

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**MAR 20 2015**

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

HANSON AGGREGATES MIDWEST,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-931-M  
A.C. No. 15-12905-324282

Mine: Laurel Quarry

**DECISION AND ORDER**

Before: Judge Andrews

Appearances: Emily O. Roberts, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, TN, Representing the Secretary of Labor

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,  
Washington, D.C., Representing Respondent

**STATEMENT OF THE CASE**

This case is before the undersigned Administrative Law Judge on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Hanson Aggregates Midwest, LLC (“Hanson Aggregates” or “Respondent”) pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). Citation No. 8724144 was issued on December 5, 2012, with an assessed penalty of \$127.00. A hearing was held in Middlesboro, Kentucky on July 17, 2014, at which the parties presented testimony and documentary evidence. After the hearing, Post Hearing Briefs and Respondent’s Reply Brief were submitted and have been fully considered.

**ISSUES**

The issues to be determined are whether the citation was validly issued; whether the violation was the result of the operator’s moderate negligence; and whether and in what amount the assessment of a civil penalty against the operator is appropriate.

## JOINT STIPULATIONS

The parties agreed to the following stipulations, submitted and marked as Government Exhibit 1 at the hearing:

1. Hanson Aggregates Midwest, LLC, owns and operates Laurel Quarry, I.D. No. 15-12905, a limestone surface mine, which is located in Pulaski County, Kentucky;
2. Laurel Quarry is a “mine” as that term is defined in Section 3(h) of the Mine Act. 30 U.S.C § 803;
3. Respondent is subject to the Federal Mine Safety and Health Act of 1977;
4. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision;
5. At all times relevant to these proceedings, Laurel Quarry had an effect on interstate commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803;
6. Laurel Quarry is small, with 37,584 hours worked in 2012;
7. Copies of the citation in contest in this case are authentic and a copy was served on the Respondent by an Authorized Representative of the Secretary employed by the Mine Safety and Health Administration;
8. The Respondent timely contested the violation;
9. MSHA’s Proposed Assessment Data Sheet and “Exhibit A—Docket Number KENT 2013-931M” accurately set forth (a) the number of assessed penalty violations charged to Respondent for the period stated and (b) the number of inspection days per month for the period stated;
10. The penalty proposed will not affect the Respondent’s ability to continue in business;
11. The Respondent abated the citation timely and in good faith.

## EVIDENCE

### Testimony of Donald Michael Gabbard

Donald Michael Gabbard (“Gabbard”) is a mine inspector with the Department of Labor, Mine Safety and Health Division. He has both a four-year degree in education and a two-year degree in mining from Morehead State University. (Tr. 14)<sup>1</sup>. Gabbard attended the Mine Academy where he was trained to be an authorized representative of the Secretary of Labor in 2009. (Tr. 14). He has been employed with MSHA as either a mine inspector or trainee for approximately six years. (Tr. 14). Before working for MSHA, Gabbard worked on a surface coal mine for approximately six months and at an underground limestone mine for close to 28 years.

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<sup>1</sup> Citations to the transcript will be labeled “Tr.” followed by the page number(s).

(Tr. 15, 84). While at the limestone mine, Gabbard worked as a surveyor, a fill-in supervisor, and performed scaling operations. (Tr. 15). He held a blasting license for approximately 28 years. (Tr. 15). His experience includes roof control operator, running a bench and a face drill, maintenance, and production. In total, he has worked for approximately 35 years in the mining industry, including his time with MSHA. (Tr. 15-16).

On December 5, 2012, Gabbard inspected Laurel Quarry, which is an open pit quarry that produces limestone. (Tr. 16-17). During his inspection, Gabbard issued a citation for loose ground, which consisted of a large boulder that he estimated to be approximately 5ft x 5ft x 3ft perched on a 40 foot highwall. (Tr. 17-18, 23). The citation was for a violation of standard 56.3200, which requires loose ground to be taken down or supported before work or travel is permitted in any area that could be affected by it. (Tr. 19). The standard also requires a warning or barricade to be in place until the loose ground condition is corrected. (Tr. 19).

Gabbard testified that the condition cited had been driven past while he and Respondent's Agent James Kirby ("Kirby") were on the bench road to inspect an excavator. (Tr. 19-20). The bench had been barricaded off with a berm that had to be moved in order for them to gain access to check the excavator. (Tr. 20-21, 115-117). He did not see the loose boulder as they drove by, due to the curvature of the road that goes around to the active bench. (Tr. 20). However, when they were on their way back from the excavator inspection, Gabbard explained that he could see the large boulder with air coming through the cracks around and behind it. (Tr. 20). He discussed the boulder with Kirby, who was adamant that he had not seen it before. (Tr. 21). They also discussed the need to have the boulder taken down since daylight could be seen around it. (Tr. 21). Gabbard could not recall whether Kirby agreed the boulder needed to be taken down, but testified Kirby understood it would have to be tested. (Tr. 21).

