

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N. W., SUITE 9500  
WASHINGTON, DC 20001**

June 6, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2010-15-M
Petitioner	:	A.C. No. 30-03038-198913
v.	:	
	:	
HELDEBERG BLUESTONE &	:	Grippee Quarry #4 South
MARBLE INC.,	:	
Respondent	:	

**DECISION**

Appearances: Paul Koob, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Petitioner

Paul F. Giebitz, President, Heldeburg Bluestone & Marble, Inc., East Berne, New York, for the Respondent

Before: Judge Koutras

**STATEMENT OF THE CASE**

This civil penalty proceeding, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), (hereafter “Mine Act”) concerns an alleged violation of mandatory safety standard 30 C.F.R. § 56.15004, as stated in a Section 104(d)(1) significant and substantial (hereafter “S & S”) unwarrantable failure citation No. 6536680, served on the respondent on August 3, 2009. The cited standard, in relevant part, requires all persons to wear safety glasses when in or around an area of a mine where a hazard exists which could cause injury to unprotected eyes.

A hearing was held in Albany, New York on March 22, 2011, and the parties appeared and participated fully therein. The issues include whether the alleged condition or practice, if established, could significantly and substantially contribute to the cause and effect of a mine hazard resulting from the respondent’s alleged unwarrantable failure to comply with the cited safety standard resulting in a penalty assessment of \$2,000.00.

The parties stipulated to the following:

1. The respondent and its quarry operations that are the subject of these proceedings are subject to the jurisdiction of the Mine Act and the Commission.
2. MSHA Inspector Matthew Mattison was acting in his MSHA official capacity when he issued the citation on August 3, 2009, and that a true copy was properly served on the respondent.
3. A prior citation was issued on July 21, 2009, for a violation of Section 30 C.F.R. § 56.15004, was served on the respondent and issued to foreman Mark Kudlack. The respondent did not contest that citation and the assessed civil penalty was paid.

(TR. 5-7).

Petitioner's counsel noted my partial summary decision of March 1, 2011, finding that miner, Perry Shaul failed to wear protective glasses while performing work, striking stone with a sledge hammer. (Tr. 7). I take note that Respondent failed to respond to Petitioner's motion in this regard. The respondent does not dispute the fact that no safety glasses were worn.

MSHA inspector, Matthew Mattison testified that when he arrived at the quarry on August 3, 2009, at approximately 2:30 p.m., he observed two miners extracting stone and that he was 40 to 60 feet away. He observed stone splitter, Perry Shaul using a sledge hammer and a chisel on the stone striking it two or three times without wearing any eye protection. The chisel was positioned on the bluestone stone bottom where he was trying to pop it off the ground, and he observed shards of stone splinters and dust coming off the stone. The other individual working with him was foreman Mark Kudlack. (Tr. 16-18).

Mr. Mattison stated that he was familiar with bluestone quarries and has inspected many such operations and that workers typically wear eye protection. He explained that the stone would break apart when struck when someone was hitting a wedge with a sledge hammer. The size of the chips and dust he observed ranged from the size of a penny/dime to dust particles. (Tr. 19-20).

Mr. Mattison stated that Mr. Shaul was directly facing and leaning into the stone while swinging the sledge hammer. He was concerned for Mr. Shaul's safety when he observed him working without wearing his safety glasses because the debris, chips, and splinters could enter his eyes causing possible blindness and permanently disabling eye injuries. (Tr. 20). He was not concerned with the foreman's safety because he was wearing his safety glasses. (Tr. 21).

Mr. Mattison stated that the foreman was standing five to six feet from Mr. Shaul observing his work and that during this time the foreman never told Mr. Shaul to put his glasses on or to stop working. Mr. Mattison believed that had he not been present, Mr. Shaul would

have continued his work without eye protection because two weeks earlier on July 21, 2009, he observed him doing the same work without eye protection and issued a citation that he served on foreman Kudlack. (Tr. 22-23; Exhibit P-2).

