FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 16, 1996

STANDARD LAFARGE, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 95-114-RM
	:	Citation No. 4413670; 11/05/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Marblehead Quarry
	:	Mine ID No. 33-00099
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 95-239-M
	:	A. C. No. 33-00099-05546
v.	:	
	:	Marblehead Quarry
LAFARGE CONSTRUCTION MATERIALS, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 96-28-M
	:	A.C. No. 33-00099-05548A
v.	:	
	:	Marblehead Quarry
THEODORE M. DRESS, Employed by LAFARGE CONSTRUCTION MATERIALS, Respondent	:	

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U.S. Dept. Of Labor, Cleveland, Ohio for Secretary of Labor;
William K. Doran, Esq., Smith, Heenan & Althen, Washington, D.C., for LaFarge Construction Materials.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under sections 105(d), 110(a) and 110(c) of the Federal

Mine Safety and Health Act of 1977 (30 U.S.C. §§§ 815(d), 820(a), 820(c)). They involve a citation issued by the Secretary of Labor's (Secretary) Mine Safety and Health Administration (MSHA) as the result of an investigation of an accident at the Marblehead Quarry of Standard Lafarge (Lafarge) (also known as Lafarge Construction Materials (Tr. 9)). The quarry is located in Ottawa County, Ohio.

The citation alleges that Lafarge violated mandatory safety standard 30 C.F.R. §56.16002(a)(1) when a miner who climbed into a surge bin to work was trapped by falling rock. Section 56.16002(a)(1) requires surge bins to be "[e]quipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by caving or sliding materials". In addition, the citation alleges that the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was due to Lafarge's high negligence and unwarrantable failure to comply (30 U.S.C. § 815(d)(1).

Lafarge contested the citation, asserting that it did not state a violation. Also, Lafarge challenged the citation's S&S, unwarrantable, and negligence findings.

After the citation was issued, the Secretary petitioned the Commission to assess Lafarge a civil penalty of $3,800 and to assess Theodore Dress, the foreman in charge at the time of the accident, a civil penalty of $3,000. Lafarge and Dress challenged the petitions.

A hearing was conducted in Toledo, Ohio, at which the parties presented oral testimony and documentary evidence. Subsequently, counsels filed helpful briefs.

THE ISSUES

The principal issues with regard to Lafarge are whether it violated section 56.16002(a)(1); if so, whether the violation was S&S and unwarrantable, and the amount of the civil penalty that must be assessed, taking into consideration the statutory civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. §820(i)).

The principal issues with regard to Dress are whether the alleged violation occurred, whether he knowingly authorized, ordered, or carried it out, and, if so, the amount of the civil penalty that must be assessed, taking into consideration the applicable section 110(i) criteria.

STIPULATIONS

The parties stipulated that:

> 1. The Marblehead Quarry is owned and operated by Lafarge ... [and] is subject to the ... Act;
>
> 2. [T]he Administrative Law Judge has jurisdiction to hear and decide the matters;
>
> 3. Inspector James D. Strickler, who issued [the c]itation [,]... is a duly authorized representative of the Secretary;
>
> 4. [A] copy of the [c]itation ... was served on Lafarge ... and on Dress ...;
>
> 5. [I]mposition of any appropriate civil money penalty will not affect the ability of Lafarge ... to continue in business;
>
> 6. Lafarge ... is a large operator;
>
> 7. [T]he assessed violation history report [Gov. Exh. 1] may be used in determining an appropriate civil money penalty (Tr. 8-9).

In addition to the stipulations, counsel for the Secretary agreed that Lafarge had a small number of pervious violations. He characterized the company's history of violations as "good" (Tr. 130). Counsel also agreed that Dress had no applicable history of violations (Tr. 130).

THE ACCIDENT, THE INVESTIGATION, AND THE CITATION

The Marblehead Quarry is a dolomitic limestone extraction and processing facility. The operation encompasses 2,500 acres and produces 3,500,000 tons of limestone a year (Tr. 89). At the quarry, limestone shot from the face is transported to the primary crusher, where it is reduced in size to 10 inches or smaller. It is then transported by two conveyor belts to a surge bin. The crushed limestone is dumped from the belts into the bin. When the bin is vibrated the stone passes through the bin and falls onto a conveyor belt below the bin. The stone then travels along the belt to other facilities for further processing (Tr. 14-15,51,90; Resp. Exh.1).