Gabbard explained that if the berm at the base of the wall had been properly constructed to 25 percent of the height of the wall away from the base of the wall, he would have found the boulder's condition to be safe even though it was loose. (Tr. 21-22). He testified that the berm was nowhere near the required 25 percent, and part of it was totally missing and banked up against the face of the highwall above it. (Tr. 22). Gabbard explained that this would make a ramp, which could cause the boulder to speed up and possibly cross the bench or fall into the work area over 100 feet below. (Tr. 22). He estimated that the rock on the highwall was about 40 feet high from the bench. (Tr. 22, 25). Gabbard further explained that he knew the boulder was loose because it was setting(sic) loose independently and he could see air or daylight behind the fractures on the side of the rock. (Tr. 23). Given the approximate size of the boulder, he estimated it weighed around 11,000 pounds. (Tr. 24, 111). Gabbard believed the condition of the loose boulder was "absolutely, 100 percent" a hazard, and if it had come down it could have crushed people using the roadway below causing fatalities. (Tr. 25, 87).

Gabbard stated that the road below the boulder was relatively narrow and there was a berm on the outside of the roadway to prevent falling over the bench to the lower work level. (Tr. 25). On the highwall side of the roadway, there was a partial berm in place, but some sections were nowhere near the required distance of 10 feet away from the base of the highwall. The back of the berm almost touched the highwall. (Tr. 26). Gabbard did not measure the width of the road; however he estimated that it was approximately 17 feet wide. (Tr. 112). According to Gabbard, the area affected by the loose material would definitely include the travel route to the bench and possibly even the workstation below because the bench was so narrow. (Tr. 26).

Gabbard opined that the condition had existed for a minimum of several weeks depending on when the bench had last been blasted or the last time there were severe rains. (Tr. 29). He could tell there had recently been rain because the bench was very muddy. (Tr. 29). The bench was in existence when Gabbard previously inspected the mine several months prior. (Tr. 30). He also testified that this particular bench was exposed to scaling materials, drills, loaders, and supervisor's trucks as well as foot traffic from blasters. (Tr. 31). He believed that if the excavator was located on the bench and it had been used, then it was an active machine that would have been on the bench during the time the loose condition existed. (Tr. 32). Gabbard only saw the miner who accompanied him on the inspection in the affected area, but testified that the area was active because it contained a running machine that had been operated. (Tr. 32).

After spotting the condition, Gabbard stated that for about 40 minutes he and Kirby discussed getting the scaler off the bench and not exposing any miners to the loose condition. (Tr. 33). He testified that it was correct that he and Kirby were together at the time of the scaling. (Tr. 200). From where they were standing, he could not see where the boulder fell or any pieces of rock that might have fallen with it. (Tr. 200). Gabbard testified that the scaled material landed in the end of the berm that was right at the base of the highwall. (Tr. 35-36, 87). He testified the boulder did not clear the berm and that Kirby responded to this by saying, "it didn't clear the berm; it's not a violation." (Tr. 36). Gabbard believed it was still a violation but was influenced to lower it from Significant and Substantial ("S&S") to non-S&S. (Tr. 36).

Gabbard explained that it was still a violation because it could have cleared the inadequate berm had it bounced even the least bit to the west. (Tr. 37). Gabbard stated that based on his experience as a miner and as an inspector, it would not be possible to predict exactly how a loose boulder or loose material would fall. (Tr. 133). Gabbard suggested that if the boulder had fallen 10 separate times, it would not have fallen and landed the same way each time depending on what it hit, how much loose it knocked off, and what corner struck the wall. (Tr. 110). He believed they were very fortunate the pile of muck located right up against the face of the highwall was so soft and that the boulder went into this soft material. (Tr. 37). He testified that when the boulder fell into the leftover muck material, it sucked it in like "dropping a rock in the mud." (Tr. 37). He also stated that approximately 10 rocks did clear the berm and did come

into the roadway although this was not in the citation. (Tr. 38, 87-88, 90). And, in reference to the large boulder at issue, he stated that it could have “absolutely” fallen in a different way, depending on its trajectory and how it struck the wall. (Tr. 39). Had the rock not been scaled, Gabbard testified that “something very ugly could have happened,” with a potentially fatal accident due to vehicles and foot traffic on the bench. (Tr. 40-41).

Gabbard would have expected only one miner to have been affected by the situation, as there would usually only be one person going past the dangerous situation at a time whether it was a driller, supervisor, or mechanic. (Tr. 41-42, 122). He stated there was no warning sign posted indicating loose. (Tr. 42-43). There was, however, a barrier of muck in place at the bench entry. (Tr. 42).

Gabbard designated the citation as moderate negligence because the loose boulder was not highly obvious from one direction and could be overlooked. (GX-3, Tr. 44-45).<sup>2</sup> He explained that he was not able to observe the boulder until he was on his way out of the bench. (Tr. 45). Gabbard found this to be a mitigating circumstance, which prevented a finding of high negligence. (Tr. 45). He also stated that Kirby was adamant that he was unaware of the loose boulder and Gabbard believed him. (Tr. 45).

