of the highwall. The dewatering pump was placed on a pallet attached to the front of the forklift (Tr. 21). Dow described Gallant as in the area between the forklift and the highwall, with his back to the edge, one leg on one side of a drill hole and the other leg on the other side, and the rear of his body protruding over the edge (Tr. 21-22, 23-24, 35-36, 99). He believed Mr. Gallant was positioning a hose to be used in dewatering the hole (Tr. 21-22). Dow testified that Eaton also was 1½ feet from the edge with his back to it, standing on the right of Mr. Gallant with his head turned toward Gallant, holding the discharge hose (Tr. 22, 36, 59). Finally, Dow stated that Mr. Allard, a helper, similarly was 1½ feet from the edge, a couple of feet from Mr. Eaton and further away from Mr. Gallant (Tr. 22, 36-37). Allard was facing the equipment, looking parallel along the edge sideways with his right side toward the

highwall and his left toward the rear bench area (Tr. 24).

Inspector Constant confirmed that the workers were 1½ feet from the edge (Tr. 106). He said that Gallant was bent over with his back to the highwall, facing the forklift and the dewatering unit (Tr. 103-104,154). Constant related that Eaton also had his back to the edge and his head was turned toward his right where the dewatering was taking place (Tr. 105). He stated that Allard was two feet away from Mr. Eaton and his head was turned toward Mr. Eaton (Tr. 106).

The testimony of the operator's witnesses is contrary to that of the inspectors. Moreover, the operator's people often changed their testimony and contradicted each other. Gallant denied that he was in front of the forklift and said that he was 10 to 15 feet from the edge, facing the highwall (Tr. 221, 229). According to Gallant, they had not got far enough to discuss holes when they were interrupted and so had not decided what hole they would dewater (Tr. 223). However, Eaton stated that he and Gallant drove to the first hole and Gallant was setting up to dewater that hole which was 4 or 5 feet from the edge (Tr. 246, 263, 272). Eaton first estimated their distance from the edge as 8 feet, give or take a foot, but later said ten feet (Tr. 250, 268). He denied that Gallant's body was swung over the edge (Tr. 266). Although Eaton initially stated that the distance between the first and second row of holes was thirteen feet, he subsequently said that the two rows melded and were close together where the hole was being dewatered (Tr. 251, 271).

Finally, Mr. Allard, whose regular job was laborer and truck driver, testified that Eaton had measured the water in the holes to be dewatered that morning and that Gallant was getting ready to submerge the pump into the first hole (Tr. 170-172, 202). Allard further stated that Gallant was on the side of the forklift where the controls were, Eaton was on the other side, and Gallant was asking Eaton if he was ready (Tr. 172, 202). Allard furnished varying estimates of how far he, Gallant, and Eaton were from the edge. He gave the distance as 15 feet, 12 to 15 feet, never more than eight feet, perhaps closer than eight feet, and seven feet (Tr. 183, 191-192, 195-196, 198, 205). Allard first asserted that he was standing 5 feet behind the first hole, then stated that he was even with the back row of holes and finally admitted that he did not know the distance between the

rows (Tr. 175-176, 182, 193). When asked to explain the differences in his estimates, Allard could only say that the edge was not straight (Tr. 191).

The operator's witnesses also disagreed with the inspectors and each other over Allard's location and his participation, in the dewatering process. The parties stipulated Allard was present but the stipulations do not specify his location or his activities (Stips. 13-15). Allard said that he unwound the hose from the reel attached to the pump after Gallant drove up with the pump and positioned the dewatering unit (Tr. 172-173). According to Allard, he was holding the discharge hose, waiting for pumping to begin and the water to discharge (Tr. 168-169, 172, 174). Allard stated that he, Gallant and Eaton were the same distance from the edge and even with the back row of holes (Tr. 182). However, Eaton said he was not paying attention to Allard, and did not know exactly where he was or what he was doing (Tr. 248). Because Eaton had a full view of the entire face, he did not believe Allard was in front of him (Tr. 268). He thought Allard was some place to his rear or right (Tr. 248). Gallant did not know where Allard was, but said that he was not near the hole and had been told to stay by the truck (Tr. 223, 228-229).

Allard is not the only individual whose presence at the scene is a matter of dispute between the operator's witnesses and between them and the inspectors. Mr. Eaton testified that Mr. Wilcox was on his hands and knees, taping to find out the depth of the water in the hole (Tr. 246-247). However, Allard did not remember where Wilcox was and Gallant did not mention Wilcox (Tr. 174). Neither inspector testified that Wilcox was at the dewatering operation, with Inspector Dow stating that Wilcox was at the truck which was 60 feet away (Tr. 25, 95-96, 103-105). The stipulations merely state that Wilcox was on site, but not involved in the violation (Stips. 13-15).

