

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 2018

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

v.

MARTIN MARIETTA MATERIALS
SOUTHWEST, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2018-0228
A.C. No. 41-01335-459015

Mine: Beckmann Quarry

DECISION

Appearances: Christopher D. Lopez-Loftis, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;

Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801.¹ This case involves Citation No. 9356617 issued to Martin Marietta Materials Southwest, Inc. (“Martin Marietta” or “Respondent”), in August 2017. The Secretary proposed a penalty of \$1,806.00. The citation was designated as significant and substantial (S&S), reasonably likely to result in an injury causing lost workdays or restricted duty, and involving high negligence on the part of the operator.

A hearing was held on September 12, 2018, in San Antonio, Texas. MSHA Inspector Emilio Perales testified for the Secretary. Howard Evans, the primary superintendent at the Beckmann Quarry, testified for Martin Marietta. After fully considering the testimony and evidence presented at hearing, I find that the Secretary met his burden of proof in establishing the violation as issued. I assess the proposed penalty of \$1,806.00.

¹ In this decision, the transcript, the joint stipulations, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Jt. Stips.,” “Sec’y Ex. #,” and “Resp. Ex. #,” respectively.

II. STIPULATIONS OF FACT

The parties entered the following stipulations of fact into the record at hearing:

1. Martin Marietta Materials Southwest, Inc. (hereinafter, “Respondent”) was at all times relevant to this proceeding engaged in mining activities at the Beckmann Quarry Mine.
2. Respondent’s mining operations affect interstate commerce.
3. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (The “Mine Act” or “Act”).
4. Respondent is an “operator” as that word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Beckmann Quarry Mine (Federal Mine I.D. No., Mine ID 41-01335) where the contested citation in this proceeding was issued.
5. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the Act.
6. On or about August 29, 2017, Mine Safety and Health Administration (“MSHA”) Inspector Emilio Perales was acting as a duly authorized representatives [sic] of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation from docket CENT 2018-0228, at issue in this proceeding.
7. The citation at issue in this proceeding was properly served upon Respondent as required by the Act and was properly contested by Respondent.
8. The citation at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing their [sic] issuance. Materials published on MSHA’s website or otherwise published by MSHA may also be admitted into evidence by stipulation for the purpose of establishing their issuance and availability. The truthfulness or relevancy of any statements asserted therein is not stipulated to by the parties.
9. Respondent demonstrated good faith in abating the violations.
10. The penalties proposed by the Secretary in this case will not affect the ability of Respondent to continue in business.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

On August 29, 2017, MSHA Inspector Emilio Perales² visited the Beckmann Quarry to conduct an inspection. Tr. 11. He met with Robert Deware, the acting plant manager, and Howard Evans, the supervisor for the primary section of the mine. Tr. 11. Perales explained the general operation at the mine: workers drill holes in a pattern at the top of the wall, then fill them with explosives; they initiate a blast, which causes material to come down from the wall; and loaders pick up the material to be hauled away and processed. Tr. 17, 27. Before workers are allowed near the wall, the operator must check the area for stability and address any loose materials. Tr. 16, 27. In a process known as scaling, miners use a rock breaker to knock down any loose material. Tr. 14, 30. Perales explained that scaling is practiced industry-wide and must be done after every shot. Tr. 26, 27. The scaling process is the subject of this citation.

Perales and the inspection party began the inspection at the highwall. Perales observed loose, unconsolidated material in several places on the highwall. A portion of the highwall had already been mucked out, and Perales observed loose unconsolidated rock on the corner that had not been scaled. Tr. 12. There was also a “back break” to one side of the corner. Tr. 12. Perales explained that “back breakage” refers to a crack in the rock indicating that energy has gone back into the highwall, causing material to loosen. Tr. 16. He observed a significant amount of loose material in the breakage. Tr. 16. Adjacent to the highwall was an inactive section, and Perales observed loose rock there, as well. Tr. 12.