Gabbard is required to take notes during an inspection and he takes such notes from the time that he steps out of his vehicle until the time that he gets back in. (Tr. 45). These notes then become part of the report that he turns into his field office supervisor.<sup>3</sup> (Tr. 45). Gabbard took field notes during his inspection of Laurel Quarry in December 2012. (Tr. 46.) His notes contain in pertinent part:

Loose ground conditions were above the roadway to the upper . . . ABC bench. Access to this roadway had been bermed off but was opened so the equipment on the bench could be inspected. The workers’ pickup and the supervisor’s pickup both travel past the loose, which was hard to see from the entry view. Upon exiting the bench, this AR spotted and pointed out loose ground overhanging the roadway. The rock was approximately five foot by five foot by three foot cubed and was cracked loose to where open sky . . . could be seen behind the loose in one section. . . . The area was barricaded immediately. The excavator operator moved the berm with a dozer and drove a pickup past the loose. . . . When scaled, the loose was caught by the berm. The boulder did scale easily but did not clear the berm and enter the roadway.

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<sup>2</sup>Hereinafter, Government exhibits will be referred to as “Gx” followed by a number. Respondent’s exhibits will be referred to as “Rx” followed by a number.

<sup>3</sup>The field notes are available at GX-4.

(Tr. 48-49, GX-4).

His notes further indicated (1) that he had marked injury or illness as reasonably likely, but after further discussion he changed his marking to unlikely, (2) that the inspection party had travelled past the loose – this being the exposure, and that if left in this condition, it would be traveled past again, (3) the injury would be fatal by a crushing injury from a falling boulder, (4) the number of persons affected would be one – the next person in the area, and (5) the negligence was moderate due to the lack of visibility when approaching the bench, recent rains could have loosened material around the boulder, and the agent was adamant he was unaware of the condition. (Tr. 49-50; GX-3, 4)

Gabbard testified regarding details from the Regular Inspection Information form, which is an official U.S. Department of Labor, Mine Safety and Health Administration document. (GX-6). In the document citation number 8724144 was considered a non S&S violation because the boulder did not cross the protective berm when it was scaled and only smaller pieces entered the roadway. (Tr. 55). Gabbard explained that he referenced the protective berm in the citation because the berm was supposed to be 10 feet away from the base of the highwall, but in this case it was only four or five feet away. (Tr. 55-56). He stated the boulder ended up falling into the berm, but smaller rocks did enter the roadway. (Tr. 56). He only mentioned these rocks in his typed closeout notes. (Tr. 100).

Gabbard took photos of both the violation and its abatement. (Tr. 56). These photographs comprised Government Exhibit 7, A-J. (Tr. 57.). During Gabbard's testimony, he gave a description of and explained what was portrayed in each photo. GX-7A was described as a picture of the boulder at issue. It showed how the sky could be seen on the left side where there was a crack, and how it appeared that nearly 70 percent of the boulder was not supported. (Tr. 58, GX-7A). GX-7B captured the boulder's profile where a crack could be seen with air going through it. (Tr. 58; GX-7B). GX-7C displayed a profile picture of the wall itself and other rocks that were protruding from it, which could have potentially affected the trajectory of the boulder when it was taken down. Gabbard explained that this particular photograph was also taken to show the road condition, the loose material, and to give perspective on the distance because it was deceiving. (Tr. 59-60). After examining GX-7C and RX-5, Gabbard explained that the berm ended before the end of the highwall and part of the slope shown in the photographs had to be treated as a highwall because it was so significant, and there was no berm at that point. (Tr. 202). Gabbard testified that the boulder came down pretty much right at the junction where the berm ended and the muck material began. (Tr. 204). Gabbard stated that there was no distance between the boulder and the face of the highwall and that nowhere in GX-15 could you see a definitive berm pulled out from the face at least 10 feet. (Tr. 205).

Gabbard testified that GX-7D was basically the same photograph as GX-7C except that it showed muck material at the bottom of the wall. (Tr. 63). Gabbard stated that on this side of the wall there was no berm whatsoever, only the muck pile, which could have caused any material that fell to gain speed. (Tr. 63).

He stated GX-7E was taken from the intake side to show that not only was the bottom of the boulder not connected to the wall, but also that there was a crack on the boulder's right side which extended back to where the boulder was not connected on the right side. (Tr. 64).

Gabbard testified that GX-7F depicted the boulder near the left of the picture and how the berm was nearly non-existent below the wall. (Tr. 65). He stated that most of the material near the base of the wall was primarily muck which could help the rock speed up, and in the far low right corner of the picture you could see where the berm began. (Tr. 65)

He said GX-7G showed the highwall after the boulder had been removed. (Tr. 66). Gabbard described GX-7H as a picture of the boulder after it was scaled from the highwall. (Tr. 67). He explained that the boulder landed approximately four to six feet away from the wall and that only half of it could be seen as the rest was buried in the soft muck. (Tr. 67).

Gabbard described GX-7I as an additional picture of the boulder where it landed in the loose material. (Tr. 68). Finally, he testified about GX-7J and explained that this photo was taken to show how there was not a proper berm in place and that additional rocks did fall into the roadway after the boulder was scaled. (Tr. 68) Red circles were drawn around the rocks in GX-15 since he did not have anything in writing describing which rocks had fallen in the road. (Tr. 102-103). Gabbard knew these rocks cleared the berm because they were fresh and not the same texture or color, and were drier, making it fairly obvious they came off the highwall with the boulder. (Tr. 69, 102-103). This exhibit showed all the pieces as they were right after the boulder was scaled, except for one rock that had been moved out of the roadway. (Tr. 69, 107).

