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SOL (MSHA) V. WALKER STONE CO. INC.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. DENV 79-217-PM A.C. No. 14-00164-05001
v.	Kansas Falls Quarry & Mill Mine
WALKER STONE COMPANY, INC., RESPONDENT	Docket No. DENV 79-367-PM A.C. No. 14-01200-05001 P. F. Quarry and Mill

DECISION

Appearances: Keithley F. T. Lake, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
David S. Walker, President, Walker Stone Company, Inc., for Respondent

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). On January 15, 1979, the Mine Safety and Health Administration (MSHA) filed a petition for the assessment of civil penalties, docketed in DENV 79-217-PM, alleging that Respondent committed violations of 30 CFR 56.12-25, 56.12-8, and three separate violations of 56.5-50(a). Thereafter, on February 28, 1979, MSHA filed a second petition, docketed in DENV 79-367-PM, alleging that Respondent committed two violations of 30 CFR 56.12-1 and one violation of 56.14-1. On February 16 and March 12, 1979, Respondent filed answers contesting the violations in these dockets. A hearing was held on September 5, 1979, in Kansas City, Missouri, at which Petitioner was represented by counsel and Respondent was represented by its president, Mr. David S. Walker.

Docket No. DENV 79-217-PM

Citation No. 183004, March 22, 1978

Evidence was first received on Citation No. 183004 which alleges a violation of 30 CFR 56.12-25. After the conclusion of the parties'

presentation, a decision was made orally from the bench. It is recorded at pages 75-79 of the transcript and with certain necessary corrections and deletions reads as follows:

> THE COURT: All right. That completes, then, the evidence on this particular citation; and, as I announced, I will rule, or decide, this matter from the bench unless somebody objects to that at this time.
>
> Now, ordinarily, I would proceed and make a finding first as to the facts of the violation. However, we do have a number of alleged violations here, today; and, in order to dispose of certain criteria that would be involved in each and every one of those, if they were proved, I think that it might be orderly just to go ahead and make findings on those so that they can be applied, then, to each and every one of the citations, if any, that are found to be violations.
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> Number one, as to the history of past violations: No evidence was presented, so I find there is no history.
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> Number two, as to the size of the company: Based on the evidence presented, the acreages and the number of people working, I find that it is a small concern.
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> Number three, I further find that the penalties which will be assessed here, will not affect the operator's ability to continue in business.
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> Now, with respect to Citation No. 183004, the inspector alleged as the condition or practice the following: "Enclosures of the southside control house were not properly grounded." He alleged that this violated 30 CFR 56.12-25. That provision of the mandatory standards reads as follows: "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."
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> The following is my decision as to the fact of the violation; and I'm going to preface it so that there will be no misunderstanding about my decision. I have no question or doubt about the seriousness of this condition. The matter that preceded this case [in another docket and concerning a different company] involved an exactly similar kind of condition; and the man was killed. So you simply cannot underrate, or understate, the seriousness. * * * But I am not dealing with that in this decision.
>
> My decision is based on the lack of sufficient specificity in the citation. I will try to explain that, if

I can. * * * The inspector pointed out that he finds where some of the "enclosures" * * * had no ground at all; and some that were grounded; but, in his view, not properly. Furthermore, he indicated that his view, as to the, as to whether a grounding was proper or not proper, was based on his reading of the Electrical Code; and I believe that he indicated he relied on the 1975 edition.

Now, having heard all of the evidence on both sides, it just seems to me that the statement made, as to the condition or practice, was such that Respondent would be hardput to defend itself.

The rules do require that these citations be explicit. Now, then, what I mean by that is this: If we're relying here on the failure of grounding, the word "properly" should not have been used at all. In other words, not grounded, that would be one kind of a case and could be defended on that basis.

Now, if it were, and apparently is, based, at least in part, on a so-called improper grounding, then I believe that this citation should specify if it was based as I understand it was, on a standard, if that's what they're called, as set out in the Electrical Code. I think that should be indicated so that the operator, or the Respondent, will know with which, with what he is charged. It's a question of exactness.