The surge bin is approximately 22 feet wide, 22 feet long, and 13 feet high (Tr. 91-92). At the bottom of the bin are a chute and vibrating feeders (Tr. 55, 92). The feeders allow the rock to flow evenly out of the chute and onto the lower conveyor belt (Tr. 52). The chute and vibrators, which are integral parts of the bin, hang below the bin floor.

The floor is flat. It has two rectangular openings in the middle (Tr. 47, 92). As stone falls into the bin from the overhead conveyor belts, it piles on the floor between the two openings. As the vibrators shake the bin, the rock "sloughs off" the piles and falls through the openings, into the chute, and onto the lower conveyor belt (Tr. 96).

The bin was installed at the quarry in 1992. When the bin was first used, some of the rock around the openings was compacted. This rock is so solid that it only can be removed by chiseling or by using high pressure water hoses (Tr. 41, 45, 90, 95). The solid material is called the "dead bed" (29). The dead bed forms ridges around the openings in the bin floor. Rock on the sides of the ridges opposite the openings slids away from the openings and does not pose a hazard to anyone working below. Rock on the other sides of the ridges slids down through the openings (Tr. 41, 49-50; 96 see also Tr. 42-43; Resp Exh. R-2).

David Nelson, the plant manager, testified that miners did not "regularly" work around the bin and that it was not a "standard practice" for someone to work at or in the bin (Tr. 92-93). Nelson believed miners worked inside the bin approximately one time a year (Tr. 94-95). Nelson was familiar with the bin because his duties required him daily to check it (Tr. 96-97).

When a miner was assigned to work inside the bin, the normal procedure at the quarry was to run the vibrators until the sensor at the bin control tower indicated the bin was empty. Then, the vibrators were left running for an additional time to shake out and dislodge anything remaining in the bin (Tr. 97-98). After that, all of the electricity to the bin was disconnected (Tr. 98). However, Nelson admitted that because the bin had not been emptied that often in the past, Lafarge officials did not know "automatically" how long it took to clean out the bin (Tr. 105).

According to Nelson, when Lafarge's employees had to work in the bin, they were instructed "to check the bin for loose material, look at it and use [their] own judgment" (Tr. 98-99). Usually, employees looked into the bin from below. They were closer to any remaining material if they looked from below then

if they looked from above (Tr 100). Nelson agreed, however, that if miners looked into the bin from the top, they would get a "different perspective" (Id.) Nelson was of the opinion, that if loose material remained in the bin after it had been vibrated, the only way to ensure safety was to go to the top of bin, take a bar, and knock out the loose the material (Tr. 105-106).

On July 15, 1994, Daniel Harder worked as a laborer at the quarry. He had been at the quarry for less than two years, but he had a long work history at other quarries (Tr. 33-34). Dress was Harder's foreman. Dress's duties were to supervise miners and to oversee production (Tr. 111-112).

As Dress came to work on July 15, the surge bin was operating normally. However, Dress noticed sand leaking through a hole near the bottom of the bin. Dress looked at the hole and decided that it should be patched. He also decided that the patch could be applied from inside the bin (Tr. 112-113).

To get the bin ready for the repair work, Dress ordered that the vibrators be kept operating. As has been noted, this was the procedure normally used to clean loose rock out of the bin (Tr. 40, 98, 113). The vibrators operatored for approximately 20 minutes to a half hour more.

Dress told Harder and another miner, Brian Chumley, to go the bin. In the meantime, Dress went to the building housing the controls of the bin, disconnected the bin's electricity, and locked out its electrical circuits.

Dress then went to the bin. Harder and Chumley were there. Dress and Harder looked into the bin from below (Tr. 113-114). Dress saw "a cone ... of hard-packed fines ... like a wall of hard-packed sand. And laying up above ... on the other level ... [was] some loose surge material" (Tr. 116-117). Dress did not believe any of this material could fall (Tr. 117). As he recalled, the rock was lying on the side of the dead bed away from the opening (Tr. 41). According to Dress, he and Harder discussed the situation and concluded that it was safe for Harder to patch the hole (Id.).

