CCASE:
SOL (MSHA) V. LEBANON ROCK
DDATE:
19900522
TTEXT:

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. PENN 89-73-M A.C. No. 16-00039-05505
v.	Lebanon Quarry
LEBANON ROCK INCORPORATED, RESPONDENT	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Robert M. Mumma II, President, Lebanon Rock, Incorporated, Harrisburg, Pennsylvania, Pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. A hearing was held in Harrisburg, Pennsylvania, and the parties waived the filing of posthearing briefs. However, they presented oral arguments at the close of the hearing, and I have considered these arguments in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the respondent violated the cited mandatory safety standards, (2) whether the violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed

pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq

2. Sections 56.9006 and 56.12016, Title 30, Code of Federal Regulations.

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The Lebanon Quarry is owned and operated by the respondent and it is subject to the jurisdiction of the Act.

2. The presiding judge has jurisdiction to hear and decide this matter.

3. The violations were timely abated by the respondent.

4. The quarry production is approximately 200,000 tons a year. The quarry produces high calcium limestone (Tr. 28).

5. The respondent's history of prior violations, as shown by an MSHA computer print-out, reflects a favorable history of compliance.

6. Payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to continue in business.

7. The respondent owns the property where the subject quarry is located and it shares the property with the Elco Concrete Company.

Discussion

The facts and evidence in this case establish that an accident occurred on May 25, 1988, at a portable limestone crushing and processing plant owned and operated by the respondent. Patrick Werth, a laborer who sometimes operated the crusher, was injured while performing work repairing the skirting on a return

belt. Mr. Werth had turned the belt off by using a push button, but he did not lock the belt out with a lock which was provided and available at the electrical switchbox location. While he was performing this work, the crusher operator and a loader operator were attempting to dislodge a rock which was stuck in the crusher jaws. The crusher and crusher take-away belt were running while this work was going on, and this was a normal and acceptable operating procedure when rocks are stuck in the crusher.

After freeing the rock, the loader operator who was helping the crusher operator, started the return belt which Mr. Werth was working on. Mr. Werth was standing on a portion of the return belt which was not visible from the location where the crusher and loader operator were working, and they could not see Mr. Werth because the view was obstructed by the belt structure and framework. No signal or warning was sounded before the return belt was started up, and since it was not locked out, Mr. Werth was drawn through a 15-inch high opening and suffered cracked vertebrae. When the crusher operator realized that Mr. Werth was on the belt when it started up, he immediately shut it down by using the same push button used by Mr. Werth to turn the belt off. The push button was located at the crusher station where the crusher and loader operator were working to free the rock.

As a result of the accident, MSHA Inspector Andrew Nawa conducted an investigation, and after completing it he issued the following citations:

Section 104(a) "S&S" Citation No. 2626303, May 26, 1988, cites an alleged violation of 30 C.F.R. 56.12016, and the cited condition or practice is described as follows:

> The plant helper or laborer was injured while repairing the return belt conveyor skirting. The helper was on the belt while other employees were working on the primary crusher trying to free a hang-up. When the hang-up was cleared the conveyor belts were started. A lock-out system was provided but not used.

Section 104(a) "S&S" Citation No. 2626304, May 26, 1988, cites an alleged violation of 30 C.F.R. 56.9006, and the cited condition or practice is described as follows:

> A start-up signal was not provided for the crushing plant. An employee was injured while in a confined space and not provided with adequate warning of the start-up of the plant.

Petitioner's Testimony and Evidence

Patrick Werth testified that he was employed by the respondent as a laborer and was laid off on December 17, 1989. He confirmed that he was working at the mine on May 25, 1988, when he was injured when he was caught under a brace on the return belt of the portable plant when the belt was started up while he was standing on it while repairing the belt skirting.

Mr. Werth stated that he went to the belt area to work on the belt after he had helped two other employees, Mr. Stanley Deck and Mr. Alberto Rolon, free up a rock which was stuck in the crusher jaw. He confirmed that he had shut the belt down by turning it off at a switch box which was located at the platform which was over the crusher where the work to free the rock was taking place. The switch box was approximately 100 feet from where he was working on the belt skirting. He also confirmed that he told Mr. Rolon and Mr. Deck that he was going to work on the return belt.