Gabbard testified that "the citation would not have been issued if the berm had been the proper distance back and the proper height up in order to prevent the boulder from clearing the berm." (Tr. 71-72). To be considered an adequate barrier, the berm would have to have been the required 25 percent from the wall to where it began. (Tr. 72). Estimating the highwall at approximately 40 feet would require the beginning of the berm to be at least 10 feet from the base of the wall. (Tr. 72). Gabbard explained that there was not enough room on the bench to create an adequate berm because the road was so narrow. (Tr. 73). MSHA provides an online handbook as well as policies on CD that can be referenced for guidance on how to properly build berms, and they are updated frequently. (Tr. 73-74).

The Haul Road Inspection Handbook provides guidance on how to use berms to protect miners from rock falls. (Tr. 76). Gabbard read from page 3 to explain how as a rule of thumb, “a barricade should be placed a distance out from the wall of either 15 feet, or one-fourth of the wall height, whichever value is greater.” (Tr. 76). The handbook also provides that the height of the barricade should be at least four feet; and where the highwall height exceeds 60 feet, barricades should be at least six feet high. (Tr. 76; GX-8). Gabbard testified that the protective berm was not four feet high in all places; in some instances the muck was more than four feet high, but there was not a constructive berm that was more than four feet high. (Tr. 76). He explained that in order for the berm to have met the 25 percent requirement, it should have been a minimum of 10 feet from the base of the wall to where the back side of the berm begins. (Tr. 77). According to Gabbard, the berm on the highwall side and below the loose ground conditions did not resemble these minimum dimensions at all. (Tr. 77). Gabbard further testified that he also uses the Highwall and Pit Enforcement Guidance document dated April 21, 2010, for guidance on how to use berms to protect from rock falls. (Tr. 79; GX-9). This document reduced to writing MSHA’s policy that a protective berm should be out from the base of the highwall a distance of 25 percent of the height of the highwall. (Tr. 79).

#### Testimony of James Ollie Kirby

James Ollie Kirby is a plant manager for Lehigh Hanson, which includes Hanson Aggregates Midwest. (Tr. 138). He is the plant manager at Laurel Quarry in Somerset, Pulaski County, Kentucky where he is responsible for communicating with his employees, safety, and ensuring the plant operation runs okay. (Tr. 138). He sometimes operates machinery himself and supervises a total of 16 employees. (Tr. 138-39). Kirby has been with Hanson Aggregates for 39 years. (Tr. 139). He has worked in the mining industry since 1997 and was in the construction business for the remainder of the time. (Tr. 139-40). In addition to working as a plant manager, Kirby also worked as a maintenance mechanic and an equipment operator. (Tr. 140). Most of his experience has been with surface mining. (Tr. 140).

Kirby was familiar with the highwall that was cited in this case, and he accompanied the Inspector during the inspection. (Tr. 140-41). Laurel Quarry is a surface mine that mines limestone aggregate. (Tr. 141). Production generally begins by removing the overburden to get to the rock, which is then drilled and blasted. (Tr. 141) Laurel Quarry has multiple highwalls, some are active and others are inactive. (Tr. 141-42). Kirby testified that there is a safety program at the mine including weekly toolbox meetings, annual safety audits, emails on safety concerns, and MSHA fatality alerts. (Tr. 142).

Kirby testified that when at the mine he examines the active highwalls every day to ensure that they are safe, meaning no loose rock material and adequate berms. (Tr. 143). If Kirby is unavailable, other employees are trained in highwall safety and will sometimes help

with the examinations. (Tr. 143-144). Kirby reviews all workplace examinations after they are conducted and if conditions needing correction are found, they are corrected. (Tr. 144).

Kirby described the highwall at issue, which was located on the north side of the pit. (Tr. 145). He said it was the highest wall at the mine. The AT bench was located right in front of the wall. (Tr. 145). There was also a wall on the bench below, the ABC bench. Kirby explained the layout -- first you have the overburden, then the AT bench, and then the ABC bench below the AT. (Tr. 146). The boulder at issue was on the highwall above the AT bench. (Tr. 146).

Kirby testified that he had recently measured the distance between the berm and the wall in the area where the boulder was located. (Tr. 146). He said that the berm and the wall had been untouched since the time of the inspection. (Tr. 147). Kirby measured a distance of 15 feet from the inside of the berm to the base of the wall and 18 feet from the center of the berm to the base of the wall. (Tr. 147). He estimated that the wall was anywhere was from 35-40 feet tall. (Tr. 147). With that estimation, the measurements he took would be approximately 30 percent of the height of the wall, which was more than the required 25 percent. (Tr. 147). Kirby also measured the width of the roadbed from the inside edge of the base of both berms and found it to be 25 feet wide. (Tr. 148-49). He testified that the road was not used very much given that it was inactive. (Tr. 149). Kirby remembered last being there on November 1, 2012 based on his blasting and drill logs, which he had just recently looked at within the last few weeks. (Tr. 150).

At the time of inspection, the whole bench was blocked off by a berm. (Tr. 150-51). Kirby stated that when the bench was last used in early November whoever was working would have been on a different part of the bench in an area past where the boulder was located. (Tr. 151-52). He explained that the bench dead-ends approximately 100 to 125 feet past where the boulder was located. (Tr. 152).

