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SOL (MSHA) V. WALKER STONE
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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. CENT 92-52-M A.C. No. 14-01518-05503
v.	Portable Plant No. 3
WALKER STONE COMPANY, INC., RESPONDENT	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David S. Walker, pro se, Chapman, Kansas, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. the "Act." The Secretary of Labor on behalf of the Mine Safety and Health Admintration, (MSHA), charges the Respondent, the operator of the mine, Portable Plant No. 3, with four violations of mandatory regulatory standard found in 30 C.F.R.

The operator filed a timely answer contesting the alleged violations, the serious and substantial (S&S) characterization of three citations and the appropriateness of the proposed penalties.

Pursuant to notice, a hearing on the merits was held before me at Topeka, Kansas, on June 17, 1992. Testimony was taken from Federal Mine Inspector Richard Laufenberg who made the inspection on October 22, 1991 and from David Walker, President of Walker Stone Company. At the conclusion of the hearing, the parties submitted the matter waiving their right to file post-hearing briefs.

Stipulations

At the hearing, the parties entered into the record the following stipulations which I accept as established fact.

1. Walker Stone Company Incorporated is engaged in mining and selling of stone in the United States, and its mining operations affect interstate commerce.

2. Walker Stone Company Incorporated is the owner and operator of Portable Plant No. 3 Mine, MSHA I.D. No. 14-01518.

3. Walker Stone Company Incorporated is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation as modified was properly served by a duly authorized representative of the Secretary upon an agent of respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue business.

8. The operator demonstrated good faith in abating the violation.

9. Walker Stone Company Incorporated is a small mine operator with 67,187 hours worked per year as reflected in the records for 1990.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

11. The conditions cited in Citation No. 3629902 constitute a violation of 30 C.F.R. 56.14112(a)(1).

12. The conditions cited in Citation No. 3629903 constitute a violation of 30 C.F.R. 56.14112(a)(1).

13. The conditions cited in Citation No. 3629904 constitute a violation of 30 C.F.R. 56.14112(a)(1).

Citation No. 3629901

This citation, as amended, charges the operator with a 104(a) non S&S violation of 30 C.F.R. 56.6101.

The citation charges as follows:

> The magazine area was not kept free of dry grass and brush. Dry vegetation was observed at a distance of less than 25 feet. The magazines were used to store explosive material.
>
> A grass fire in the area could result in an unplanned detonation of the explosive material stored in the magazines.

The cited safety standard 30 C.F.R. 57.6101 reads as follows:

> 57.6101 Areas around explosive material storage facilities.
>
> (a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.

The essential facts are not in dispute. Inspector Richard Laufenberg testified that there was dry vegetation within 25 feet of each of two magazines used to store explosive material. One was used to store detonators and the other to store explosives. There was vegetation knee high to waist high within 25 feet to the north and west of the detonator magazine. It covered 30 - 40% of that area. There was also dry grass within 25 feet to the north and east of the other explosive magazine, covering 90% of that area. On the other hand the area in front leading up to the door of each magazine was clear of all vegetation. To abate the citation a front end loader was used to scrape clear the area around the magazines.

There was no contrary evidence. The operator simply argued that the magazines were in a somewhat isolated area and that there was no hazard of either magazine exploding. The operator also stated he was relying upon photographs taken at the time of inspection by the inspector to prove there was no hazard. At the hearing it was established that the photographs were lost and thus unavailable to either party.

The undisputed testimony of the mine inspector clearly established the alleged 104(a) non S&S violation of 30 C.F.R. 57.6101. There was dry vegetation within 25 feet of both th detonator and explosive magazine.

I have considered the statutory penalty criteria set forth in Section 110(i) of the Act and find that MSHA's proposed $20 penalty is fully supported by the record. It is a modest but appropriate civil penalty in view of the testimony of the mine inspector who found that under all the circumstances and facts involved in this violation, it was not a significant and substantial violation.

Citation No. 3629902

Citation No. 3629902 charges the operator with 104(a) S&S violation of 30 C.F.R. 56.14112.

The citation charges as follows:

> The guard for the tail pulley on the Pioneer conveyor belt was constructed in a manner that would not withstand the vibration, shock, and wear to which it was subjected during normal operations. The guard was constructed of old conveyor belting and hung on hooks mounted to the frame of the conveyor. Bent hooks and an accumulation of limestone dust on the belt guard, had eventually caused the guard to fall off the tail pulley section of the conveyor. A well designed guard is necessary to prevent someone from being caught by and entangled in the moving parts.

The cited safety standard 30 C.F.R. 56.14112(a)(1) reads as follows:

> 56.14112 Construction and maintenance of guards.
>
> (a) Guards shall be constructed and maintained to -
>
> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operations . . . .

The essential facts are undisputed. Inspector Laufenberg testified the citation quoted above accurately describes the violative condition he observed at the time of his October 22, 1991 inspection. The operator stipulated that "the conditions cited in Citation No. 3629902 constitute a violation of 30 C.F.R. Section 56.14112(a)(1)." (Stipulation No. 11). The primary issue remaining is whether or not the violation was significant and substantial. Since this is the primary issue in the remaining two citations (Citation Nos. 3629903 and 3629904) this issue in all three cases alleging an S&S violation of the same standard will be discussed below under the heading entitled "Significant and Substantial Violations" after setting forth the violative conditions charged and established in these two remaining citations.