Mr. Werth stated that he had worked for the respondent for 9 weeks before he was injured and that he received no training during his employment. He stated that on the day he started work he was instructed to go to the crusher and that another employee told him what to do. He identified his boss during the 9 weeks of his employment as Mr. Doug Glasford, who he identified as the quarry foreman or superintendent (Tr. 14-19).

Mr. Werth stated that the entire length of the return belt on which he was working could not be seen from the starting switch box location and that the view along 10 feet of the belt was obstructed by the belt bracing (Tr. 20).

Mr. Werth stated that he suffered three cracked vertebrae when he was caught in the belt bracing and was hospitalized for 7 days. He was out of work for a year and 2 months, cannot lift heavy objects, and he sometimes has pain (Tr. 20).

On cross-examination, Mr. Werth explained what he was doing while attempting to free the rock lodged in the crusher and he confirmed that the crusher and crusher belt were both in operation. He confirmed that if the rock were freed, it would have dropped through the crusher and onto the running belt, and that it would have jammed the return belt which he had shut off when it reached that point. He conceded that the shutting down of the return belt was not normal procedure, and that normally all of the belts are started before the crusher is started (Tr. 22).

In response to further questions, Mr. Werth confirmed that operating the crusher while attempting to free the rock was normal procedure because the crusher vibration will help free the jammed rock (Tr. 25). He confirmed that he had never heard about

the belt lock out procedure and that the switch which he used to shut off the return belt was a push button on/off switch. There was no switch at the location where he was working on the return belt skirting, and in order to start and stop the belt, he would have to go to the switch located at the crusher platform (Tr. 28-29).

Mr. Werth stated that after the rock was cleared from the crusher Mr. Deck started up all of the belts after he saw the rock go down the crusher. He confirmed that Mr. Rolon quickly stopped the return belt because he knew that he was there (Tr. 30).

Andrew Nawa, self-employed, testified that he was formerly employed by MSHA as a district health specialist and left in August, 1988. He confirmed that he visited the mine on May 26, 1988, to conduct an investigation of the accident concerning Mr. Werth. He identified exhibit G-1, as the accident report which he prepared. He explained his findings and confirmed that he issued the citations in question (Tr. 31-39).

Mr. Nawa confirmed that he issued Citation No. 2626303, citing a violation of 30 C.F.R. 56.12016, because the power switches for the belt conveyors were not locked out while Mr. Werth was performing his work (Tr. 39, exhibit G-2). He confirmed that locks were provided by the respondent in the control trailer where the electrical power switches for the plant were located. The locks were provided for the lockout system, and they were hanging on the wall. However, they were not used to lock out the belt conveyors and no warning signs were posted. The belts should have been locked out in the trailer where the off/on switch was located and at the primary crusher area by the person who shut it off (Tr. 41-42).

Mr. Nawa stated that the violation was significant and substantial because an accident occurred and that if a belt starts up and moves when someone is not expecting it, he could sustain injuries ranging from a pinched finger to a fatality. He stated that there is "a vast history of accidents of people getting hurt that way." Since the accident occurred, the likelihood of injury was high (Tr. 42).

Mr. Nawa stated that he based his high negligence finding on the fact that an order had been issued approximately a month earlier at the site for failure to use a lockout system which was available. He believed that the order was served on Elco Concrete Products, but that the management at the site was aware of what transpired (Tr. 43).

Mr. Nawa confirmed that he issued Citation No. 2626304, citing a violation of section 56.9006, for the failure by the respondent to provide and use a start-up signal before starting

the conveyor belts (Tr. 43). Petitioner's counsel asserted that the cited standard has been redesignated as section 56.14201, as part of Title 30, Code of Federal Regulations, effective July 1, 1989 (Tr. 45, exhibit G-4). Counsel confirmed that the standard in effect at the time the citation was issued is essentially the same, and the respondent agreed (Tr. 45-46).

Mr. Nawa stated that he cited a violation of section 56.9006, because the accident occurred when Mr. Werth was in a position where he could not be seen from the location of the start-up switch and no signal system was provided. He confirmed that the entire length of the belt was not visible from either of the two belt start-up positions and that he personally determined that this was the case and that no warning systems were installed on any of the belts (Tr. 47-48).