The Secretary’s Exhibits 2-1 and 2-2 are photographs taken from the southwest³ corner of the lower pit bench. There are loose boulders apparent in both photos. Sec’y Exs. 2-1, 2-2. Exhibit 2-1 shows the surface of the bench and overlooks the inactive south wall. Tr. 13-14. Exhibit 2-2 overlooks the west wall, the active area.⁴ Tr. 15. The back breakage is located along

² Emilio Perales has worked as a mine inspector for MSHA for 20 years. Tr. 8. Prior to that he was employed in the mining industry for 16 years in shipping, production, and as a safety manager. Tr. 9. His work experience was at the Beckmann quarry, the mine that is the subject of this proceeding. Tr. 8-9. As a safety manager, Perales managed the safety aspects of drilling, loading, and blasting on highwalls, and he has inspected many mines with highwalls. Tr. 10. Perales has also completed the course of regular training required of inspectors. Tr. 8.

³ Perales referred to this corner as the southeast corner, while Evans called it the southwest corner. Tr. 13, 37. I will refer to it as the southwest corner for consistency.

⁴ There was some confusion in the witnesses’ testimony as to the meaning of the terms “active” and “inactive” and which areas of the mine were active. The inspector referred to the area with the partial berm shown in Exhibits 2-1, D-7, and D-8 as “inactive.” Tr. 13-14, 21, 32. He referred to the other area, where there was a loader, tire tracks, and back breakage, as “active.” Tr. 23, 32. Evans at first referred to the area with the partial berm as “done,” “inactive,” and “mined out.” Tr. 36, 38, 48. He then stated that that area was “part of the active mine,” and later that it was the same area as the area with the loader, but seen from a different angle. Tr. 52-53. In response to further questions, he referred to the area with the loader as both active and inactive. Tr. 54-56. Evans then claimed he had been confused about the definition of “active,” and had only meant that miners were not presently digging and mucking in some areas. Tr. 56. In terms of whether mining would continue on the wall, he stated that only the south wall was

the active side. Sec'y Ex. 2-2. Perales observed that material had been removed from the active area after blasting, which would have required a loader to make repeated trips to the face. Tr. 15. A loader is visible in Exhibit 2-2, and Perales observed someone operating it at the time of the inspection. Sec'y Ex. 2-2; Tr. 19. Respondent's Exhibit D-5 shows a closer view of the area in Exhibit 2-2. There are tire tracks from a loader close to the highwall. Resp. Ex. D-5; Tr. 21, 30, 45. Perales observed the loader going back and forth to load material, which exposed the operator to the highwall repeatedly. Tr. 23. There were no photographs introduced to show the highwall above where the loader was working. Tr. 28. Respondent's Exhibits D-7 and D-8 are photographs of the inactive wall shown in Exhibit 2-1. Tr. 21, 31, 32. There is a berm at the end of the wall, but most of the length of the wall is not bermed. Resp. Exs. D-7, D-8. At the inspection, Perales discussed the condition with Evans, who told him the plant manager had directed the crew to clean up the area. Tr. 24. Perales interpreted this to mean that Evans had directed miners to remove the berms. Tr. 21, 24, 30. Perales explained that berms are used to keep people away from an inactive highwall. Tr. 21. They are placed some distance away from the highwall so that if any rock falls, it will fall behind the berm. Tr. 21, 22. A loader operator working to remove the berms would be exposed to rock falls from the inactive highwall. Tr. 15.

Perales explained that a loader operator working near the highwall would be exposed to hazardous conditions. Tr. 15, 23. He was concerned that material could fall from the highwall and hit the cab of the loader. Tr. 24. A rock could potentially come through the windshield, and depending on the size of the rock, it could cause serious injury. Tr. 24, 25. He noted that some large loose rocks were visible in the photos. Tr. 25.

To terminate the violation, the operator installed berms along the inactive part of the pit and used a rock breaker to scale the active area. Tr. 19. The Secretary's Exhibit 2-3 shows the highwall after it was scaled. Tr. 19.

