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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. PENN 79-161-M A.O. No. 26-00265-05009I
v.	Cedar Hollow Plant and Quarry
WARNER COMPANY, RESPONDENT	

DECISION AND ORDER

Appearances: Barbara Kaufmann, Esq., Covette Rooney, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner Thomas McGoldrick, Esq., Bala Cynwyd, Pensylvania, for the Respondent

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Reading, Pennsylvania on April 24, 1980. The gravamen of the charge was that the operator failed to ensure strict compliance with the mandatory safety standard that requires electrically powered equipment be deenergized and locked out before mechanical work is done on such equipment, 30 CFR 56.12-16. As a result of this dereliction, it was charged the Lime Plant Foreman lost his right hand when he attempted to remove a blockage in a chute feeding the screw conveyor with the power on. For the extremely serious violation charged and for the foreman's failure to exercise the high degree of care imposed by the Act, the Assessment Office proposed a penalty of $5,000. Upon contest, the solicitor recommended the penalty be increased to $10,000.

The operator admitted the fact of violation but claimed its foreman's misconduct and negligence was so unforeseeable and unpreventable as to make it unjust to impute his actions to the operator for the purpose of determining the amount of the penalty warranted. The operator further claimed the contributory negligence of its nonsupervisory personnel (rank-and-file miners) was not attributable to it as a matter of law.

In response to the trial judge's pretrial order the parties briefed the issues of strict liability and imputed negligence. On April 18, 1980 the trial judge issued an order establishing as the law of the case (1) that the Mine Safety Act is a strict liability statute, (2) an operator is vicariously liable under the doctrine of respondent superior for both the violations and the negligence of its employees and officers of whatever rank, (3) the negligence of an operator's agents and employees of whatever degree is imputable to the operator for the purpose of assessing an appropriate civil penalty, and (4) the operator may show in mitigation that the conduct of an agent was so aberrational in nature as to be substantially or totally unforeseeable or unpreventable.

After hearing the parties at length and carefully considering the evidence adduced, the trial judge entered the following bench decision:

> Based on a preponderance of the reliable, probative and substantial evidence, and after carefully observing the demeanor of the witnesses and probing their veracity, I find:
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> 1. The violation charged did, in fact, occur.
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> 2. That it was extremely serious and created a hazard of a fatal or disabling injury.
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> 3. That the violation occurred as a result of the Lime Plant Foreman's (Mr. Martyniuk's) thoughtless, if not reckless, disregard for compliance with the mandatory safety standard cited.
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> 4. That the operator's defense in mitigation of the penalty, namely unforeseeable and unpreventable employee misconduct is unpersuasive. It is unpersuasive because the operator knew or should have known that before the accident its lock-out procedure was inadequate and widely disregarded. There has been much improvement since then. The operator's defense is also unpersuasive because under the circumstances Mr. Martyniuk's conduct as well as that of Mr. Thompson and Mr. Richardson was not aberrational or unforeseeable but ordinary human error that stemmed from a lack of safety consciousness. Only conduct that is willfully reckless or obviously inexplicable, demented or suicidal can reduce imputable conduct amounting to gross negligence to that of slight negligence.
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> 5. The operator's defense is also unacceptable as a matter of law. The Mine Safety Law is a strict liability statute under which an operator is liable without fault for the failure of its employees to exercise the high degree of care imposed by the Act. Here, no basis is shown for refusing to impute, without diminution, the gross negligence of Messrs. Martyniuk,

Thompson and Richardson to the operator.

6. That to insure a change in the widespread attitude of disregard for safe practices that previously existed on the part of management and labor in this facility, the Secretary should announce his intention to invoke the authority of section 110(c) of the Act to prosecute any individual civilly or criminally for any future violations of 30 CFR 56.12-16.

7. That the premises considered and after a careful balancing of the equities, the amount of the penalty warranted and that best calculated to deter future violations and insure voluntary compliance is $7,500.

Accordingly, it is ORDERED that the operator pay a penalty of $7,500 on or before May 15, 1980.

The foregoing is a true and correct copy of the decision entered on the record in this matter on April 24, 1980. It is ORDERED, therefore, that the same be, and hereby is, ADOPTED AND CONFIRMED as the trial judge's final decision in this matter.

Joseph B. Kennedy
Administrative Law Judge