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SOL (MSHA) V. KEYSTONE PORTLAND CEMENT
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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 80-25-M
A.O. No. 36-00125-05006 F

v.

Mine: Keystone Portland Cement
Quarry and Plant

KEYSTONE PORTLAND CEMENT COMPANY,
RESPONDENT

DECISION

Appearances: James Swain, Esquire, Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Petitioner Mark S. Refowich, Esq., Fishbone and
Refowich, Easton, Pennsylvania, for Respondent

Before: Judge Edwin S. Bernstein

On March 5, 1979, Barry Ettleman, an electrician apprentice,
was electrocuted while working at an electrical panel at
Respondent's plant. After an investigation, Petitioner alleged
that Respondent violated the mandatory safety standard at 30
C.F.R. 56.12-16.(FOOTNOTE 1) Respondent admitted that it violated
the standard, and stipulated to four of the six criteria to be
applied in determining the amount of a civil penalty under
Section 110(i) of the Federal Mine Safety and Health Act of 1977
(the Act). A hearing was held on September 30, 1980, in
Philadelphia, Pennsylvania, to determine the amount of the
penalty to be assessed.(FOOTNOTE 2)

Findings of Fact

The parties stipulated, and I find:

1. Respondent owns and operates a cement quarry and plant in Bath, Northampton County, Pennsylvania.
2. Respondent's facility comes within the jurisdiction of the Act, and I have jurisdiction over this proceeding.
3. Respondent violated 30 C.F.R. 56.12-16 in connection with the death of Barry Ettleman on March 5, 1979.
4. Respondent is a medium-sized operator with approximately 328,485 man-hours of work per year.
5. Between March 8, 1977, and March 7, 1979, Respondent was cited for 36 violations under the Act, including one other violation of 30 C.F.R. 56.12-16.
6. Respondent demonstrated good faith in abating the violation by stopping production for approximately five and one half hours while the relay circuit that caused Mr. Ettleman's death was removed and rewired.
7. The assessment of a civil penalty of \$8,000 (the amount originally proposed by Petitioner), or even \$10,000 (the maximum penalty allowed in this type of proceeding under Section 110(a) of the Act), will not affect Respondent's ability to remain in business.

Mr. Marvin H. Bock, an electrical inspector for MSHA, and Robert L. Rough, an MSHA metal-nonmetal inspector, testified for Petitioner. Respondent did not present any witnesses on its behalf. However, acting under the authority of Section 113(e) of the Act (FOOTNOTE 3) and Rule 614 of the Federal Rules of Evidence, (FOOTNOTE 4) I called John Flemscich, an electrician and the sole eyewitness to the fatality, to testify.

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Inspector Bock testified that he had been with MSHA for 22 months as of the date of the hearing, and that previously he spent 24 or 25 years doing electrical work for Bethlehem Mines Corporation. He has been an electrician or electrician trainee since 1943. At the time of the accident, he was an inspector trainee with MSHA, having been with the agency less than eight months.

Mr. Bock explained that on March 7, 1979, he and MSHA inspector Robert L. Rough visited Respondent's plant to investigate a fatality which occurred the previous night. The inspectors were taken by a plant official to the site of the palletizing machine where Mr. Ettleman had been electrocuted. Mr. Bock discovered a relay in the panel which was not shown on the company's electrical diagrams and was, in his opinion, added after the panel was installed. This was the part of the panel which electrocuted Mr. Ettleman. None of the people working at the plant at the time were aware of the relay's purpose. The relay was not controlled by the cutoff switch on the side of the panel, but by a power control located two floors above. Mr. Bock concluded that the relay was not original equipment, but may have been added by outside contractors. This would have been done at least 12 years before the accident. The plans for the control panel were located in a pocket in the panel's door, but they were old, hard to read, and did not contain any indication that the relay existed. Mr. Bock thus referred to the relay as a "sneak relay," one that no one was aware of.

He stated that a handle on the cabinet doors contained a lock. Therefore, nobody was exposed to any danger unless he opened the cabinet with a key.

When asked if there was any way that the operator could have or should have known of the condition, Mr. Bock replied: "There is no way that it could have been known, because it wasn't on the print. It should have been put on the print by somebody."