Howard Evans, the superintendent for the primary section of the mine, was present during the inspection and testified at hearing. He had been in that position for eight months at the time, but it was his first inspection as a superintendent. Tr. 35. He believed there had been a misunderstanding with the inspector regarding the berms in the inactive area. Tr. 35. Evans recalled telling the inspector that his boss, Chance Allen, had instructed him to clean the area. Tr. 35. But the area Allen was referring to was the catch bench between the upper level and the floor. Tr. 36; *see* Resp. Ex. D-8. The purpose of the catch bench is to catch material that may fall from the upper bench to keep it from falling to the floor. Tr. 36. Allen wanted the catch bench cleaned because that part of the mine had been mined out and was designated for reclamation. Tr. 36. Evans testified that no berms were removed in the area. Tr. 37. He stated that miners had begun construction on a berm in the inactive area prior to the inspection, but that it takes several days to build a berm. Tr. 37. He did not see anyone working in the inactive area other than the miners building the berm. Tr. 45. He admitted that there was loose material in the area and it looked like the wall had not been scaled. Tr. 51-52. Regarding the active wall, Evans believed that the back breakage observed by the inspector did not pose a hazard. Tr. 39. He said

completely inactive. Tr. 56. The inspector's testimony was more consistent, and I credit his account. I find that the south wall was "inactive" in the sense that mining would not continue in that direction, while the west wall was actively being mined.

that back breakage is common, and only poses a problem if it is deep, which this was not. Tr. 39, 47, 49. He stated that the wall had been scaled to a 45-degree angle using a rock breaker, and he believed this would prevent any material from falling. Tr. 40. However, he later admitted that there were loose rocks in the Secretary's Exhibit 2-1 showing the southwest corner and said that that area had probably not been scaled. Tr. 51-52. He stated that as far as he could recall, the wall further down where the loader was working was "in pretty good shape" with no loose material, and he did not believe it posed any danger to the loader operator shown in Exhibit 2-2. Tr. 40, 41. No other work was being done along the west wall at the time. Tr. 42. Evans also testified that miners are trained to watch the highwall as they are loading and to stay at a 45-degree angle to the wall. Tr. 41. He noted that the loaders are 60 feet long with 26 feet from the tip of the bucket to the front of the cab. Tr. 42. The large loaders are used in that area in order to keep the loader operators farther from the wall. Tr. 42.

IV. ANALYSIS

A. The Violation

Perales cited the mine for a violation of 30 C.F.R. § 56.3131. That standard requires that

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

30 C.F.R. § 56.3131.

The inspector testified that he observed loose material and back breakage along the lower bench in the corner of the pit. The photographs from the day of the inspection clearly show large loose boulders on the west wall. Sec'y Ex. 2-1, 2-2; Resp. Ex. D-1, D-4, D-5, D-9, D-10. The photographs also show obvious cracks or back breakage along the west wall. I credit the inspector's testimony that the back breakage created a fall-of-material hazard. Tr. 16. While Evans at one point testified that the west wall had been scaled to a 45-degree angle, he later acknowledged that there were loose rocks indicating that the area had not been scaled. *See* Tr. 40, 51-52; Resp. Br. 6. The angle of repose is not readily apparent from the photographs. Even if the area was indeed scaled, the scaling was not adequate. There was still loose material present that created a hazard to miners working below.

Martin Marietta argues that there was no one working in the area because it had already been mucked out. Resp. Br. 5. However, the witnesses' descriptions of the mining cycle indicate that the loose rocks would most likely arise during blasting. Tr. 16-17, 39. Thus, they were most likely present when the loader approached the corner to remove material, leaving the tire tracks observed by the inspector. Moreover, there was nothing to prevent the loader observed on the day of the inspection from approaching the corner. The area where that loader

was working was part of the same active wall. The fall-of-material hazard was present in an area where a miner was working.