Kirby explained that they drove onto this bench during the inspection because of an excavator that was parked on the other side of the berm barricade that Gabbard wanted to inspect. (Tr. 153-54). The barricade had to be opened in order for them to get through to the excavator, which was located on the east end of the bench. (Tr. 154-55). Kirby asked his excavator operator to come up and start the excavator so it could be inspected. (Tr. 155). During the trip, they first crossed the barricade and then saw the excavator before they approached the area where the boulder was located. (Tr. 155). The last time that the excavator had been used was in late October when it was used for removing material from the wall for the ABC bench. (Tr. 155-56). He stated that somebody would have had to cross in front of the boulder in that early part of November. (Tr. 176) Kirby testified that the excavator had been parked in that area because it was a "pretty good size" and they did not have another need for it so they let it sit. (Tr. 156). Gabbard did not issue any citations for the excavator. (Tr. 156).

After the inspection, the excavator operator left, leaving only Kirby and Gabbard. (Tr. 157). Gabbard wanted to drive out on the bench while they were still up there, which they did, and Gabbard began inspecting the highwall. (Tr. 157-58). Neither Kirby nor Gabbard saw the boulder when driving past the highwall for the first time. (Tr. 158). It was not until they were on their way back that they could both see the crack behind the boulder. (Tr. 158-59). Gabbard told Kirby that they had a problem, and Kirby agreed. (Tr. 160). Kirby reminded Gabbard that he had a berm, but Gabbard did not think the berm could catch the boulder. (Tr. 160). Kirby asked Gabbard to let him get the excavator and push the boulder off the wall and see where it would land. (Tr. 160). Gabbard agreed to that plan. (Tr. 160).

Kirby testified that they had a lot of rain in October and November and speculated that the gap behind the boulder was due to the rain. (Tr. 160-61). He stated that he had previously examined this highwall and had not seen the boulder in that condition. (Tr. 161). According to Kirby, Gabbard never mentioned the berm being inadequate during their discussions. (Tr. 161).

The excavator operator was called back up to do the scaling; he had to go all the way around the pit to the west side and come up to get to the boulder. (Tr. 162). The excavator did not have to drive past the boulder to get to this position. (Tr. 162). When the operator had the excavator in position, he was told to go ahead and push it off. (Tr. 163). Kirby estimated that he and inspector Gabbard were about 350 yards from the boulder when it was scaled. (Tr. 164). Due to the elevation, they could not see whether any other rocks fell along with the boulder. (Tr. 164-165). Kirby took a photograph on July 7, 2014 of the area on the wall where the boulder came off, and he testified that the area had been inactive up until the date of the photograph. (Tr. 168, Rx-4)

After the scaling was completed, Kirby and Gabbard went to inspect the boulder without making any other stops. (Tr. 169). Kirby testified that he saw where the boulder had fallen behind the berm, but did not see any rocks that had fallen into the roadway. (Tr. 170-171). He did not move any rocks from the roadway and did not know of anybody else moving any rocks. (Tr. 171-72). Kirby testified that the inspector was surprised to see that the boulder stayed behind the berm; basically that the berm did its job. (Tr. 172). Kirby believed the berm was in the right position to protect the miners because it was the right height and distance from the highwall. (Tr. 172, 174).

When asked about GX-7C, Kirby testified that it showed a pile of sandstone, shale and dirt that was piled up against the wall. (Tr. 185). He agreed that there was no space between that material and the wall and that it was sloped towards the road. (Tr. 185). Kirby also agreed that there was supposed to be a space between the wall and where the berm started. (Tr. 185). He explained that what was shown in GX-7C was not a picture of a highwall and was not the same

wall the boulder was located on. (Tr. 186). He marked GX-16 to show where he saw a berm. (Tr. 187).

Kirby identified GX-14 as a picture of the scaled boulder. (Tr. 189). He agreed that there was material directly up against the wall, but that it was not part of the berm which was located on the south side of the picture. (Tr. 189). Kirby also examined GX-7C in comparison with RX-4 and noted that you could see the same area in displayed in GX-7C in RX-4. (Tr. 192). Kirby could not see the edge of the berm displayed in GX-7C in RX-4. (Tr. 192). He could, however, see where the highwall ended out past the boulder in both exhibits. (Tr. 193). Kirby marked on RX-4 where the highwall ended and the material began to slope up against the wall. (Tr. 196, Rx-5). He testified that the sloped material began after the highwall ended. (Tr. 196).

Kirby told the inspector he did not agree with the citation because the berm held the boulder. (Tr. 173). Kirby did not think the boulder was loose. (Tr. 174). Kirby examined exhibit GX-7A and testified that the he could see sky through the crack behind the rock, and felt that the rock was not secure but he would not say it was loose. (Tr. 182).

## **CONTENTIONS OF THE PARTIES**

The Secretary contends that Respondent violated 30 C.F.R. § 56.3200, that the violation could have resulted in a fatal injury to one miner, that the violation resulted from the operator's moderate negligence, and that the assessed penalty of \$127.00 is appropriate in light of the six 110(i) criteria. *See Sec'y Post-Hearing Brief* at pp. 6-11.

Respondent contends that it did not violate 30 C.F.R. § 56.3200 because there was no hazardous ground condition. Assuming *arguendo* that there was a hazardous ground condition, Respondent asserts that no employees would have been exposed to the hazard because the workbench was inactive. *See Respondent's Post-Hearing Brief* at pp. 8, 17.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th

Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cited specific evidence does not mean it was not considered).