Robert L. Rough, an MSHA metal-nonmetal inspector, accompanied Mr. Bock on March 7, 1979, and issued Citation No. 303262 to Respondent.(FOOTNOTE 5) Mr. Rough did not personally examine the equipment, but after talking to Respondent's

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representatives, he concluded that they "weren't aware of this sneak source. They knew [about] it when they talked to their retired electrician." The "retired electrician" referred to by Mr. Rough was Mr. Michael Kapustic.

Mr. Rough explained that 30 C.F.R. 56.12-16 was violated since the switch controlling the power to the relay was not locked out. He added that although this is a fairly common violation, it often results in fatal injuries. It takes approximately 40 volts of power to cause a man's heart to stop; the voltage going through the relay which caused Mr. Ettleman's death was 440 volts.

John Flemscich was the final witness, and the only one who was present when the accident occurred. He is an "Electrician A" who has been employed by Respondent for approximately seven years. He described how he and Mr. Ettleman went to the palletizing machine's switchbox on the day in question to remedy a malfunction. The switchbox is located about nine feet off the ground. Mr. Ettleman was standing on a platform about three feet high and reaching up into the control panel while Mr. Flemscich worked down below. When Mr. Flemscich heard Mr. Ettleman scream, he knew immediately what had happened. His first impulse was to turn off the power switch next to the box, but he saw that it was already in the "off" position. When Mr. Ettleman fell away from the box, Mr. Flemscich called for an ambulance.

Conclusions of Law

It is not disputed that Respondent violated 30 C.F.R. 56.12-16. It is also undisputed that Respondent was a medium-sized operator which was cited for 36 violations of the Act during the two-year period preceding the accident. The parties agreed that Respondent demonstrated good faith in abating this violation, and that the assessment of a civil penalty will not affect Respondent's ability to remain in business.

Although the parties stated that MSHA initially found Respondent to be grossly negligent in connection with the fatality, the evidence before me does not support such a finding. At the hearing, counsel for MSHA stated that Respondent "should have known the condition existed in the exercise of ordinary care * * *." Respondent conceded that it was "guilty of ordinary negligence and not gross negligence." The testimony of all the witnesses supported that conclusion. Respondent was negligent in locating the relay in the panel where it could cause an accident, in not designating the relay on the plans, and in not having a cutoff switch any nearer than two building floors away.

The gravity of the violation was great, since an accident would almost certainly result in a fatality. This is despite the fact that the switch was high off the ground and protected by cabinet doors so only a few electrical personnel could come into contact with it.

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Upon consideration of all the foregoing criteria, I assess a penalty of \$4,500.(FOOTNOTE 6)

ORDER

Respondent is ORDERED to pay \$4,500 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

~FOOTNOTE_ONE

1 The standard provides:

"Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel."

~FOOTNOTE_TWO

2 Petitioner's Assessment Office proposed a penalty of \$8,000. Prior to the hearing, counsel for the parties proposed to settle this case for \$4,000. I rejected the settlement as being too low, based upon the facts presented to me by counsel at a prehearing conference.

~FOOTNOTE_THREE

3 Section 113(e) states in part that the Commission's judges have the power to "compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects * * *."

~FOOTNOTE_FOUR

4 Rule 614(a) of the Federal Rules of Evidence provides: "The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." Rule 614(b) provides that the court "may interrogate witnesses, whether called by itself or by a party."

~FOOTNOTE_FIVE

5 The citation was introduced into evidence as Petitioner's Exhibit A. It reads as follows:

"The main 440 volt power and control disconnect switch for the palletizing machinery in the packhouse was turned off, but not locked out or tagged while men were working in this power and control cabinet. Subject switch was out of men's view while working in the cabinet because of the open cabinet doors. There was another source of 440 volt power entering the control panel that was still energized while men were working on the control

panel. There were no other preventative measures taken to prevent this equipment from becoming energized. The source of this other voltage was remotely located up two (2) flights of stairs, above the location of the panel the men were working at."

~FOOTNOTE SIX

6 The assessment of a civil penalty of \$4,500 is entirely consistent with my earlier refusal to approve a settlement of \$4,000, as recommended by the parties, or in any amount less than the original \$8,000 proposal. The refusal to accept a lower amount was based upon the information presented to me by counsel for the parties. Prior to hearing, Respondent's counsel stated that a "master electrician" stood by and watched for about 20 minutes until Mr. Ettleman touched the relay and was electrocuted. Also, at the prehearing conference, counsel failed to indicate that none of Respondent's personnel knew of the relay. When I asked counsel to otherwise justify the settlement, Mr. Refowich replied: "What can I say?"