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SOL (MSHA) V. EDWARD KRAEMER & SONS  
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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 PROCEEDING

Docket No. LAKE 88-129-M  
A. C. No. 33-00091-05504

v.

White Rock Quarry

EDWARD KRAEMER & SONS,  
INCORPORATED,  
RESPONDENT

DECISION

Appearances: Maureen M. Cafferkey, Esq., Office of the Solicitor,  
U. S. Department of Labor, Cleveland, Ohio, for the  
Secretary;  
Willis P. Jones, Jr., Esq., Jones and Bahret,  
Toledo, Ohio, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Proposal for Penalty filed  
by the Secretary (Petitioner) on August 18, 1988, for an alleged  
violation of 30 C.F.R. 56.14001. The Operator (Respondent)  
filed its Answer on September 16, 1988.

On January 11, 1989, Petitioner filed Interrogatories and  
Request for Production of Documents. On January 19, 1989,  
Respondent filed a Motion for Protection Order arguing, in  
essence, that discovery shall not be allowed inasmuch as it was  
initiated beyond 20 days after the filing of the Proposal for  
Penalty filed on August 18, 1988 (See, 29 C.F.R. 2700.55).  
Respondent's Motion was denied by Order dated January 30, 1989.

Pursuant to notice, this case was heard in Toledo, Ohio, on  
February 23, 1989. Robert G. Casey and Arthur J. Hoffman  
testified for Petitioner. Edward S. Kraemer and M. Honora Kraemer  
testified for Respondent.

Petitioner filed a Post-Trial Brief on April 27, 1989. On  
May 15, 1989, Respondent filed a Post-Trial Brief and Proposed  
Findings of Fact and Conclusions of Law. On May 19, 1989,  
Respondent filed a Reply to Petitioner's Post-Trial Brief.

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## Stipulations

The Parties agreed on the following stipulations:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. Edward Kraemer & Sons owns White Rock Quarry in Clay Center, Ohio.

3. Edward Kraemer & Sons, Incorporation is an operator as defined by Section 3(d) of the Act.

4. White Rock Quarry is a mine as defined by Section 3(h) of the Act.

5. Edward Kraemer & Sons are subject to the jurisdiction of this Court and the 1977 Mine Act.

6. The size of proposed penalty, if assessed, will not affect the Operator's ability to continue in business.

## Citation

Citation No. 3060361, issued on March 29, 1988, alleges as follows:

In the quarry, at the running crusher, the front face of the approximately three and one half foot diameter fast spinning flywheel is unguarded. Although this flywheel is approximately eight feet off the ground, the steel access ladder to the crusher operator's control deck passes within eight inches of said flywheel. A person mounting or dismounting the crusher could contact this flywheel and be injured.

## Regulation

30 C.F.R. 56.14001 provides as follows: ". . . flywheels; . . . and similar exposed moving machine parts which may be contacted by persons, and which many cause injury to persons, shall be guarded."

## Findings of Fact and Discussion

### I.

The crusher in question has been used at Respondent's White Rock Quarry since January 1, 1988. The flywheel of the crusher, as depicted in Petitioner Exhibit 1, has a diameter of approximately 3 feet. The flywheel does not have any belts or chains. The exposed face of the flywheel is essentially smooth, but contains four nuts in its center. The flywheel operates at

~906

approximately 1800 to 2100 revolutions per minute, and is located approximately 8 feet off the ground. Those persons who operate the crusher must climb a vertical steel ladder from the ground to enter the platform where the crusher is operated from. In entering the work platform from the ladder, two handrails must be grasped to hoist one's self onto the platform. These handrails are located at the top of the ladder and 8 1/4 inches laterally from the flywheel, (FOOTNOTE 1) and approximately 10 inches in front of the flywheel. The flywheel has two separate guards along the upper portion of the outside circumference of the flywheel, covering approximately 180 degrees of the circumference. (Petitioner's Exhibit 1 and 2, and Respondent's Exhibit 3.)

Robert G. Casey, an MSHA Special Investigator Specialist, who was a supervisor of inspectors on March 29, 1988, accompanied an inspector on an inspection of the White Rock Quarry on that date. Casey indicated that he observed the crusher in operation, and the flywheel was "spinning very fast" (Tr. 34). He said that he observed an employee climbing the ladder to the work place, and noticed how close the latter's hand was to the flywheel when he grabbed the handrails. Casey concluded that the guards in place were inadequate to prevent the hazard, which he described as being immediately obvious, of a worker missing a guard rail, hitting the flywheel, and injuring his hand, or on a windy day having his clothing caught in the flywheel or its hub causing the worker to be entangled in the machinery.

Arthur J. Hoffman, who has been operating a crusher for Respondent since June 1986, indicated that in the winter he wears a jacket under coveralls. He said that in the spring when he wears a jacket he has never climbed to the top of the crusher with the jacket unzipped. He said that in the summer he wears short sleeve shirts. He indicated that it would be possible to miss a rail in climbing the steps of the ladder, but not by 6 inches, and that he has never come in contact with the flywheel while going up or down to the work site. He also indicated that although it would be possible to slip off the ladder, his hand would not come in contact with the flywheel since in climbing the ladder, his body presses backward, and thus in slipping he would not fall forward. He also indicated that if his jacket would be open while reaching for the handrail, and he would fall, the jacket would not get caught in the flywheel, as the revolutions of the flywheel create a wind which blows the jacket behind him.