Mr. Nawa confirmed that the violation was significant and substantial because the accident occurred, the lack of a start-up signal can result in serious accidents, and he was personally aware of injuries resulting from the lack of such a signal. There was always a risk that someone will be caught in moving machinery because they are not aware that it is going to move. If a signal were used, a person would have time to stay clear of the moving equipment (Tr. 48).

Mr. Nawa stated that he made a finding of moderate negligence because start-up signals were in use in other places at the facility, and he was not sure that the respondent was aware of the need for a signal at the cited portable plant (Tr. 49).

On cross-examination, Mr. Nawa confirmed that the prior order was served on Elco Concrete Products and not on Lebanon Rock, and he conceded that he was not sure about who the management personnel were who were operating at the same facility as the respondent. However, he believed that there was continuity among the same individuals and companies who operated at the site. He stated that when he went to the site to investigate the accident a lady serving as the scale master was vague as to who was in charge of the respondent's operation and that 20 minutes passed before anyone appeared and identified themselves as the respondent's superintendent (Tr. 51-52).

In response to further question, Mr. Nawa confirmed that Mr. Werth was not trained in the use of the lockout system, and he doubted that Mr. Rolon and Mr. Deck received any training (Tr. 60).

MSHA Metal/Non-Metal Inspector Elwood Frederick, testified that he terminated Citation No. 2626304, after the respondent installed a signal belt on the crusher oil pump to signal when it was started and a siren which also sounded when the conveyor belt system was started up. Mr. Frederick confirmed that he had

previously inspected the respondent's plant in March, 1988, and that he issued a combined section 107(a) order and 104(a) citation to Elco Concrete Products, Inc., citing a violation of section 56.12016, for failing to lock out the primary crusher main conveyor belt before performing work on the belt skirts (exhibit G-5).

Mr. Frederick stated that the respondent and Elco operated at the same quarry location and that the respondent owned the land. He explained that prior to March, 1988, there was no distinction between the two operations and they were conducted by the same family, namely, the family of Mr. Mumma, the respondent's owner. Referring to his notes and an MSHA conference work sheet which were attached to a copy of his order/citation, Mr. Frederick stated that Mr. Doug Glasford was identified as the respondent's plant superintendent, and that Mr. Richard Allwein was identified as Elco's superintendent. He explained that during his inspections of the quarry site, he encountered problems in identifying the specific family members or individuals who were responsible for the respondent's and Elco's operations, and that this was caused by a split among the family who had interests in both operations. As a result of these problems, Mr. Frederick assigned an MSHA independent contractor ID Number to Elco so that he could distinguish it from the respondent's operation. He stated that Elco operated at the front of the quarry site, and that the respondent operated to the rear of the property near the quarry (Tr. 68-77).

On cross-examination, Mr. Frederick confirmed that during his inspection on March 24, 1988, Mr. Glasford informed him that he was the respondent's plant superintendent. Mr. Frederick also confirmed that Mr. Allwein had worked at the quarry site for a long time. He also believed that the respondent and Elco were a part of a company known as Pennsy Supplies, in which Mr. Mumma had an interest (Tr. 77-79).

Respondent's Testimony and Evidence

Robert M. Mumma II, respondent's president, explained the operation of the plant portable crusher system which is used to process high calcium limestone. He stated that when the plant was originally purchased and installed, it was a complete "turn-key" package which he believed included a belt alarm for the crushing unit in question. He produced a copy of a March 2, 1987, proposal from the plant manufacturer and supplier which includes the operational specifications for all of the portable crushing plant equipment (exhibit R-1). Referring to paragraph two on page two of the specifications concerning the secondary crushing unit, Mr. Mumma pointed out that they include an "oil pressure/temperature alarm switch."

Mr. Mumma stated that according to normal operating procedures all maintenance on the crushing plant is performed while the plant is down and not in operation. He stated that when the crusher unit is operating, all of the belt conveyors are supposed to be running and that Mr. Werth should not have shutdown the return belt with the "on-off" switch which he used, and that this switch is intended to be used only in emergencies.

Mr. Mumma confirmed that he owns 50 percent of Lebanon Rock and that his late father's "estate" owns 50 percent of the company. He also confirmed that he has no interest in Elco Concrete, but that other family members have a controlling interest in that company. He also confirmed that he has an interest in several other inter-locking companies which he identified as Pennsy Supply and "999".