Respondent Violated 30 C.F.R. § 56.3200

On December 5, 2012, at 1355 hours MSHA Inspector Donald Michael Gabbard issued this citation with the following Condition or Practice:

Loose Ground conditions were observed above the access road to the ABC level workbench. An approximate 5ft x 5ft x 3ft loose boulder was approx. 40 ft. above the travel route. This condition would expose persons using the route to crushing hazards if the boulder cleared the berm at the base of the highwall when falling. The roadway was used today to access the excavator on the bench. Crushing injury from falling material can be fatal.

The Termination Action indicated that the boulder was effectively scaled down. It did not cross the berm and enter the roadway. The Citation was terminated at 1405 hours. (Gx-3).

The cited standard, 30 C.F.R. §56.3200 provides the following:

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.

There is no general requirement that a violation of a regulation must create a safety hazard for a valid citation to issue. If conditions exist which violate the regulation, a citation is proper. *Allied Products, Inc.*, 666F.2d 890, 892-893 (5<sup>th</sup> Cir. 1982). Commission case law is consistent with this principle in that section 56.3200 “requires that operators restrict miners’ access to areas where hazardous conditions exist, whether or not it is likely that the hazard will result in an injury.” *Cyrpus Tonopah Mining Corp.*, 15 FMSHRC 367, (March 1993). In order to establish a violation of section 56.3200, the Secretary must demonstrate the operator’s failure to maintain highwall stability by correcting hazardous conditions before work or travel is permitted in an affected area. *See Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). Whether a violation has occurred is measured against the standard of whether a “reasonably prudent person” familiar with the factual circumstances would recognize that a hazard existed within the purview of the applicable standard. *Id.* (citing *Spartan Mining Co.*, 30 FMSHRC 699, 711 (Aug. 2008)).

The Commission has affirmed the determination of an ALJ that §56.3200 was violated where a high spoil pile and a slope had not been taken down to prevent rocks from falling and miners were allowed to work and travel in an adjacent area. *Bellefonte Lime Company, Inc.*, 20 FMSHRC 1250, 1251 (Nov. 1998). In a case involving rocks on top of a highwall that were in danger of falling in an area that was not barricaded Judge Manning found there was a violation of §56.3200. I agree with his analysis of the two parts of the safety standard:

The safety standard provides that “[g]round conditions that create a hazard to persons shall be taken down or supported *before other work or travel is permitted in the affected area.*” (Emphasis added). The second part of the safety standard provides that “[u]ntil *the 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.” *Secretary v. Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 349 (Feb. 2011)(Emphasis added).

In *Secretary v. Hoover, Inc.*, 33 FMSHRC 751, 756 (Mar. 2011) Judge Miller found that where there was loose material on a highwall and the area had not been bermed-off or barricaded there was a violation of §56.3200. The Judge pointed out that the mine could have barricaded the area if it did not want to scale the highwall, but failed to do so.

In the instant case the AT bench had been barricaded with a berm. Along the highwall side of the bench, there was muck material also referred to as a berm. However, the presence of muck or berm at the base of a highwall does not change the fact of a hazard presented by loose unconsolidated material, such as the large boulder, high on the face of the highwall. It follows that I do not find persuasive decisions suggesting that muck or berm at the base of a highwall means the loose material on a highwall that has not fallen does not constitute a hazard.<sup>4</sup> This is because in any given fall of rock the path and presence of obstacles that could change the path or trajectory of the rock, including the shape and size of the rock itself, would preclude precise prediction of the final resting spot.

The serious nature of the loose boulder observed by Gabbard is underscored by the overall conditions on the AT bench that day. Gabbard went to great lengths at hearing to establish that the berm that did exist did not meet MSHA’s safety standards. (Tr. 22, 26, 44, 68, 71-73). Gabbard’s testimony and the photographs support a finding that the berm material was not 10 to 15 feet from the base of the highwall to the beginning of the back of the berm. The road was narrow and there was not enough room for these dimensions to be met. I credit Gabbard’s estimates that the bench was only 17 feet wide considering the outside berm, and

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<sup>4</sup> See, *Chico Crushed Stone Partnership*, 15 FMSHRC 524 (Mar. 1993)(ALJ), *Hanson Aggregates Southeast*, 28 FMSHRC 1049 (Nov. 2006)(ALJ), *Nelson Quarries, Inc.*, 30 FMSHRC 254 (Apr. 2008)(ALJ).

hence there was insufficient width to accommodate an adequate berm pulled out 10 feet from the base of the highwall (GX-7C, GX-7D, GX-7F, GX-7J, GX-15). Kirby's reported measurements suggesting a much wider bench were taken long after the date of the citation, just before the hearing. His testimony is not supported by the contemporaneous photographs, and *exactly* where he made any such measurements was not *documented*. Certainly, the photographs in RX-4 and RX-5 are from a distance and not helpful. It is for these reasons that I place greater weight on the observations and estimates made by Inspector Gabbard at the time of the citation than the attempt by Kirby to discredit Gabbard's conclusions.