If it, in fact, includes both these items, that, too, it seems to me, [should] have been stated. The operator did understand sufficiently to abate the problem because a new grounding system, or method, was installed; but * * * in this circumstance, I don't know that that cures the [problem].

The reason I was so careful to distinguish that I am ruling only on the basis of the exactness, or specificity, of the citation is because I don't want to get into the problems and the questions of what is involved by, indirectly at least, incorporating the Code, the Electrical Code, in such a regulation as this. I am just not addressing myself to that question whatsoever.

I hope that is clear in this record that I am basing my decision wholely on the language used in describing the citation; and since the inspector is here, I have to say that this is no criticism in any way, shape or form of his action; but I do honestly believe, in these circumstances, that is not a clear enough statement to defend. So that is my decision on this citation.

Thus, as to Citation No. 183004, it was found that there was no violation since the citation was vague and ambiguous and that it did not give sufficient notice as to the exact nature of the violation. The citation was vacated and the portion of the petition concerning that citation was dismissed (Tr. 132). I hereby AFFIRM this decision for Citation No. 183004.

Citation No. 183005, March 22, 1978

Following the above decision, Petitioner and Respondent introduced evidence on Citation No. 183005. After considering this evidence, a decision was issued from the bench. This decision found in the transcript at pages 90-93, with some corrections, is set forth below:

> THE COURT: On this citation, we are here considering Citation No. 183005, the inspector charged, as a condition or practice, as follows: "Energized power conductors, entering the control switchboxes in the southside control room were not passing through insulated bushings."
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> This was alleged to be a violation of 30 CFR 56.12-8 which reads as follows: "Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."
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> This is my decision on this citation; and I should state, which I failed to state previously, that this is pursuant to 29 CFR 2700.65(a), which provides that this decision, will be reduced to writing after the filing of the transcript; and I want to specifically reserve the right to make appropriate corrections or changes; and, if necessary, I might make some additions.
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> My decision on the fact of the violation is as follows: The evidence here, [which] as I understand it, is practically, if not wholly, undisputed, is that power conductors were entering the control switchboxes and were not passing through insulated bushings. Now, this is directly contrary to the mandatory standard which I cited.
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> The defense, as I understand it in part, was that these provisions or standards do not act to give a warning to Respondent, or the operator, so that he will know specifically whether or not he is in violation. I think it should be noted that Congress, in passing this law, has

provided little or no discretion where standards are violated. The only discretion that comes into it is the amount of the penalty which is based, then, on various criteria such as gravity and negligence; and so, therefore, in appropriate cases, the penalty can be very small, if those things are taken into account. But, otherwise, the legislation, the legislative history is clear that when the standards are violated, the inspector has no alternative but to issue a citation; and, unless for some reason the Commission should find that it would be unwarranted, I believe that it also is obligated to find a violation.

So I do find that, in this case, the standard as charged was violated. My findings on the statutory criteria are as follows: I have already made findings on the prior history, size of the operator and effect on the operator's ability to continue in business.

So far as good faith compliance is concerned, my recollection is that there was no specific evidence on this point; and so I will [make no finding] on this particular criterion.

Gravity: The inspector testified as to the seriousness of it, the fact that it could cause a shock and even an electrocution; and I accept his testimony and find that it is serious.

So far as negligence is concerned, there was some testimony, I believe, that the operator should have been aware. Mr. Walker, himself, has testified, however, that this installation was made by a qualified electrician, had been there for a number of years without any problem, and that, in the circumstances, he had no particular reason to be aware of the violation. However, as pointed out I believe during the course of the testimony, there is an obligation on the part of operators to be aware of the regulations. So, in the circumstances of this case, I will find that there is some negligence. That completes the criteria.

The Office of Assessments has asked the sum of $40 for this violation; and I believe that it is an appropriate amount in the circumstances; and I hereby assess the sum of $40.

I hereby AFFIRM the above decision and assessment for Citation No. 183005.