The inspector based his violation in part on information indicating that miners had been working to remove berms near the south wall. The testimony of Evans indicated that in fact the mine was in the process of constructing berms in that area. Resp. Br. 5. Thus, I base my findings on the activity of the loader and the loose rocks and back breakage on the west wall. Those conditions created a hazard to the loader operator working below, and I find that a violation occurred.

B. Significant and Substantial

The Secretary alleges that the violation was reasonably likely to cause injury resulting in lost workdays or restricted duty and was S&S.

A violation is significant and substantial (S&S) “if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to uphold a citation as S&S, the Commission has held that 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). The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010); *see also W. Ridge Res., Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

Here, the Secretary has proven a violation of a mandatory safety standard, 30 C.F.R. § 56.3131. The hazard addressed by the standard is that of loose material falling from the wall when a miner is working below. Perales testified that a vibration could cause material to come down. He observed the loader working in the area, and there were tire tracks from a loader close to the cited area. I find that it was reasonably likely that material would fall while the loader was working below, satisfying the second *Mathies* element.

The third *Mathies* element requires proof that the hazard created was reasonably likely to result in injury. *Musser Eng’g, Inc.*, 32 FMSHRC at 1280–81. Respondent argues that injury was unlikely because no one was assigned to work directly below the loose rocks. Resp. Br. 8. Respondent further argues that even if a miner did enter the area, loader operators are required to

move at a 45-degree angle, allowing them to see any falling material, and the length of the loader would keep the operator at least 26 feet from the wall. Resp. Br. 8-9. Even accepting that a miner was unlikely to enter the area before the next blasting cycle, the tire tracks indicate that a loader operator did approach the wall while the hazard was present. The inspector and Evans gave differing opinions on whether a loader operator would be exposed to injury from a falling rock. I found the inspector to be a credible witness and accept his testimony on this point. Based on the proximity of the tire tracks to the wall, I find that it was reasonably likely that a rock would strike the loader if it fell. The inspector noted that a rock could come through the window of the loader and strike the operator. The rocks were of varying sizes, but he testified that even a small rock could contribute to a fatal injury. I credit his explanation and find that the violation was reasonably likely to result in a reasonably serious injury. I find that the violation was S&S and affirm the gravity as issued.

C. Negligence

The Secretary alleges that the violation involved high negligence on the part of the operator.

In evaluating negligence, the Commission employs a traditional negligence analysis based on whether an operator failed to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Operators are held to a high standard of care under the Mine Act. *Am. Coal Co.*, 38 FMSHRC 2062, 2083 (Aug. 2016); *Brody*, 37 FMSHRC at 1702. The Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have taken under the same circumstances. *Brody*, 37 FMSHRC at 1702. High negligence “suggests an aggravated lack of care that is more than ordinary negligence.” *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

The inspector testified that it is an industry-wide practice to inspect the highwall and scale after every shot before work can proceed. The loose rocks and breakage here were obvious and should have been noticed and addressed before the loader was allowed to work in the area. I affirm the high negligence designation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

- (1) the operator’s history of previous violations,
- (2) the appropriateness of such 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

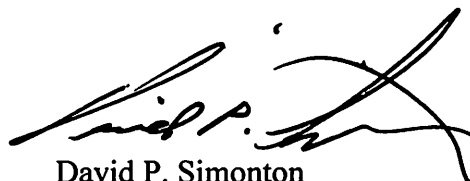
notification of a violation.

30 U.S.C. § 820(i).

The Secretary proposed a penalty of \$1,806.00. The mine has not been cited under this standard in the past 15 months. Sec'y Ex. 3. The parties stipulated that the violation was abated in good faith and the proposed penalty will not affect Respondent's ability to remain in business. Jt. Stips. ¶¶ 9, 10. As discussed above, the violation was reasonably likely to cause an injury resulting in lost workdays or restricted duty and involved high negligence on the part of the operator. I find that the proposed penalty of \$1,806.00 is appropriate to the violation.

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$1,806.00** within 30 days of this order.⁵



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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⁵ 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