Mr. Mattison stated that after he issued the previous citation he spoke to Mrs. Giebitz, one of the respondent's owners who was working at the quarry office about the matter. (Tr. 24-26).

On cross-examination by Mr. Paul Giebitz, Mr. Mattison confirmed that he terminated the citation in issue after Mr. Shaul put on the safety glasses that were provided to him by the respondent that was nearby where he was working. (Tr. 30). The glasses were ten to 12 feet away, sitting on an air compressor. (Tr. 33).

Mr. Mattison confirmed that when he initially observed Mr. Shaul working on the stone from a distance of 40 to 60 feet, he could see dust and chip debris coming from the stone, and that Mr. Shaul and Mr. Kudlack showed him where the glasses that were not worn were located on the compressor. (Tr. 32-33).

Mr. Mattison explained that while he indicated on the face of the citation that any resulting injury would be "fatal", he did not believe that a fatal accident would occur. He further confirmed that while he never observed any stone debris striking Mr. Shaul's face, it was flying off the stone while it was struck. (Tr. 36).

Mr. Mattison further explained that the basis for his "high negligence" finding was due to the fact that foreman Kudlack was present during the work performed by Mr. Saul and was the designated individual responsible to ensure the safety of the miners. Petitioner's counsel confirmed that a Section 110(c) investigation concerning foreman Kudlack did not result in any further action against him because it involved a higher burden of proof as is required pursuant to a Section 104(d)(1) citation. (Tr. 37).

Quarry foreman Mark Kudlack testified as an adverse witness and that his duties include maintaining safety, training miners, and correction violations. He confirmed that he issues safety glasses to the miners in the morning and insures that they have them before leaving the office (Tr. 42-45). He testified that on August 3, 2009, he observed miner Perry Shaul working to extract stone using a wedge and sledge hammer without wearing his safety glasses for approximately five minutes. He confirmed that Mr. Shaul was previously cited for not wearing safety glasses two weeks prior to the issuance of the citation in issue in this case. Although Mr. Shaul was extracting stone in both instances, Mr. Kudlack explained that on the prior occasion he was using a jackhammer rather than a sledge hammer. (Tr. 47-48).

Mr. Kudlack testified that Mr. Shaul obviously had a problem with failing to wear his eye protection "because he was cited beforehand," as well as previous instances when he was observed without wearing eye protection. (Tr. 48-49). Mr. Kudlack further explained that Mr.

Shaul complained that his glasses did not fit him well and was given larger ones. Even though they were a better fit, Mr. Kudlack stated “I’d catch him without them on,” and confirmed that he fired Mr. Shaul after the citation was issued. (Tr. 50).

### The Violation

The respondent did not dispute the fact that miner Perry Shaul was not wearing his safety glasses while working to extract stone with a wedge and sledge hammer on August 3, 2009. The respondent’s admission, and the credible testimony of the inspector clearly establish this was the case. I therefore conclude and find that the failure of the cited miner to wear his safety glasses constituted a violation of mandatory safety standard Section 30 C.F.R § 56.15004, AND IT IS AFFIRMED.

### Significant and Substantial Issues

A significant and substantial (“S&S”) violation is described in Section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that in order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “ requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6

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

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The existence of a violation has clearly been established pursuant to the first prong of the Mathies Test. With respect to the second prong requiring a discrete safety hazard contributed to by the violation, Inspector Mattison testified that he observed shards of stone splinters and dust coming off the stone as the miner was striking a chisel or wedge placed under the stone with a sledge hammer in an effort to raise and extract the stone. (Tr. 16-18; 32, 36). Although the inspector did not include his observations on the face of his citation, after observing his demeanor during his testimony, I find his testimony to be credible. He further testified that the miner could be struck in the eye by shards, dust, or debris causing an injury. (Tr. 20).

Foreman Kudlack did not rebut the inspector’s testimony regarding his observations of shards, splinters, and dust on the day of his inspection. Although Mr. Kudlack testified during his deposition that he observed no chips, he explained that the presence of such debris would depend on the condition of the wedge. However, he agreed that a miner striking a wedge into stone without eye protection presents a slight degree of danger and a hazard to the eyes. (Exhibit P-1; 14-17).