Harder essentially agreed with Dress. When Harder looked into the bin, he too saw some rock, but like Dress, Harder did not believe that it would fall. Harder did not think that the situation was dangerous (Tr. 21, 24-25, 57). Both Dress and Harder stated that if the rock had looked loose, they would have gone to the top of the bin and knocked it out with a bar.

While Harder prepared to patch the hole, Dress left to find Harder a wooden bock upon which to stand so that Harder could better reach the hole. When Dress returned, Harder had climbed up into the bin and did not need the block (Tr. 118-119). This was the first time Harder had worked inside of the bin.

Once inside, Harder began to weld the patch over the hole. Dress remained outside, along with Chumley (Tr. 22). No other miners were working in the vicinity. During the course of the repair work, Dress and Chumley left so that Chumley could do other work (Tr. 22, 53, 93). However, Dress returned periodically to check on Harder (Tr. 53).

Harder welded for approximately 45 minutes. He was almost finished when he heard rocks begin to fall around him. Harder jumped down to get out of the bin. Harder managed to got his head out of the bottom opening, and he assumed a crouched position. Rocks continued to fall about his back and shoulders. He could not get all of the way out (Tr. 23, 37). Fortunately for Harder, Dress had returned. He came immediately to Harder's aid. He helped Harder remove some of the rocks, and Harder was able to free himself (Id.).

Harder estimated that he was trapped for about five minutes (Tr. 36). He suffered minor cuts. Dress took him for first aid, and asked if Harder wanted to go home. Harder responded that he felt "okay" (Tr.37). He stayed and finished the shift. When describing the experience, Harder stated, "[I]t was scary, that's for sure" (Id.).

In October 1995, Strickler was conducting an inspection at the quarry when an employee told him about the accident (Tr. 64). Strickler investigated and concluded there had been a violation of section 56.16002(a)(1). In Strickler's view, the violation centered around the company's failure to remove the loose material before Harder entered the bin (Tr. 77-78, 79-80). Strickler stated:

> There was a buildup of material in ... [the bin]. They observed it. They tried to make a correction, but it was still there. They made no other attempt to remove the material above the individual and put him in that situation (Tr. 65, see also Tr. 76-77).

In Strickler's opinion, to comply with the standard Dress should have "made sure that there wasn't any loose material in [the] bin" (Tr. 82). The company should have run the vibrators more and should have barred down the rock from the top of the

bin, if necessary (Tr. 68). Strickler stated; "That's taking a little bit more time and more precaution. And evidently, there had to be loose stuff in there because something came loose and covered ... [Harder] up" (Id.).

Strickler testified that the violation was abated when the company "had a safety meeting and instructed the employees on working inside bins and hoppers" (Tr. 127). As best Strickler could recall, the instruction concerned the use of safety belts and lines when going into hoppers (Id.). It also involved instructions in the procedures to take when removing loose material from bins, e.g., running the vibrators. Abatement did not include the installation of any additional devices on the bin (Tr. 128).

Strickler cited the company pursuant to section 104(a) of the Act (30 U.S.C. § 814(a)). After discussing the citation with his supervisor, Strickler modified it to one issued pursuant to section 104(d)(1) (Tr. 67-68). The modification was based on Strickler's belief that the violation was due to Lafarge's unwarrantable failure to company with section 56.16002(a)(1). He explained that the company knew that rock had built up in the bin, nevertheless Dress assigned Harder to work inside the bin (Tr. 68). Strickler also believed that the company was "highly negligent" (Tr. 69). Finally, Strickler found that the violation was S&S because he believed it reasonably likely that Harder would have suffocated (Tr. 69).

THE MOTION TO DISMISS

Following presentation of the Secretary's case-in-chief, counsel for Lafarge and Dress moved to dismiss the proceedings. Counsel argued that the Secretary had not proven a violation, in that section 56.16002(a)(1) states its requirements are applicable during "normal operations", and patching the hole in the bin "was definitely not a part of the normal operations" (Tr. 85). Counsel for the Secretary responded that patching the hole constituted maintenance of the bin and that "maintenance is considered part of ... normal operations" (Tr.86). I agreed with counsel for the Secretary, and denied the motion (Id.).