Edward S. Kraemer, who has a Bachelor of Science Degree in Civil Engineering, and has been "associated" with crushers for over 20 years (Tr. 171), indicated that because the flywheel spins in a clock-wise direction, any exposed pinch point would be too far away to be contacted by one falling from the ladder. He also indicated that the center of gravity of one climbing the vertical ladder would be on the outside. He explained that accordingly, if one would fall or slip from the ladder, one would fall backward. Thus, any contact with the flywheel would consequently cause one to fall backwards and not be drawn into the flywheel.

The two guards on the flywheel on the date in question, as depicted in Petitioner's Exhibits 1 and 2 and Respondent's Exhibit 3, would appear to guard against the hazard of a hand getting caught between the edge of the flywheel and the body of the crusher. A visual inspection of these photographs fails to indicate that these guards would prevent one from coming in contact with the surface of the face of the rotating flywheel. The testimony of Hoffman and Kraemer tends to establish that inadvertently coming in contact with the flywheel would not be likely. However, their testimony is not so persuasive as to establish that coming in contact with the flywheel is impossible. As such, it fails to contradict the opinion of Casey that it is possible for a worker to lose his balance, fail to grab the hand-rail, and come into contact with the flywheel. I thus conclude that the flywheel, "may be contacted" by a person using the vertical ladder in question. It is likely, as explained by Kraemer, that due to the position of one's center of gravity, as consequence of ascending and descending the vertical ladder, a hand coming into contact with the flywheel would be thrown away from it. This does not preclude the possibility, as indicated by Casey, that due to the high speed of the flywheel, a hand coming into contact with the flywheel might suffer debridement of the skin.

Accordingly, I conclude that inadvertent contact with the flywheel by one using the vertical ladder "may cause injury to persons." Thus, I conclude that it has been established that, because the exposed face of the flywheel has not been guarded, Respondent herein violated 30 C.F.R. 56.14001.(FOOTNOTE 2)

II.

According to Casey the violation herein was significant and substantial, because an injury was reasonably likely to occur due to the fact that the hands of the crusher operator using the ladder come within 6 inches of the flywheel. He noted essentially the high probability of the occurrence of such an accident, as Respondent runs 2 work shifts per day, 5 days per week, and each crusher operator makes 4 round trips per shift on the ladder. However, taking into account the following: (1) the handrail is over 8 inches removed from the flywheel in a lateral direction, and 10 inches in front of the flywheel; (2) Respondent has been using crusher since 1974, all similar to the one in question with a flywheel only particularly guarded, without any incidences of one coming in contact with the flywheel; (3) the testimony of the crusher operator, Hoffman, that he has never come in contact with the flywheel, and (4) considering the effect of the center of gravity upon one falling and losing ones' balance, as testified to by Hoffman and Kraemer; I conclude that it has not been established that the hazard of coming into contact with the flywheel would be reasonably likely to occur (cf. Mathies Coal Co., 6 FMSHRC 1, (Jan. 1984)).

According to Casey, coming in contact with the flywheel would cause debridement of the skin, and "the wheel actually throwing him off balance, and possibly flipping him and doing more severe damage, breaking bones or . . . (Tr. 128). I find this evidence not sufficient to support a conclusion that a debridement is a serious condition or that a severe injury such as a broken bone was reasonably likely to occur. Consequently, I conclude that any serious injury has not been established to be reasonably likely to occur. Therefore, I conclude that it has not been established that the violation herein is significant and substantial (See, cf. Mathies Coal Co., supra).

III.

Although it is possible that one using the ladder might slip and injure one's hand against the rotating unguarded surface of the flywheel, it has not been established that such an occurrence was likely to occur. Nor has it been established that any serious injury was reasonably likely to occur. Accordingly, I conclude that the gravity of the violation herein was low. It is clear that, as testified to by Casey, it was obvious that the surface of the flywheel was not completely guarded. However, in light of the fact, as testified to by Edward S. Kraemer and not contradicted, Respondent has never been cited for an unguarded flywheel in spite of having crushers since 1974 with similar not completely guarded flywheels, and considering the fact that no one in the past has been injured by coming in contact with such a flywheel, I conclude that Respondent's negligence herein was low. I also have taken

~909

into account the remaining statutory factors set forth in section 110(i) of the Act as stipulated to by the Parties, as well as the history of violations set out in Petitioner's Ex. 4. Taking all these into account I conclude that a penalty herein of \$20 is proper for the violation found herein.

ORDER

It is ORDERED that Citation No. 3060361 be amended to reflect the fact that the violation therein is not significant and substantial. It is further ORDERED that Respondent, within 30 days of this Decision, shall pay \$20 as a civil penalty for the violation found herein.

Avram Weisberger  
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE\_ONE

1. I have accepted the testimony of M. Honora Kraemer, Respondent's Safety and Loss Prevention Officer, with regard to the lateral distance of the flywheel from the handrail as she actually measured that distance. In contrast, there is no evidence that the testimony of Robert G. Casey, MSHA Inspector, Arthur J. Hoffman, the crusher operator, or Edward S. Kraemer, with regard to the distance between the flywheel and the handrail was based upon any measurement.

~FOOTNOTE\_TWO

2. In light of this conclusion, and for the reasons set forth in I, infra, I denied Respondent's Motion for a Directed Verdict which was made at the conclusion of the Petitioner's case and renewed again after both Parties had rested.