It was fortunate in this case that the large boulder happened to land in muck that was soft enough to absorb the impact and hold it against further bounce or travel. But the result could have been different, had it landed on a more solid pile of material and bounced, or been projected by obstacles in its path to go beyond the muck. Further, the photographs and testimony do show that some smaller rocks did fall onto the roadway. The presence of these fresh smaller rocks on the bench roadway supports the opinion of Inspector Gabbard that the berm was not adequate and the path of falling rock cannot be precisely predicted. To prevent violation of the safety standard, where there is loose unconsolidated material on a highwall, the area must be barricaded and a warning sign posted until such time as scaling is performed and completed.

The barricade to the bench was removed and the inspection party travelled along the AT and under the boulder before any scaling took place. As observed by Judge Lewis, under strict liability standards, Respondent "had the responsibility to ensure that its mine site was safe and that any hazardous highwall condition be corrected." *Secretary v. Tulsa Stone Company*, 35 FMSHRC 3392, 3398 (Nov. 2013). When a violation of the Act is found, operators are mandatorily subject to strict liability pursuant to section 110(a) of the Act, 30 U.S.C. § 820(a). *See Wake Stone Corp.*, 2014 WL 1870764 (April 2014). Before, or upon, removal of the barricade the highwall should have been scaled before any access to the area was allowed.

The Secretary presented sufficient evidence of a hazardous condition associated with the highwall above the AT bench at Respondent's mine to establish a violation of § 56.3200. In making this finding, I rely primarily on the testimony of Inspector Gabbard who observed a loose boulder perched on the side of a highwall that was approximately 40 feet tall during his inspection of the subject mine on December 5, 2012. (Tr. 16-18, 23). Gabbard reasonably estimated the boulder was approximately 5ft x 5ft x 3ft in dimension and weighed 11,000 pounds. (Tr. 17-18, 23-24, 111). I credit Gabbard's testimony that he knew the boulder was loose because it was sitting on the highwall independently and he could see air or daylight behind the fractures on the side of it. (Tr. 23). The boulder was overhanging the roadway, sitting loose independently, not connected underneath to the wall, and nearly 70 percent was not supported. (TR. 23, 58, 64; GX-5, GX-7E) Given its loose condition, Gabbard considered it to be a definite hazard, and if it had come down off the highwall it could have caused a crushing

fatality. (Tr. 25). Photographs of both the hazard and its abatement were taken during Gabbard's inspection, which were admitted into evidence at the hearing. (Tr. 56-69). GX-7A clearly depicted the crack on the left side of the boulder and it does also appear that nearly 70 percent of the boulder was unsupported. (Tr. 58, GX-7A). There were smaller rocks that had fallen out beyond any highwall berm and onto the roadway. (GX-15).

Kirby testified that in his opinion the boulder was not loose on the day of the inspection even though he agreed air could be seen coming through the crack. (Tr. 174, 182). His position was that the boulder did not pose a hazard, although it did need to be "taken care of" because if a rock that size became unstable it could fall off the highwall. (Tr. 183). However, unlike Inspector Gabbard, Kirby offered no reasons to support his conclusion that the rock was not unstable. Rather, his argument rested primarily on his repeated claim that it needed to be addressed even though it was not loose. Yet, while maintaining it was not loose, he would not say it was "secure". (Tr. 182, 183). I do not find his testimony to be credible. The evidence presented clearly shows that the boulder was cracking off the highwall because air could be seen through those cracks. A boulder of that size and magnitude that has become loosened from the highwall is most definitely a hazardous ground condition within the meaning of the cited standard.

The evidence further reflects that travel was permitted in the affected area before the hazardous condition was corrected. Prior to the inspection, the large boulder had not been removed or supported in any way. (Tr. 42). Kirby testified that this particular bench had not been used since the early part of November when they were last blasting, and he had not previously seen the boulder in this condition. (Tr. 149, 161, 175-76, 197). Perhaps, as Gabbard believed, Kirby did not know about the overhanging boulder. But under strict liability he should have known, since it is the responsibility of the operator to insure the safety of miners at the mine. Yet, during the inspection, the worker's truck and the supervisor's truck were both driven past the hazardous condition in route to examine the excavator that was located beyond the boulder thus exposing the excavator operator, the inspector, and the supervisor to the hazard before the condition was abated. (Tr. 48-49, 115, 153-54,).

Inspector Gabbard believed the area had been active; however, it was inactive on the day of the inspection. The barricade to the AT was in place until it was opened to give access to the inspection party. (Tr. 115-16, 118, 154-55). Although Kirby testified the area had been inactive about a month, the excavator had not been tagged out, and he admitted that either he or the operator would have to travel past the boulder to remove the excavator if it was needed at another location. (Tr. 120, 180-82). Moving the excavator would again have resulted in exposure to the hazardous condition. (Tr. 119-120). Moreover, although the affected area had been barricaded off, there was no signage posted to warn against entry as required by the cited standard. (Tr. 42, 118).

Considering the loose condition of the boulder, Gabbard credibly testified that had it fallen on its own it could have taken a different path based on its trajectory and how it struck the wall. (Tr. 39, 110). This unstable condition clearly created a hazard to those present during the inspection and any other worker who may have travelled down the AT bench to retrieve the excavator or perform other work.