THE VIOLATION

The first issue is whether there was a violation of section 56.16002(a)(1). If not, Lafarge's contest must be granted and the Secretary's civil penalty proceedings dismissed.

Citation No. 4413670 states:

> On 7-15-94 a maintenance employee was required to perform the task of welding a metal patch on the inside of [the] ... surge bin. The employee started out by standing on top of the vibrating feeder, in order to gain a better angle to weld, he climbed up inside the bin. After a short period of time, loose material began to fall, the employee attempted to exit the discharge chute, when the loose material entrapped him.... The foreman at the scene was able to free him by removing some of the large rocks and getting him off the feeder (Gov. Exh. 3).

Subsequently, the citation was modified as follows:

> It was management's responsibility to take the necessary precautions to eliminate the hazards involved, [p]rior to assigning an employee to the task of welding a metal patch on the inside of the ... bin. After running the bin vibrators to remove most of the material from inside the bin, management observed material attached to the sides of the bin but made no attempt to remove loose material prior to the work being started (Id. at 2).

Subpart O of the regulations for metal and nonmetal mines contains standards for "Materials Storage and Handling". Section 56.16002 of Subpart O contains standards for "[b]ins, hoppers, silos, tanks, and surge piles." As noted, section 56.16002(a)(1) states in pertinent part

> (a) Bins ... where loose unconsolidated materials are stored, handled or transferred shall be —
> (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations person are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials[.]

The wording of the standard makes clear that the specified facilities used for storing and handling materials — bins, hoppers, silos, etc. — must either be equipped with mechanical devices or with other means so that persons are not required to enter or work where they are exposed to entrapment. It also makes clear that the standard is applicable during normal operations.

Here, the vibrators were the "mechanical devices" with which the bin was equipped to prevent persons from being trapped. They

were an integral part of the bin. Although they were used primarily to shake stone into the feeder and to facilitate its even flow onto the belt below, they also could be and were used to comply with the standard. (Strickler and Dress essentially agreed that the company tried to eliminate all of the loose material by running the vibrators until the loose rock was cleared from the bin (see especially Tr. 65, 76-77).) That the mechanical devices had a dual purpose does not prevent them from meeting the singular goal of the standard.

In addition to the "mechanical devices" required by the standard, the record supports finding the bin was equipped with another "effective means" to prevent entrapment. The inspector and Lafarge's witnesses agreed that a bar could be used from above to knock down and eliminate loose material (Tr. 68, 105-106, Tr. 120). While it is true that unlike the vibrators, the bar was not attached to bin, the bin was nonetheless "equipped" with the bar in that the it readily was available when necessary (Tr. 120) (Webster's Third New International Dictionary 768 (1968)).

Since the bin was equipped with mechanical devices to prevent persons from working where they were exposed to entrapment by caving or sliding materials, Lafarge was required to use the devices to achieve the mandated result. In other words, Lafarge was required to operate the vibrators to clear the loose rock so that Harder would not be trapped. If its operation of the vibrators did not sufficiently clear the rock, Lafarge was required to make sure a bar was used to complete the task. In other words, under the standard, both the means for achieving the end and effective use of the means were required.

By failing to operate the vibrators to eliminate all of the loose rock, and by failing to ensure that the remaining loose rock was barred down prior to Harder entering the bin, Lafarge violated the standard, provided patching the hole was a "normal operation".

As used in the standard, "normal" connotes a regular or periodic pattern (see Webster's 1540). Nelson, the plant manager, testified that miners worked inside the bin approximately once a year (Tr. 94-95). Thus, they were regularly exposed, albeit on an annual basis, to the hazards of such work. This periodic exposure was sufficient to make such work a "normal operation".

In addition, the hole in the bin, was the result of the regular use of the bin. Repair of the hole was simply a

necessary extension of this regular use and, as counsel for the Secretary argued, in this way too was a “normal operation”.

Therefore, I conclude that Lafarge violated the standard.