Thereafter, the parties introduced evidence in a consolidated fashion on Citation Nos. 183014, 183016 and 183018 which cite separate violations of 30 CFR 56.5-50(a). The following bench decision found at pages 128-131 of the transcript, with some necessary corrections, was issued at the hearing on the merits of the three violations:

> THE COURT: Both sides rest. I will make this decision pursuant to the same reservations I previously mentioned. My decision on the fact of the violation is as follows; and this concerns the following citations: 183014, 183016 and 183018. Each of these citations allege a violation of 30 CFR 56.5-50(a).
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> The inspector found, respectively, overexposure levels as follows: 245 percent, 319 percent and 479 percent. In terms of decibels, this has indicated noise level readings, respectively, in the three cases of 96, 101 and 94 to 97.
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> The standard involved, which is 56.5-50, requires that no employee shall be permitted an exposure to noise in excess of that specified in the table below. The table specifies that any employee, working 8 hours, shall be exposed to no more than 90 decibels.
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> In this case, the readings were made for periods of 520 minutes, 480 minutes and 500 minutes, respectively; each of which [equals or] exceeds an 8-hour period. Accordingly, at least as I understand this regulation, there has been a violation in each of the three instances. However, I recollect that the fact of the violations was tied into the failure to wear the personal protective devices; and this comes about because, under the measurements taken, if personal protective devices are worn and reduce the noise sufficiently to * * * the permissible noise exposures, * * * in these instances at least, there would be no violation.
>
> It seems to me that the matter of wearing these personal protective devices, in this case, is more of a policy matter on the part of the enforcement agency; and does not specifically raise a question in regard to whether or not this provision is violated. As I read it, the men were not wearing the devices; and they were overexposed, as found by the dosimeter; and, accordingly, the section has been violated.

I don't understand there being a question before me as to whether or not it would be violated had they been wearing the ear protection devices because that would raise whole new questions of fact about how much those particular devices would reduce the noise or other questions. To summarize, I do find violations, in the three cases cited, as charged.

My findings on the criteria, other than history, size of operator and effect on the operator's ability to continue in business are as follows:

Good faith compliance: I understand that the miners involved were provided with protective devices which provided the abatement in this instance. There being nothing to the contrary, I find that there is good faith compliance.

So far as the gravity, or seriousness, is concerned, the inspector testified that serious ear injury could result. I accept his testimony and find that the violations are serious.

On negligence, the inspector testified that the foreman, or other supervisors, could have observed the failure to wear the ear protective devices which, in this case, would have been satisfactory to meet the standard. Mr. Walker, testifying for the operator, has suggested that, or testified that it was company policy to provide to the miners these protection devices; and that if they did not wear them, there was not much the company could do about it.

As has been brought out here in the course of the questioning, the standards are mandatory. This does create problems where you're dealing with individuals. The question of the failure of an employee to wear the proper equipment is one that, in other areas, has been raised. In the course of the negotiations, consultations, with Labor, I believe that, if this matter is properly approached and the seriousness of it impressed upon the union leadership, or the labor leadership, that they will, in most instances, comply.

If there is an instance, and it's brought to my attention, where the operator has been in absolute good faith and has done everything that you could ask that operator to do and the men still, for one reason or another, fail to respond, then I would take that into account; and in all probability would find no violation in that particular instance.

To sum it up, however, in view of all the circumstances mentioned, I would find [some] negligence in this instance. Because of the circumstances, however, in assessing a penalty, I would take into account the difficulties mentioned. The Office of Assessments has proposed a penalty of $38 for each of the three instances; and because of the circumstances, I would cut that in half and assess a penalty of $19 for each of the three instances. So that completes the record as far as these three citations are concerned.

I hereby AFFIRM the above decision finding violations as to Citation Nos. 183014, 183016 and 183018, and assessing separate penalties of $19 for each violation.

Docket No. DENV 79-367-PM

Citation Nos. 183076, 183077, 183079, September 7, 1978

Following the decisions made in DENV 79-217-PM, Petitioner made the following motion to approve a settlement for all the citations in DENV 79-367-PM:

MR. LAKE: * * * At this time the Petitioner would like to present to the Honorable Judge Michels a proposed settlement for his consent and which has been reached between the Petitioner and the Respondent, Walker Stone.

As to Citation 183076, which alleged a violation of 30 CFR 56.12-I, where it was stated that the electrical circuits, originating in the control trailer, were not equipped with circuit breakers or fuses of the correct size and capacity to protect the circuits against excessive overloads or short circuits.