Citation No. 3629903

This citation charges a 104(a) S&S violation of 30 C.F.R. 56.14112. The citation reads as follows:

> The guard for the tail pulley on the #2 conveyor belt was constructed in a manner that would not withstand the vibration, shock, and wear to which it was subjected during normal operations. The guard was constructed of old conveyor belting and hung on hooks mounted to the frame of the conveyor. Bent hooks and an accumulation of limestone dust on the belt guard, had eventually caused the guard to fall off the tail pulley section of the conveyor. A well designed guard is necessary to prevent someone from contacting the moving machine parts. The tail pulley was located approximately four (4) foot above ground.

The cited safety standard reads as follows:

> 56.14112 Construction and maintenance of guards.
>
> (a) Guards shall be constructed and maintained to -
>
> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation . . . .

The essential facts are undisputed. The credible testimony of Inspector Laufenberg established the violative conditions alleged in the citation. The inspector testified the citation accurately describes the condition he observed at the time of his inspection.

In addition, the operator stipulated that the conditions cited in Citation No. 3629903 constitute a violation of 30 C.F.R. 56.14112(a)(1). (Stipulation No. 12)

The S&S issue involved in this citation will be discussed under the heading "Significant and Substantial Violations" since this is also the primary issue in two other citations charging violations of the same safety standard.

Citation No. 3629904

This citation charges the operator with a 104(a) S&S violation of 30 C.F.R. 56.14112.

The citation reads as follows:

> The guard for the tail pulley on the 65 foot Universal stacking conveyor belt was constructed in a manner that would not withstand the vibration, shock, and wear to which it was subjected during normal operations. The guard was constructed of old conveyor belting and hung on hooks mounted to the frame of the conveyor. Bent hooks and an accumulation of limestone dust on the belt guard had eventually caused the guard to fall off the tail pulley section of the conveyor. A well designed guard is necessary to prevent someone from contacting the moving machine parts. The tail pulley was located approximately three (3) foot above ground.

The cited safety standard 30 C.F.R. 56.14112(a)(1) reads as follows:

> 56.14112 Construction and maintenance of guards.
>
> (a) Guards shall be constructed and maintained to -
>
> (1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation . . . .

The essential facts are undisputed. Inspector Laufenberg testified the citation quoted above, accurately describes the violative condition he observed at the time of his October 22, 1991 inspection. There was no contrary evidence.

The operator also stipulated that "The conditions cited in Citation No. 3629904 constitute a violation of 30 C.F.R. 56.14112(a)(1)." (Stipulation No. 13).

The S&S issue involved in this citation will be discussed under the heading "Significant and Substantial Violations" since this is also the primary issue in the other two citations charging violations of the same safety standard.

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, (August 1985) 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).

Whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

The reasonable likelihood that the hazard contributed to will result in an event in which there is a serious injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (July 1984); Monterey Coal Co., 7 FMSHRC 996 (1985). Thus the time frame for determining' if a reasonable likelihood exists includes not only the time that a violative condition existed but also the time it would have existed if normal mining operations had continued. Rushton Mining Co., 11 FMSHRC 1432 (1989); Halfway, Inc., 8 FMSHRC 8, 12 (1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

The Secretary is not required to present evidence that the hazard actually will occur. In Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987), the Commission held that:

> In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required.

See also Eagle Nest, Incorporated, Docket No. WEVA 91-293-R (July 28, 1992).

Citation Nos. 3629902, 3129903 and 3629904 each allege a significant and substantial violation of 30 C.F.R. 56.14112(a)(1). These citations involve three (3) different tail pulley guards. Each tail pulley was 18 to 24 inches in diameter and the conveyor belts were 30 to 32 inches wide. The tail pulley guards were constructed of conveyor belting hung on hooks. Due to poor construction and maintenance, a substantial portion of each tail pulley guard had fallen off leaving employees exposed to the hazard of contact with the pinch point between the pulley and the moving conveyor belt.

Each belt and pulley was moving at a speed of approximately 100 RPM. The pinch points between the belt and pulley were located 2 to 4 feet above ground level and were easily accessible to employees. I credit the testimony of Inspector Laufenberg that there was spillage from the belt which could cause an employee to trip and fall into the belt and also that an employee could be drawn into the pinch point by his clothes being caught in the pinch point. There was no stop cord near the conveyor belts. Evaluated in terms of continued normal mining operations, the hazard contributed to would reasonably likely result in serious injury.

The most probable injury would be the loss of an arm. The operator was clearly negligent in his failure to comply with the cited safety standard. The record fully supports the inspector's evaluation of the operator's negligence as moderate. I find the gravity of the violation was indeed serious. The operator abated all violations in good faith. He is a small operator.

Upon evaluation of all the evidence, I concur with Inspector Laufenberg's finding that each of the three violations involving tail pulley guards was a significant and substantial violation. The credible testimony of Inspector Laufenberg established that in each case there was a violation of a mandatory safety

standard; that a discrete safety hazard existed and that there was a reasonable likelihood, evaluated in terms of continued normal mining operation, that the hazard contributed to would result in serious injury.

Accordingly, it is found each of the violations of 30 C.F.R. 56.1412(a)(1) is a significant and substantial violation an considering the statutory criteria in Section 110(i) of the Act, the full amount of MSHA's proposed penalty is assessed for each violation.

ORDER

Each of the citations is AFFIRMED. Walker Stone Company IS DIRECTED TO PAY civil penalties in the sum of $224 to the Secretary of Labor within 30 days of the date of this decision. Upon receipt of payment, this case is DISMISSED.

August F. Cetti
Administrative Law Judge