The inspectors and the operator's witnesses also differed over what happened when the inspectors arrived on the scene. Both inspectors said that Dow got out of the car and, following Constant's instructions, motioned to and yelled at the men to come back from the edge (Tr. 48-49, 115-116, 127). They reported that Constant told Dow not to go near the edge and that Constant was parking the car while Dow was calling and motioning (Tr. 48, 107-108, 114). According to the inspectors, the workers came back 25 feet from the edge and a discussion then took place (Tr. 49, 116). The operator's people tell a different story. According to Gallant, it was Inspector Constant who yelled out his name, and said that he was too close to the hole where he was standing, but did not say that he was too close to the edge (Tr. 224-225, 229-230). Gallant stated that Dow was 10 to 15 feet behind Constant (Tr. 225-226). Eaton also said that it was not Dow who motioned and told them to come back from the edge. Eaton

related that Constant approached and said “Come back”, but Eaton also asserted that no one told him to come back from the edge (Tr. 289). Allard said that an inspector came to the forklift, Eaton turned toward the inspector, they talked and then they moved away (Tr. 174-175 186-187). Allard did not see the inspector and did not know which inspector came up to them (Tr. 174-175, 190).

After observing and listening to the witnesses and upon a review of the entire record, I determine that the Secretary’s evidence regarding the location of the workmen and their activities is more credible than that offered by the operator. The operator’s witnesses denied that they were as close to the edge or that their backs were to the highwall. But they disagreed over their location and what they were doing when the inspectors saw them. Gallant denied he knew what hole they were going to dewater, whereas Allard testified that Gallant was getting ready to submerge the pump in the hole and Eaton stated that Gallant was setting up at the hole. The operator’s witnesses could not even agree on who was present. It does not seem possible that differences over such fundamentals could be due only to poor memory. In any event, these conflicts render the operator’s evidence unreliable and non-credible. There are no such discrepancies in what the inspectors had to say. Therefore, I accept the inspectors’ testimony that the workers were within a few feet of the edge with their backs to the highwall. I further accept the description of the inspectors that Mr. Gallant was astride the hole that was going to be dewatered and I find that he was holding a hose or positioning a submersible pump while Eaton was holding the discharge end of the hose.

I credit the inspectors’ statements that they could see the workers from the car as they approached the bench area. I believe Dow when he said that he had a full view of the work area, that his line of sight was free and unobstructed, and that there was nothing between him and the blast site (Tr. 22-23, 40, 61-62). Also credible is Constant who reported that when he was driving the car, he had a side view of the workers and could see the relation of their upper bodies to the edge (Tr. 130-132, 154).

After close examination of the testimony, I do not believe an inspector of Constant’s experience would walk up to individuals whom he thought were too close to the edge. In the operator’s version, Constant would have parked his car and then gone over to the men, a very leisurely approach under the circumstances. Much more plausible is the inspectors’ description that while Constant was parking the car, Dow motioned and called the workers back from the edge and this is what I find.

Finally, I accept the description of the ground conditions given by the inspectors who said that the ground was uneven and

irregular with varying elevations and that supplies and explosives were lying about (Tr. 55, 62, 119-120). I take note of Eaton's denial of the existence of large rocks, but he admitted he did not know whether the explosives were on site when the inspectors arrived (Tr. 261, 264).

Conclusions of Law

Section 56.1005 of the mandatory standards, supra, requires that safety belts be worn where there is a danger of falling. The parties have stipulated that safety belts were not worn (Stip. 12). The issue, therefore, is the existence of a danger of falling. Under applicable precedent it must be determined whether a reasonably prudent person familiar with the mining industry and the factual circumstances would recognize a danger of falling under the circumstances presented. Austin Powder v. Secretary of Labor, 861 F.2d 99 (5 Cir. 1988); Lanham Coal Company, 13 FMSHRC 1341 (September, 1991); Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983). In view of the proximity of Gallant and Eaton to the edge, the positions of their bodies with backs to the edge, Gallant's stance astride the hole, and the activities both men were performing, I conclude that a reasonably prudent person would have recognized the danger of falling. Accordingly, a violation existed.[1]

[1] In its brief the operator argues for the first time that the Secretary cannot prevail because the subject citation was not introduced into evidence. This argument is without merit. First, it comes too late. Since a hearing on the merits has been held, any objection that might exist has been waived. Moreover, if the operator had timely made this objection, it would have been taken care of by admitting the citation into evidence. By waiting until the hearing is over, the operator cannot create a valid objection when the objection, if timely made, would have been met. In any event, it has long been my practice not to require admission of a challenged citation or order, since it is part of the record as a pleading.