Respondent argues that the boulder did not pose a hazard because the berm effectively caught it when it was scaled off the highwall. *See Respondent's Post-Hearing Brief* at p. 8. However, this argument must fail. The hazard existed because of the loose boulder on the highwall that could have fallen at any time crushing whoever was below; it existed prior to the scaling. Whether it was effectively scaled and caught by the berm is after-the-fact and of no consequence to determining if there was a violation of the cited standard.

The hazardous condition posed by the boulder was not abated prior to travel in the affected area, and the area was not posted with a warning sign against entry. As such, I find that the Secretary has established by a preponderance of the evidence that a violation of the cited standard occurred.

#### Gravity and Negligence

The Mine Act requires that the “gravity of the violation” be considered in assessing a penalty. 30 U.S.C. § 820. Gravity is an evaluation of the seriousness of the violation. The Secretary has promulgated a three-factor inquiry to determine the gravity of a citation for purposes of calculating the penalty. Those factors are the likelihood of the occurrence of the event against which a standard is directed, the severity of the illness or injury if the event has occurred or was to occur, and the number of persons potentially affected if the event has occurred or were to occur. 30 C.F.R. § 100.3(e).

Given the fact that the area had been barricaded off and the boulder was caught when it was scaled, I agree with Gabbard’s testimony that it was “unlikely” injury would have occurred. (Tr. 49-50, 92). But I also agree with Gabbard that had an injury occurred it would have been to one individual and it would have been fatal by a crushing injury from the falling boulder. (Tr. 41, 49-50, 122).

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. **Moderate negligence** is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances. **Low negligence** is where the operator knew or should have known of the

violative condition or practice, but there are considerable mitigating circumstances. 30 C.F.R. § 100.3(d).

I agree with Inspector Gabbard's determination that the difficulty in observing the boulder was a mitigating factor. He and Kirby did not see the boulder when they drove onto the AT bench past the highwall for the first time. (Tr. 20, 44-45, 158). It was not until they were on their way back out that they could see the crack behind the boulder. (Tr. 45,158-59) Testimony from both Gabbard and Kirby indicated that there had recently been heavy rains in the area, (Tr. 29, 113, 160-61) and it is possible the rain either caused or accelerated the loosening of the boulder. Given that the precarious position and loosened condition of the boulder was not obvious, the possibility of weather factors, and that Kirby was adamant he was unaware of the condition, Gabbard determined the negligence to be moderate.

There are however, additional factors that Gabbard did not take into consideration. The bench beneath the highwall was barricaded against entry at the time of the inspection and probably for a period of time before the inspection. (Tr. 20-21, 42, 115-16, 150-51, 175-76). Furthermore, this material was only moved for purposes of the inspection. (Tr. 115-16). Kirby testified that nobody had even been to the AT bench since November when they were last blasting. I have found, above, that Kirby's testimony was not credible. However, it reasonable to conclude that the AT bench was inactive for *some* period of time. It is, simply, that on this record that period of time cannot be determined with accuracy. Further, notwithstanding the nonconforming berm material and the narrow bench, the boulder did not fall onto the road. There was no dispute at hearing that when the boulder was scaled off the highwall the material at the base of the highwall on the AT bench did catch the boulder. (Tr. 35-36, 54, 56, 68, 87). While I am not in agreement, Gabbard did testify that the citation would not have been issued if there had been a berm meeting the guidelines published. By MSHA.

Based on the above discussion of mitigating circumstances, I find that Respondent acted with low negligence when it violated section 56.3200.

### Penalty

In this matter, the Secretary proposed a penalty of \$127.00 for Citation No. 8274144. When assessing a civil penalty, the Commission has affirmed that ALJs are not bound by the Secretary's proposals. *See* 30 U.S.C. § 820(i); *Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (citing *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000)). Rather, the ALJ is independently responsible for determining the amount of the penalty in accordance with the six statutory criteria set forth in section 110(i) of the Act:

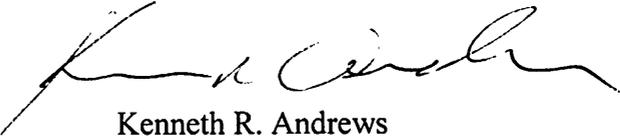
[1] the operator's history of previous violations, [2] the appropriateness of the penalty to the size of the business of the operator charged, [3] whether the operator was negligent,

[4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*

I have considered all six statutory penalty criteria. Laurel Quarry is a small mine with only 37,584 hours worked in 2012. During the approximate two years preceding the current violation, Laurel Quarry was only issued a total of eight citations, none of which were for a violation of section 56.3200. I find this to be a low history of violations. The parties stipulated that the Secretary's proposed penalty amount of \$127.00 would not affect the operator's ability to continue in business. They further stipulated that the citation was timely abated in good faith. As discussed *supra*, the Respondent acted with low negligence. Therefore, I reduce the civil penalty assessed to \$100 for this violation.

### **ORDER**

For the reasons set forth above, Citation No. 8724144 is **MODIFIED** to reduce the negligence from **moderate** to **low**. Hanson Aggregates Midwest, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.<sup>5</sup>



Kenneth R. Andrews  
Administrative Law Judge

Distribution: (U.S. Certified Mail)

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Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 1909 K Street, NW, Washington, D.C. 20006

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<sup>5</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390