S&S AND GRAVITY

A violation is properly designated 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, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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 (January 1984); see also Austin Power Co. v. Secretary, 861 F.2d 99, 104-105 (5th Cir. 1988) (approving Mathies criteria).

Here, the Secretary has proven all four. There was a violation of section 56.16002(a)(1). It contributed to a measure of danger to safety in that the failure to ensure the vibrators were used effectively or that a bar was used to eliminate the remaining loose rock, meant that a person entering the bin was subject to being trapped by the rock. Moreover, there was a reasonable likelihood that the hazard contributed to would result in an injury. Given Harder’s presence under the rock and given the work he was doing, the loose rock was likely to fall on Harder at any time and to subject him to crushing injuries or suffocation. Harder was lucky. He suffered only minor cuts. However, it was reasonably likely that he would have been more severely injured or even killed.

In addition to being a significant and substantial contribution to a mine safety hazard, the violation was very serious. It long has been held that to determine the gravity of a violation, the violation should be analyzed in terms of its potential hazard to the safety of miners and the probability of that hazard occurring (Robert G. Lawson Coal Co., 1 IBMA 115, 120

(May 1972)). The potential hazard was injury due to cuts and/or broken bones, or death due to asphyxiation. Because Harder was required to work in the immediate presence of loose rock, it was probable that an accident causing serious injury or even causing death would happen.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act" (Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987)). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care" (Emery, 9 FMSHRC at 2003-04).

While the violation was not caused by intentional misconduct, the company was guilty of a serious lack of reasonable care. First, patching the hole from inside the bin potentially was a very dangerous job. Any miner assigned to do the job was subject to being injured or killed unless loose rock above the miner was removed. This potential threat required heightened precautions on the part of Lafarge and those acting for it. Rather than exhibit heightened care, the company and Dress relied on procedures normally used at the quarry to make sure the bin was safe.

The evidence leads inescapably to the conclusion that no one at Lafarge knew enough about emptying the bin to be certain that the procedures were adequate. As has been noted, the procedures involved the visual examination of the bin from below after the vibrators had been run for approximately 25 minutes (Tr. 101-102, 117), and for a "judgment call" based on the examination (Tr.98). Nelson candidly admitted that Lafarge officials did not "automatically" know how long it took to clear the bin, because they had not done it that often (Tr. 105). Moreover, visual inspection from below did not give a sufficiently full perspective of what remained in the bin. Inspection from above also was necessary (see Tr. 74, 79-80). In view of these factors, it was not enough for the company to have miners "look at it and use [their] own judgement" to determine whether or not loose rock remained (Tr. 98). The company should have required more.

For example, before a miner entered the bin, the company should have mandated inspection from both below and above and should have required that a bar be used from above, no matter how

long the vibrators had run.

To put the matter another way, given the company's relative unfamiliarity with emptying the bin and given the danger inherent in the work assignment, the company should have erred, if at all, on the side of safety. Its failure to make sure that the normal prework procedure did not involve more than vibrating the bin for a period it believed, but was not certain, was adequate, and did not involve more than miners, who were unfamiliar with assessing what they saw, visually inspecting the bin, represented a serious lack of reasonable care. I conclude therefore that the violation was caused by the unwarrantable failure of Lafarge to comply with the standard.

Having concluded the company exhibited a serious lack of reasonable care in allowing the violation to exist, I also conclude that the company commensurately was negligent.

CIVIL PENALTY ASSESSMENT

The violation was very serious. Lafarge was extemely lucky Harder was not disabled, or worse. The violation was caused by the company's serious lack of care. These criteria, along with the company's large size, would warrant a substantial penalty, if they stood alone. However, the are balanced by the mitigating effect of the company's prompt abatement of the violation and by its small history of previous violations.

The violation was not part of a pattern of neglect of the company's statutory responsibilities. Rather, as indicated by the company's history of previous violations, it was more in the nature of an isolated incident. Although, the Secretary has proposed a civil penalty of $3,800, I conclude that a penalty of $2,500 should be assessed.

KNOWING VIOLATION

Section 110(c) of the Act provides for the assessment of a civil penalty when any agent of a corporation "knowingly [has] authorized, ordered, or carried out" a violation of a mandatory health or safety standard (30 U.S.C. § 820(c)). Since there is no dispute about the corporate status of Lafarge and Dress' status as an agent, the critical question is whether, as the Secretary alleges Dress knowingly violated section 56.16002(a)(1).