Mr. Mumma denied that Mr. Glasford was employed by Lebanon Rock as a superintendent or foreman, and he characterized him as a "consultant" who worked on customer problems and other company administrative matters. He confirmed that Mr. Glasford may have interviewed prospective employees, including Mr. Werth. Mr. Mumma confirmed that he had no knowledge as to whether the respondent had any written safety rules and procedures, or any written training program (Tr. 110-135).

Mr. Werth was called in rebuttal by MSHA, and he stated that Mr. Glasford hired him for his job with the respondent and supervised his work "most of the time." Mr. Werth confirmed that he knew Mr. Barnett, but denied that Mr. Barnett ever supervised or instructed him as to his job duties (Tr. 136-139).

Findings and Conclusions

Fact of Violation - Citation No. 2626303

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.12016, which provides as follows:

> 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.

The failure to deenergize electrically powered equipment and to lock out power switches before any mechanical work is done on

the equipment has been consistently held to constitute a violation of mandatory safety standard 30 C.F.R. 57.12016, and the identical standard section 56.12016, applicable to surface metal and nonmetal mines. See: MSHA v. Adams Stone Corporation, 7 FMSHRC 692, 706-707, (May 1985); MSHA v. FMC Corporation, 4 FMSHRC 1818, 1821-22 (October 1982), petition for Commission review denied, November 16, 1982; MSHA v. Greenville Quarries, Incorporated, 9 FMSHRC 1390, 1428 (August 1987); North American Sand and Gravel Company, 2 FMSHRC 2017 (July 1980); Brown Brothers Sand Company, 3 FMSHRC 734 (March 1981); Ozark-Mahoning Company, 11 FMSHRC 859 (May 1989), aff'd by the Commission on March 21, 1990; Price Construction Company, 7 FMSHRC 661 (May 1985).

MSHA's credible and unrebutted evidence clearly establishes that the crusher return belt on which Mr. Werth was standing and working at the time of the accident was not locked out. The belt is an electrically powered piece of equipment, and although it was deenergized by Mr. Werth by the use of a push button, it was not locked out at the main power switch as required by section 56.12016. Further, there is no evidence that the respondent took other measures to prevent the return belt from being energized and started without the knowledge of Mr. Werth while he was working on it. Under all of these circumstances, I conclude and find that MSHA has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Fact of Violation - Citation No. 2626304

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.9006, which provides as follows:

> When the entire length of a conveyor is visible from the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visual warning system shall be installed and operated to warn persons that the conveyor will be started.

Section 56.9006 requires the installation and use of a positive audible or visual warning system for a conveyor belt when the entire length of the conveyor is not visible from the starting switch. The purpose of this requirement is to provide a warning to persons that the conveyor will be started. In this case, the credible and unrebutted testimony of Mr. Werth and Inspector Nawa establishes that the portion of the return belt on which Mr. Werth was standing was not visible from the starting switch which was located at the crusher station where the loader and crusher operator were working and from where the return belt was started up after the rock was cleared from the jaws of the

crusher. The evidence also establishes that Mr. Werth could not be seen from that location.

In the answer filed by the respondent on June 14, 1989, Mr. Mumma took the position that a start-up horn or signal would not have been activated since the primary crusher was never shutdown at the time Mr. Werth was performing work on the belt. During the course of the hearing, Mr. Mumma pointed out that the crusher equipment supplier's proposal and specifications for crushing units include an oil pressure and temperature alarm system and switches, and he explained that when the crusher unit is started up the crusher unit alarm will sound until the oil pressure is increased to a workable level. He suggested that this alarm satisfies the requirements of the standard.

I take note of the fact that the crusher specifications includes an electrical turnkey system wired to the main electrical generator source of power located and mounted in a plant trailer. However, I find no provisions for any alarms or warning devices installed on the belt conveyor components. The specifications include a remote start/stop button located on the work platform adjacent to the primary crusher and feeder to allow the plant operator to control the feed to the jaw crusher.