Given the fact that foreman Kudlack was wearing his safety glasses while in close proximity to the miner who was wielding the sledge hammer as he struck the wedge, there is a credible inference that he was aware of the existence of a hazard and wore his safety glasses to protect his eyes against injury. Under all of these circumstances, I conclude and find that the petitioner’s evidence clearly establishes the existence of a discrete safety hazard that satisfies the second prong of the Mathies Test.

With respect to the third prong of the Mathies Test requiring the establishment of a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, an evaluation of the risk of injury necessarily assumes the continuance of normal mining operations. In this case, the inspector testified that had he not been present when he observed the miner without wearing eye protection, it was his belief that the miner would have continued working without wearing eye protection that would expose him to an injury. (Tr. 22-23). He based this conclusion on the fact that he cited the same miner for a prior violation of the same safety standard for not wearing eye protection, and took note of the fact that foreman Kudlack

never instructed the miner to put on his glasses while he observed his work and never instructed him to stop. (Tr. 22-23).

Foreman Kudlack confirmed that the cited mine had a problem with failing to wear protection, and that he observed him working without eye protection on several prior occasions, in the issuance of the prior citation of July 21, 2009. (Tr. 50). Under all of these circumstances, I conclude and find that if it were not for the issuance of the citation by the inspector, one can reasonably conclude that the work being performed by the miner without eye protection would have continued in an unsafe manner exposing him to an injury to his eyes. The rather short five-minute window between the inspector's observations that the miner was not wearing safety glasses, thereby exposing him to injury to his eyes, and the issuance of the citation, does not on the facts of this case negate the reasonable expectation of a hazardous situation exposing the miner to injury to his eyes in the event he continued with his normal mining work duties. Under all of these circumstances, and the evidence presented in this case, I conclude and find that the third prong of the Mathies Test has been established.

With respect to the fourth Mathies Test, requiring a showing that any injury resulting from the safety hazard would reasonably likely be of a reasonably serious nature, the credible testimony of the inspector reflects that the miner worked directly within the hazardous work area facing and leaning into the stone while performing his task. The inspector observed chips and dust particles that came off the stone, and he was concerned for the miner's safety because stone debris, chips, and splinters entering the eye would cause possible blindness, eye damage, or permanently disabling eye injuries. Based on his experience with bluestone operations, he believed it was reasonably likely that the miner working without protection could sustain an injury. (Tr. 19-21). I conclude and find that the fourth prong of the Mathies Test has been met in this case.

Under all of the aforementioned circumstances, I conclude and find that the inspector's significant and substantial ("S&S") finding is supported by a preponderance of the credible evidence presented by the petitioner and IT IS AFFIRMED.

#### The Unwarrantable Failure Issue

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These include the extent of the violative condition, the length of time that it has existed, the operator's efforts at abating the violative condition, whether the

operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, whether the violation is obvious, and whether the violation poses a high degree of danger. *Id.* See also *San Juan Coal Co.*, 29 FMSHRC 125, 128 (Mar. 2007).

Although the cited condition existed for only five minutes, a discrete danger existed that the respondent would not have corrected the condition and the miner would have continued his work without eye protection if it were not for the intervention of the inspector. The inspector first observed the miner striking the stone two or three times without wearing his safety glasses, while the foreman was standing next to him observing his work. At no time did the foreman instruct the miner to stop work or to put his glasses on. Although he had an opportunity to do this before the inspector appeared on the scene, he did not do so.

The foreman confirmed that management was responsible for training workers to wear eye protection. Nonetheless, he observed the cited miner splitting stone without wearing protective eye wear, was aware that the same miner had been cited two weeks earlier by the same inspector, and admitted that he observed the same miner on prior occasions performing similar work without wearing eye protection. While he candidly admitted that the cited miner had a problem wearing his safety glasses and that he would "catch him without them on," there is no evidence that he, as well as the respondent's owners, ever disciplined the miner until after the second violation was issued. Such inaction constitutes indifference and a serious lack of reasonable care, aggravating factors supporting the inspector's unwarrantable failure finding. See *Sec'y v. Lopke Quarries Inc.*, 23 FMSHRC 705, 711 (July 2001).