The Commission has approved the description of "knowingly" found in U.S. v. Sweet Briar, Inc.,92 F. Supp. 777 (W.D.S.C. 1950)). There, the court stated that the word:

> does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence (92 F. Supp at 780).

The Commission has found that this interpretation:

> is consistent with both the statutory language and the remedial intent of the ... Act (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982).)

It has explained that:

> If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC at 16).

In addition, the Commission has held that to violate section 110(c), the person's conduct must be "aggravated", i.e., it must involve more than ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

It is certain that Dress did not intentionally violate the standard. Harder was sure that Dress never would assign him to do a job that Dress believed was dangerous, and I agree (Tr. 24). The respect Dress and Harder had for one another was apparent at the hearing. Both clearly were troubled by what had happened and relieved and grateful the consequences had been slight.

This said, it also is clear that intent is not the issue. Rather, and as explained by the Commission, the question is whether Dress should have known of the violation and whether he exhibited more than ordinary negligence in allowing the violation to occur.

As a foreman, Dress had a high standard of care to the company for whom he worked and to the miners who worked pursuant to his directions. When Dress assigned Harder to work under conditions that were potentially very hazardous, it became incumbent upon him to meet a standard of care proportionate with the danger. Rather than do this, Dress relied on the usual

procedures of running the vibrators and of visual inspecting the bin from below in order to assess and remove the danger, and, as I have found, these procedures were wholely inadequate.

Because of the unfamiliarity of company personnel with emptying the bin, because of the unfamiliarity of miners with working in the bin, because Harder never had worked in the bin before, there were too many uncertainties involved (see Tr. 105). In view of them, and of the fact that Harder easily could have been trapped, severely injured, or killed if he misjudged the situation, Dress should have know that loose material might remain and should have insisted that the bin be viewed from above and a bar be used. He did not.

I conclude, therefore, that Dress should have known of the violation and that his failure represented more than ordinary negligence. As a result, he knowingly violated the standard.

CIVIL PENALTY ASSESSMENT

This was a very serious violation, and Dress exhibited more than ordinary negligence in failing to make sure that Harder was not exposed to entrapment by sliding and falling rock. The Secretary has proposed that Dress pay a civil penalty of $3,000. However, I find it incongruous that the Secretary proposes Dress, an individual, pay a civil penalty greater than three fourths the amount of that proposed for Lafarge, a large operator.

Moreover, although Dress used bad judgement in placing Harder in harm's way, there is no suggestion that Dress was habitually careless in assigning miners to work in violation of mandatory safety standards. Indeed, the company's overall good history of previous violations and the fact that Dress has no applicable history of previous violations suggests exactly the opposite (Tr. 130).

In view of the fact that the violation appears to have been the result of a single, isolated lapse of judgment on Dress's part, I conclude that a penalty of $500 is appropriate.

ORDER

DOCKET NO. LAKE 95-114-RM

CITATION NO.	DATE	30 C.F.R.

4413570 10/5/94 § 56.16002(a)(1)

The citation is AFFIRMED, and DOCKET NO. LAKE 95-114-RM is DISMISSED.

DOCKET NO. LAKE 95-239-M

CITATION NO.	DATE	30 C.F.R.	PROPOSED PENALTY	ASSESSED PENALTY
4413570	10/5/94	§ 56.16002(a)(1)	$3,800	$2,500

Lafarge is ORDERED to pay a civil penalty of $2,500 within 30 days of the date of this decision.

DOCKET NO. LAKE 95-28-M

CITATION NO.	DATE	30 C.F.R.	PROPOSED PENALTY	ASSESSED PENALTY
4413570	10/5/94	§ 56.16002(a)(1)	$3,000	$500

Dress is ORDERED to pay a civil penalty of $500 within thirty days of the date of this decision.

Upon receipt of the payments, DOCKET NO. LAKE 95-239-M and DOCKET NO. LAKE 95-28-M are DISMISSED.

David F. Barbour
Administrative Law Judge

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