Inspector Nawa testified that the entire length of the return belt was not visible from the control switch located at the crusher platform area where the crusher and loader operator were working to free the rock and that Mr. Werth was not in view while he was standing on that portion of the belt which could not be seen from the crusher platform location. Mr. Nawa confirmed that there was no signal system in effect to warn Mr. Werth that the return belt conveyor would be started by use of the switch located at the crusher platform.

Inspector Frederick, the individual who terminated the violation, testified that he did so after the respondent installed a signal bell on the crusher unit oil pump to signal when it was started, and also installed a siren which sounded when the conveyor belt system was started. A copy of the violation notice of termination issued by Inspector Frederick reflects the installation of these devices.

Although Mr. Mumma's testimony suggests that the crusher unit alarm system was initially installed on the crusher unit as part of the turnkey installation of the portable plant, the fact remains that the return conveyor belt, which could be turned on and off by use of a remote push button "on-off" switch located at the crusher unit work platform, was not provided with an alarm, or equipped to sound an audible alarm or warning when that belt conveyor was again started up after it was turned off. Section 56.9006, requires the installation and use of such a warning device when the entire length of the conveyor belt is not visible

from the starting switch. Under the circumstances, I conclude and find that MSHA has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498

(April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

I conclude and find that both of the citations issued by Inspector Nawa involved significant and substantial violations of the cited standards. The failure to lock out the power switch to the conveyor belt resulted in serious injuries to Mr. Werth who was standing on the belt conveyor performing work. He suffered several broken vertebrae, was hospitalized, and missed many months of work. Although the belt had been shutdown by means of a push button, the power was not locked out, and when it was started up again, Mr. Werth was drawn into the belt conveyor support bracket opening and was injured. The accident could not have occurred if the power switch had been locked out with the locks which were available in the switch trailer. The seriousness of the hazard was exacerbated by the fact that Mr. Werth had received no safety training and was not informed about the lockout procedures.

The failure to provide an audible belt conveyor start-up signal contributed to the accident and injuries. If such a signal were in use when the belt was started, Mr. Werth may have had an opportunity to jump off the belt and avoid the serious injuries which he sustained. In addition, the evidence establishes that while working on the belt conveyor, Mr. Werth was out of the view of the two individuals who were working to free the rock from the crusher. Although Mr. Werth had helped work to free the rock shortly before the accident, after he left the platform area, further communications were not maintained, and the belt was started without any prior signal to warn Mr. Werth, who was out of the view of the person who started it. In such situations, it is reasonably likely that accidents of the kind which occurred in this case will happen, with resulting injuries of a reasonably serious nature. Under all of these circumstances, I conclude and find that the inspector's significant and substantial findings with respect to both violations was clearly justified, and they ARE AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The evidence in this case reflects that the respondent is a small limestone mine operator, and the parties have stipulated that the payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

An MSHA computer print-out concerning the respondent's history of prior violations reflects that for the period May 26, 1986 through May 25, 1988, the respondent made payment in the

amount of $336 for six assessed violations, none of which are for violations of the mandatory standards cited in this case. The parties have stipulated that the respondent has a favorable history of compliance, and I agree and adopt this as my finding and conclusion on this issue.

Good Faith Compliance

The parties stipulated that the respondent timely abated the violations in good faith. I adopt this stipulation as my finding and conclusion on this issue.

Gravity

In view of my significant and substantial (S&S) findings, I conclude and find that both of the violations were serious. The failure to lock out the return belt on which Mr. Werth was working when it was started resulted in serious injuries to Mr. Werth. Further, the failure by the respondent to provide an audible or visual warning system for the crusher belt system, particularly the return belt conveyor where Mr. Werth was working, contributed to the accident and resulting injuries. The portion of the belt where Mr. Werth was standing was not visible from the crusher station and Mr. Werth could not been observed by the person who started up the belt. If a signal or warning had been installed and used, Mr. Werth may have had an opportunity to jump clear of the belt, and he probably would not have been injured.

Negligence

Citation No. 2626304, 30 C.F.R. 56.9006

The inspector found that this violation was the result of moderate negligence on the part of the respondent. I agree with this finding and conclude and find that the violation resulted from the respondent's failure to exercise reasonable ordinary care.