The aforesaid citation was reviewed by the Office of Assessments and a penalty of [$24] was assessed. The Petitioner and the Respondent have agreed to reduce that to $16. It is the Petitioner's belief that the good faith exhibited by Walker Stone in removing this condition from the work premises was sufficient to warrant the reductions in that he [Mr. Walker] recognized, [and] he has rectified the condition and took immediate steps to abate it.

We think, for [this] purpose, the Act and the public policy considered in the aforementioned Act would be very well served. We also point out that the negligence involved in this citation was not of the degree that would not warrant a reduction in the fine. In view of the fact of the cooperation of the Walker Stone Company and their history of complying with the various suggestions brought

them by the Mine Safety and Health Administration, we think that a reduction in this instance would be in the best interest of the Act.

In regards to Citation No. 183077, which alleged a violation of 30 CFR 56.12-8, in which electrical control boxes and the control trailer of the stacking conveyor were not equipped with proper fittings or insulated bushings where the power conductor entered the boxes. It has been stated that the Walker Stone Company had employed an electrical contractor to do this work.

Mr. Walker stated that he was not that familiar with all the provisions of the Code as to all the fittings and the fact that he immediately took steps to insure that the proper bushings were inserted, were taken into consideration in proposing the settlement.

The Assessment Office, in this instance, assessed a fine of [$30]. We propose that this be reduced to $24 in view of the good faith shown by Walker Stone Company and [its effort to] rectify the condition. We feel that this would effectuate the purposes of the Act in view of the fact that the Walker Stone Company is aware of the obligation it owes to its employees and has taken immediate steps to rectify the condition.

Citation No. 183079, involving a violation of 30 CFR 56.14-1, in which it was alleged that a V-belt drive on the primary crusher conveyor was not equipped with a guard to prevent persons from contacting the pinch point of the V-belt drive. [On] this violation an assessed penalty of [$34] was proposed by the Office of Assessments.

In reviewing this particular citation, this piece of equipment is a portable piece of equipment, transported from job site to job site; and had just been relocated at this particular facility; and the particular guard in question here was inadvertently left at a prior work site. The equipment did have a guard that was used at all times with the equipment; and it just happened to be a fortuitous circumstance. The equipment was brought on this particular work site and, in the process, the guard was left behind.

We think that, in view of the facts, the circumstances here could be described as slight negligence [since] * * * there was a guard for the equipment and it just happened that it was not transported at that particular time to this particular location.

> We therefore propose to reduce the penalty to $24 in this instance. We think, due to the circumstances in this case, the purposes of the Act would be effectuated, again stating the machine was guarded, did have a guard. It just happened that it was not transported; and the time lapse between a transportation of this piece of equipment and the inspection was very short; and I think it was just a case of slight negligence.
>
> We therefore propose that the Judge approve the settlement as submitted by the Petitioner and agreed to by the Respondent; and we feel that this settlement * * * reflects the good faith effort of the Respondent to bring the conditions into compliance; and he has complied. We think that * * * the approval of the settlement would effectuate the purposes of the Act. Thank you.

This settlement was approved at the hearing subject to the submission of a non-admissions clause (Tr. 138). On September 14, 1979, counsel for Petitioner filed the clause set out below which is hereby incorporated as part of the settlement agreement:

> Respondent's consent to the entry of a Final Order by the Commission pursuant to the Settlement Agreement shall not constitute an admission by the Respondent of any violations of the Act, in any subsequent proceedings other than proceedings brought directly under the provisions of the Mine Safety and Health Act of 1977.

The settlement for the three violations in DENV 79-367-PM is hereby AFFIRMED.

The summary of the dispositions in these two dockets is as follows:

Docket No. DENV 79-217-PM

Citation No.	Assessment or Action Taken
183004	VACATED
183005	$40
183014	19
183016	19
183018	19

Docket No. DENV 79-367-PM

Citation No.	Settlement Amount
183076	$16
183077	24
183079	24

ORDER

It is ORDERED that Respondent pay total penalties of $161 within 30 days of the date of this decision.

Franklin P. Michels
Administrative Law Judge