

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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AUG 26 1986

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 85-140-M
Petitioner : A. C. No. 15-00112-05504
: :
v. : Clover Bottom Underground
: :
M. A. WALKER COMPANY, INC., :
Respondent :

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner:
Lyle A. Walker, President, M. A. Walker Company,
Inc., McKee, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the M. A. Walker Company, Inc. (Walker) with three violations of regulatory standards. The issues before me are whether Walker has committed the violations as alleged and, if so, whether those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial". If violations are found; it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with the criteria set forth in section 110(i) of the Act. Pursuant to notice, the case was heard in Berea, Kentucky, on June 24, 1986.

Citation No. 2247898 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.3022 and charges as follows:

Ground conditions along haulageways and travelways was not scaled. This include the three entries to the mine. Loose rock and frozen ice was observed on roof and ribs. The employee enter the mine through these portals. Customer truck go in and out through these portals.

The cited standard requires that "[g]round conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary."

Inspector Kenneth Ruffner of the Federal Mine Safety and Health Administration (MSHA) performed an inspection at the Clover Bottom limestone mine on January 30, 1985, when he discovered the aforementioned condition. This condition is more fully described in a technical report authored by Mr. Richard R. Pulse, a geologist also employed by MSHA (Secretary's Exhibit No. 4). Depicted therein are photographs of areas where loose rock slabs and rock overhangs are present above and adjacent to the north, one-way portal and the middle, two-way portal. Mr. Pulse reports that many of these rocks are loosely keyed into the rock walls and separated or detached rock slabs were observed to be resting upon steeply inclined weathered shale slopes. In his opinion, all of these could potentially slide or fall into the mine roadway or into the portal entrances. The report and the photographs contained therein document the existence of numerous loose slabs of limestone resting upon steep slopes above the portals and rocks loosely keyed into place, above and adjacent to the access road and mine portals. In the opinion of this geologist, it has taken decades for this condition to develop, but these rocks constitute a present danger to people entering the portals, especially during periods of heavy rain or during cycles of freezing and thawing.

Inspector Vernon Denton also testified concerning the loose rock he observed at the two aforementioned portals. He stated that it appeared to be all different sizes--from the size of a bowling ball to something approaching table size, including a large slab of rock about six (6) feet long, three (3) feet wide, and a foot thick.

The respondent's witness, Mr. James Denham, testified of the extreme difficulty he had removing the rocks that MSHA demanded be removed to abate the citation. For example, he broke a 3/4 inch cable trying to pull one of the rocks down that MSHA claimed was loose.

On the issue of whether loose rock existed along the haulageways and travelways in the area of these two portals, I must make a credibility choice. Two mine inspectors are of the definite opinion that loose rocks existed in these areas and their opinion is buttressed by the report of a geologist who likewise concluded that numerous loose slabs

of limestone existed resting on steep slopes above the portals. Weighing that formidable testimony against that of the mine superintendent who essentially testified that because the rocks were difficult to pull down, in his opinion they would not have fallen down, I must make the credibility finding in favor of the Secretary, and thus find a violation of the cited standard.

Under the circumstances herein, I find that it was reasonably likely that the aforementioned loose rock could fall down at any time, and if one of these large rocks that the Secretary maintains **was loose** fell, it would be reasonably likely that it could fall on one of the vehicles, including customer's trucks, that **go, into** and out of the mine and crush it. I therefore find that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). Furthermore, it is undisputed that mine management knew of the condition prior to the citation being issued. They just didn't believe that it was a condition that needed correction. I disagree and find that their negligence was "**high**" as cited by the inspector.

Citation No. 2247378 was also issued on March 5, 1985, by Inspector Ruffner and alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9003 and charges as follows:

No. 2 Euclid haul truck did not have any brakes.

According to Inspector Ruffner, he overheard a conversation between the men working at the Clover Bottom Mine that there were no brakes on at least one of the trucks being used in the mine and that there was a danger of colliding with one of the customer's trucks while they were going in and out hauling from the stockpile. He asked the safety director to let him test the brakes on the No. 1 and 2 trucks, which he did. When he tested the No. 2 truck, by having the driver accelerate the truck over a predetermined distance and then apply the brakes, he found it to have no brakes, caused in his opinion by running through water under the stockpile bins which was deep enough to reach the brake drums.

The record establishes that this truck was being operated in a fairly congested area with brakes that were rendered useless for all practical purposes. Therefore, I find that the violation was a "significant and substantial" one. Mathies, supra. Furthermore, the lack of adequate brakes is the type of violation that should have

been easily discoverable by the truck driver and apparently was noticed by some employees because their talking about it called the inspector's attention to the matter. Therefore, I find that the operator is chargeable with at least moderate negligence because, at a minimum, it is chargeable with negligent training and supervision for the failure of its employees to correct this condition. I also note that the violation was abated by simply drying out the brakes. No other repair was required. Before leaving this subject, I specifically reject the operator's argument that the emergency brake or parking brake being in an operable condition is sufficient to satisfy the regulatory requirement that "[p]owered mobile equipment shall be provided with adequate brakes."

Citation No. 2247379 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9053 and charges as follows:

Water was allowed to accumulate which created a hazard to moving equipment.

The cited standard requires that water which creates a hazard to moving equipment be removed.

According to the undisputed testimony of Inspector Ruffner, who likewise issued this citation on March 5, 1985, after he had issued Citation No. 2247378 concerning the truck with no brakes, the operator continued to load the other haul truck in the water which existed in the stockpile bin area. The danger according to the inspector being that the brakes would get wet and suffer the same consequences as they had on the No. 2 haul truck, which had been written up two hours earlier. Under the circumstances, as before, if a vehicle was operating in a congested area with no brakes, an accident was reasonably likely to occur resulting in disabling or even fatal injuries. Accordingly, I find the violation to be "significant and substantial." Mathies, supra.


On the issue of negligence, the water had been in the area under the stockpile bins that morning because of a drain being stopped up. Respondent produced testimony that this was the first time this drain had ever backed up. In order to abate the citation, they pumped the water out and then opened the drain. I concur with the inspector that the operator is certainly chargeable with the knowledge that the water was there at the time it existed, and of the consequences of operating the haul trucks in the water. I therefore find the operator chargeable with a "high" degree of negligence, as alleged in the citation.

In determining the amount of penalties I am assessing in this case, I have given great weight to the fact that Walker is a small operator, has a relatively minor history of reported violations and abated the violative conditions in a timely manner. Accordingly, the following civil penalties are deemed appropriate:

<u>Citation</u>	<u>Amount</u>
2247898	\$100
2247378	\$250
2247379	\$250

ORDER

The M. A. Walker Company, Inc., IS HEREBY ORDERED to pay civil penalties of **\$600** within **30** days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is DISMISSED.


Roy J. Maurer
Administrative Law Judge

Distribution:

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