Citation No. 2626303, 30 C.F.R. 56.12016

Inspector Nawa based his "high negligence" finding on the fact that the respondent had been previously cited for a violation of section 56.12016, by Inspector Frederick on March 24, 1988, after he observed the plant operator preparing to work on some belt skirts without locking out the belt power switch. However, the evidence establishes that this prior violation was served on Elco Concrete Products, Inc., and it is not included as part of the respondent's history of prior violations. Conceding that this is the case, the petitioner nonetheless suggests that because the respondent's superintendent, Doug Glasford, was present when the prior violation was issued, and was aware of the

circumstances, the respondent had constructive notice of the violation and the conditions cited, and should have taken appropriate steps to enforce its lockout procedures at the time of the accident involving Mr. Werth.

Inspector Frederick testified that prior to his inspection, the quarry was operated by Mr. Mumma's family and there was no distinction between Lebanon Rock and Elco Concrete. Mr. Frederick believed that Mr. Mumma had an interest in both operations, but due to certain "inter-family" differences and "turmoil" following the death of Mr. Mumma's father, he had difficulty in identifying any specific family members or management officials who were responsible for each of these operations. He explained that a separate MSHA Mine ID number was assigned to Elco Concrete in order to distinguish it from the respondent's operation, and a notation on an MSHA "conference sheet" which is attached to a copy of the citation issued by Mr. Frederick (exhibit G-5) reflects that "two different operations" were being conducted at the quarry site.

Mr. Frederick further testified that Mr. Glasford was serving as the respondent's superintendent at the time of his inspection and that he was with him when he observed the violative conditions. Mr. Frederick confirmed that Mr. Glasford was also present at the "closeout meeting" following his inspection and that the violation and lockout procedures were discussed with him and a representative of Elco Concrete. The conference worksheet reflects that Mr. Glasford was present on March 29, 1988, as the representative of the respondent.

Mr. Mumma denied any ownership interest in Elco Concrete Products Inc. He explained that he has a 14 percent interest in a holding company known as "999", which owns Pennsy Supply Company, and that Pennsy owns Elco Concrete. Mr. Mumma also denied that Lebanon Rock and Elco Concrete ever operated as a single entity at the quarry site, and he further explained that prior to 1985, the quarry was owned by the Corson Lime Company, and that his family was not involved in that operation. He testified that Lebanon Rock Company was established in 1985, and purchased the property and began mining high calcium limestone, and that Elco Concrete began mining dolomite at the site during the spring of 1988 (Tr. 127-128).

Mr. Mumma identified his quarry superintendent as Mr. Gerald Barnett and the record establishes that the contested citations were served on Mr. Barnett. Further, Inspector Nawa's accident report of May 25, 1988, identifies Mr. Barnett as the quarry superintendent at that time. Mr. Werth confirmed that he knew Mr. Barnett, but he denied that Mr. Barnett ever supervised him or instructed him as to his job duties. Mr. Werth further testified that he was hired by Mr. Glasford, and that Mr. Glasford was his "boss."

Mr. Mumma denied that Mr. Glasford was an employee of Lebanon Rock, and he characterized him as a "consultant" who handled sales and administrative matters and who was paid by the day or hour based on his billings. He stated that Mr. Glasford may have been associated with Lebanon Rock for 4 or 5 months, but was not at the site full time. Conceding that Mr. Glasford may have interviewed Mr. Werth for employment, Mr. Mumma stated that either he or Mr. Barnett hired Mr. Werth through the payroll department. He conceded that Mr. Glasford was on the property when the two citations were issued and that he "must have been contending (sic) to work there" (Tr. 130).

Mr. Mumma took the position that Mr. Werth deviated from normal operating procedures by shutting down the belt while the other two employees were attempting to free the rock which had lodged in the jaws of the crusher. Mr. Mumma argued that the respondent provided the proper locks, but that in his attempts to do "something beneficial for the company," Mr. Werth violated company policy concerning the normal operating procedures for shutting down the equipment (Tr. 154).