It must next be determined whether the violation was significant and substantial. A violation is 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 Div., National Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In order to establish that a violation is significant and substantial, 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. Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984). U.S. Steel Mining Co., 6 FMSHRC 1573, 1574-75 (July 1984); National Gypsum, supra; See also, Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); Austin Power, Inc. v. Secretary of Labor, supra at 103-04. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). As set forth above, I have concluded that there was a violation. Also, the violation presented the discrete hazard of falling. Because of their proximity to the edge I conclude that there was a reasonable likelihood of Gallant, Allard and Eaton falling over the edge of the highwall. Indeed, their activities in connection with the dewatering and the ground conditions further enhanced their risk of falling. Lastly, because the highwall was 55 feet high, there was a reasonable likelihood the injury would be reasonably serious. In light of the foregoing, I conclude the violation was significant and substantial as well as very serious.

The next factor to be considered is negligence. Eaton, who was in charge of the drilling, blasting, and dewatering operations, knew how close to the edge he and the others were standing. He knew also that safety belts were required. In view of these circumstances, Eaton was guilty of a very high degree of negligence and his aggravated conduct constituted unwarrantable failure as that term has been defined by the Commission. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). Under Commission precedent negligence of a rank and file miner cannot be imputed unless the operator fails to discharge

its responsibilities with respect to training, supervision or discipline. U.S. Coal, Inc., 17 FMSHRC 1684, 1686 (October 1995); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 197 (February 1991); A. H. Smith Stone Company, 5 FMSHRC 13, 15 (January 1983); Southern Ohio Coal Company, 4 FMSHRC 1459, 1464 (August 1982). However, negligence of a supervisor is imputable to the operator unless the operator can demonstrate that no other miners were put at risk by the supervisor's conduct and that the operator took reasonable steps to avoid the particular class of accident. Nacco Mining Co., 3 FMSHRC 848, 849-850 (April 1981). Here Eaton's behavior put others at risk because he was not the only person so close to the edge. As the record demonstrates, Gallant and Allard were just as close to the edge and in the same peril as Eaton. Because he was the supervisor, Mr. Eaton's negligence is imputable to the operator for purposes of fixing an appropriate penalty amount and his unwarrantable failure likewise is attributable to the operator.

The stipulations which I have accepted address the other criteria specified in section 110(i), supra. After considering all the 110(i) factors, I determine that a penalty of $6,000 is warranted.

The final issue to be addressed is Eaton's liability under section 110(c) of the Act, supra, which provides that whenever a corporate operator violates a mandatory health or safety standard any agent of the corporation who knowingly authorized, ordered, or carried out the violation shall be subject to the imposition of civil penalties. Therefore, in order to find Eaton personally liable for the violation in this case, the Secretary must show that he knowingly authorized, ordered, or carried it out. The Commission has held that if a corporate agent who is 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 violation, he has acted knowingly and in a manner contrary to the remedial nature of the statute. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). In the same vein the Commission has also stated that a corporate agent in a position to protect employee safety and health acts knowingly when, based on the facts available to him, he knew or had reason to know that a violation would occur, but failed to take preventive steps. Roy Glenn, 6 FMSHRC 1583 (July 1984). In this case there can be no doubt that Mr. Eaton acted in a knowing and intentional manner, because he knew that he and the others were standing dangerously close to the edge and that under such conditions safety belts should have been worn. Clearly, his conduct was

aggravated and exceeded ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992); Emery Mining Corp., 9 FMSHRC at 2003-04.

Upon considerations of the section 110(i) factors, including the absence of any prior history, I determine that a penalty of $400 dollars is appropriate.

The careful and detailed post-hearing briefs filed by the parties have been reviewed and were most helpful in identifying the issues. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is **ORDERED** that the finding of a violation for Citation No. 4424405 be **AFFIRMED**.

It is further **ORDERED** that the significant and substantial finding for Citation No. 4424405 be **AFFIRMED**.

It is further **ORDERED** that the high negligence finding for Citation No. 4424405 be **AFFIRMED**.

It is further **ORDERED** that the unwarrantable failure finding for Citation No. 4424405 be **AFFIRMED**.

It is therefore, further **ORDERED** that Citation No. 4424405 issued under section 104(d)(1) be **AFFIRMED**.

It is therefore, further **ORDERED** that a penalty of $6,000 be **ASSESSED** against the operator and that the operator **PAY** $6,000 within 30 days of the date of this decision.

It is further **ORDERED** that the civil penalty petition alleging that Bruce Eaton knowingly carried out the violation in Citation No. 4424405 be **AFFIRMED.**

It is therefore, further **ORDERED** that a penalty of $400 be **ASSESSED** against Bruce Eaton and that Mr. Eaton **PAY** $400 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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