The Commission has recognized that supervisors, being held to a higher standard of care, must ensure their workers take proper safety precautions. See *Sec'y v. REB Enterprises Inc.*, 20 FMSHRC 203, 225 (March 1998). On the facts of the instant case, the foreman disregarded the safety of the miner, albeit for a short period of time, but did nothing to stop him from working or instructing him to put on his safety glasses which were nearby.

The petitioner's credible and un rebutted evidence supports the inspector's high negligence finding. I find that the foreman knew, or should have reasonably known, of the existence of the obvious nature of the violation as he stood next to the miner observing him working without protective eye wear, and the high degree of danger presented at that time. I further find that the lack of any effort by the foreman to take reasonable protective action prior to the issuance of the citation by insuring and requiring the miner to put on his protective glasses, and management's knowledge of the prior citation and instances of the miner's failure to wear eye protection, was conduct that should have alerted management that greater efforts were necessary for compliance, and are relevant factors supporting the inspector's unwarrantable failure finding. See *Sec'y v. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (March 2000).

Under all of the aforementioned circumstances, I conclude and find the inspector's unwarrantable failure finding is supported by a preponderance of the credible evidence presented

by the petitioner and IT IS AFFIRMED.

Remaining Mine Act Section 110(i), civil penalty assessment criteria.

History of Prior Violations

An MSHA mine violation report dated March 18, 2011, reflects one prior violation of Section 30 C.F.R. § 56.15004, for which a penalty of \$100.00 was paid, and two unrelated citations with a total penalty of \$200.00, which was paid. I conclude that the respondent has no significant violation history.

Size and ability to continue in business

The evidence establishes that the respondent is a seasonal small family owned bluestone mine quarry owner who operates the mine eight months a year. (Tr. 56).

With respect to the effect of a civil penalty assessment on its ability to continue in the business, I take note of the fact that in its answer to the civil penalty petition, the respondent stated its continued operation would depend on the outcome of this case. In the course of the hearing, the respondent pointed out that it paid a \$100.00 civil penalty for the first citation of Section 56.15004, and believed that the proposed penalty of \$2,000.00 in the instant case “is very high,” and expressed a willingness to pay a lesser assessment. (Tr. 52-53).

Petitioner’s counsel stated that as a routine matter he requested information from the respondent concerning its financial position, and was only provided with partial tax return deductions information and nothing further has been forthcoming from the respondent. (Tr. 57-58).

The burden of proof to establish that the imposition of a civil penalty assessment would adversely affect its ability to continue in business lies with the respondent, and in the absence of any proof in this regard it is presumed that no such adverse effect would occur. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff’d* 763 F. 2d 1147 (7<sup>th</sup> Cir. 1984); *Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994).

I conclude and find that the respondent has failed to provide evidence establishing that the imposition of the proposed civil penalty assessment of \$2,000.00, for the contested Section 104 (d)(1) citation would adversely affect its ability to continue business.

Good Faith Abatement

The citation was terminated within minutes after the cited miner retrieved his safety glasses from where they were located nearby his work area.

ORDER

Based on the aforementioned findings and conclusions, the contested Section 104(d)(1) “S & S” unwarrantable failure citation IS AFFIRMED, and the respondent IS ORDERED TO PAY a civil penalty assessment of \$2,000.00, which I find is appropriate in this case, within 30 days of the receipt of this decision.

George A. Koutras  
Administrative Law Judge

Distribution: (Certified Mail)

Paul Koob, Esq., Office of the Solicitor, U.S. Department of Labor, 170 S. Independence Mall West, Suite 630 East, Philadelphia, PA 19106-3306

Paul F. Giebitz, Heldeberg Bluestone & Marble, Inc., P.O. Box 36, East Berne, NY 12059