With regard to the prior violation issued by Inspector Frederick, Mr. Mumma took the position that the respondent should not be held accountable for this violation since it was served on Elco Concrete Products, Inc. Mr. Mumma asserted that Mr. Glasford was not given a copy of the previously issued violation, was not given any information in this regard, and had nothing to transmit to the respondent, and that he simply "over-heard a verbal conversation" (Tr. 156). Mr. Mumma further asserted that if the prior violation had been served on the respondent, he would have received a copy in his office and would have been informed about the violation and would have had an opportunity to take appropriate action by immediately reviewing the plant operational procedures with his employees. Mr. Mumma suggested that since he had no prior knowledge of the previous violation, he should not be penalized for any negligence. He also expressed some doubts as to whether Mr. Werth actually informed Mr. Rolon and Mr. Deck that he was going to perform work on the belt which was started up and resulted in his injuries (Tr. 154-159).

The respondent's reliance on Mr. Werth's alleged negligence as a defense to the citation is rejected. The petitioner's position on this issue is correct, and I conclude and find that the respondent may be held strictly liable and accountable for the violation regardless of any fault by one of its employees. Although any negligence by Mr. Werth may be considered in mitigation of any civil penalty assessments for the violations which have been affirmed in this case, I cannot conclude that the evidence establishes that Mr. Werth was negligent. His credible and unrebutted testimony establishes that he received no training

and was not aware of any lockout procedures. The respondent's suggestion that Mr. Werth may not have notified Mr. Rolon and Mr. Deck that he was going to work on the belt which was started up and caused his injuries is likewise rejected. Mr. Rolon and Mr. Deck were not called to testify in this case and I find Mr. Werth to be a credible witness and I believe his unrebutted testimony.

The record in this case establishes that the prior violation issued by Inspector Frederick was in fact served on Elco Concrete Products under its own MSHA Mine ID number, and as previously noted, it is not included in the respondent's history of prior violations. Under the circumstances, I find some merit in the respondent's argument that it should not be penalized for the negligence attributable to Elco. With regard to Mr. Glasford's knowledge of the prior violation, and the respondent's constructive notice of the violative conditions, since Mr. Glasford was not called to testify, his managerial role with respect to the respondent's operation at the time this violation was issued, as testified to credibly by Inspector Frederick, remains unrebutted. Although I find Mr. Mumma's testimony concerning Mr. Glasford's status believable, I am not totally convinced that Mr. Glasford was not informed about the prior cited conditions. Nor am I convinced that Mr. Glasford did not occupy a managerial position with the respondent, and I credit Mr. Werth's testimony that Mr. Glasford was his boss.

Apart from any knowledge by the respondent with respect to the prior violation, I conclude and find that the evidence and testimony presented in this case, taken as a whole, supports a finding of a high degree of negligence by the respondent for the citation in question. Although Mr. Mumma asserted that had he been informed of the prior violation, he would have taken appropriate steps to review the plant operational procedures with his employees, he conceded that he had no knowledge of the existence of any written company safety rules and procedures. Mr. Mumma did not rebut the fact that Mr. Werth was not trained, and he acknowledged that he had no knowledge of the existence of any company training program (Tr. 132). He simply believed that Mr. Werth had been assigned to Mr. Rolon for training, and that Mr. Barnett was responsible for overseeing the operation of the plant. However, Mr. Rolon and Mr. Barnett were not called to testify, and in the absence of any testimony from these key employees, Mr. Werth's unrebutted and credible testimony establishes that he was not trained and had no knowledge of any lock-out procedures.

Mr. Mumma's acknowledgement of the fact that the respondent provided the locks for use by its employees, establishes a strong inference that it was aware of the requirements of the cited standard, and Mr. Mumma conceded that he was aware of these requirements (Tr. 90). I believe that it is not unreasonable to

expect the respondent to insure that Mr. Werth was trained, or otherwise made aware of the existence of the locks, including the necessity for using them to lock out a belt before he performed any work. Further, given the fact that Mr. Werth was working with Mr. Rolon, an individual who Mr. Mumma stated was supposed to train Mr. Werth, and who knew that Mr. Werth was working on the belt, I can only conclude that the respondent failed to take reasonable steps to adequately supervise Mr. Werth's work, and that its failure to do so contributed to the accident which resulted in serious injuries to Mr. Werth. Under all of these circumstances, I conclude and find that the violation was the result of a high degree of negligence on the part of the respondent, and the inspector's finding in this regard IS AFFIRMED.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2626303	05/26/88	56.12016	$1,000
2626304	05/26/88	56.9006	$ 800

ORDER

The respondent IS ORDERED to pay the civil penalty assessments for the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge