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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
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. CENT 93-97-M |
| | : | A.C. No. 14-00164-05515 |
| v. | : | |
| | : | Kansas Falls Quarry |
| WALKER STONE COMPANY, INC., Respondent | : | & Mill |

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner:
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing and Troup, Junction City, Kansas, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

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 (2) alleged violations of mandatory safety standard 30 C.F.R. 56.14107(a). The respondent filed a timely answer and hearing was held in Manhattan, Kansas. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and if so, (2) the appropriate civil penalties to be assessed for the violations, taking into account 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, Pub. L. 95-164, 30 U.S.C. 801, et seq.

2. 30 C.F.R. 56.14107(a).

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

Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. The respondent, is engaged in the mining and selling of limestone (crushed and broken) in the United States, and its mining operations affect interstate commerce.

2. The respondent is the owner and operator of Kansas Falls Quarry and Mill Mine, MSHA I.D. No. 14-00164.

3. The respondent 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 citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The proposed penalties will not affect the respondent's ability to continue in business.

7. The respondent is a small mine operator with 81,602 hours worked in 1991.

8. 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 citations.

## Discussions

The citations issued in this case were both issued on March 19, 1992, by MSHA Inspector Richard Laufenberg, and they both cite alleged violations of mandatory safety standard 30 C.F.R. 56.14107(a).

Section 104(a) non-"S&S" Citation No. 4123442, states as follows:

> The V-belt drive unit on the #1 screen was not guarded. A locked gate at the bottom of the stairs to the #1 screen was being used as a means to guard the V-belt unit. Current MSHA policy does not allow for a gate to be used as a means to guard moving machine parts.

Section 104(a) non-"S&S" citation No. 4123553, states as follows:

> The V-belt drive units on the #2 and #3 screens were not guarded. A locked gate at the bottom of the stairs to the #2 and #3 screens was being used as a means to guard the V-belt units. Current MSHA policy does not allow for a gate to be used as a means to guard moving machine parts.

Inspector Laufenberg confirmed that he modified citation No. 4123553, in November, 1992, to delete any reference to the No. 3 screen, because he saw no point in issuing a separate citation and he considered both screens to be in the same area (Exhibit P-5; Tr. 13, 19, 53).

## Petitioner's Testimony and Evidence

MSHA Inspector Richard Laufenberg confirmed that he inspected the respondent's surface limestone mine quarry operation on March 19, 1992. He stated that he issued citation No. 4123552, on the No. 1 screen V-belt drive unit because it was not guarded in that it was not totally enclosed at the actual drive unit. The screen was elevated off the ground and rested on four legs. The drive unit was approximately two to four feet above an adjacent walkway that was on the south side of the screen. The walkway was approximately three-feet wide, with an outside handrail. Mr. Laufenberg identified Exhibit P-6, as a diagram of the screen unit that he drew from his field notes. He prepared the diagram when he returned to the mine for a compliance follow-up inspection (Tr. 10-19).

Mr. Laufenberg identified the cited V-belt drive and walkway in question and marked his diagram accordingly (Tr. 19-20). He stated that the pinch points were "right at the walkway", and they consisted of the shive on the screen drive which served to

shake the screen, and the motor drive. The turning shive was a moving machine parts, and the V-belt itself was approximately an inch to a couple of inches wide and moved "very fast, maybe as fast as a thousand RPM's", and was also a moving machine part which was not guarded all around the structure (Tr. 21-22).

Mr. Laufenberg stated that the pinch points that he described could be contacted by someone, and be believed that such contact would result in lacerations, and if someone's hand was pulled through the pulleys, it would result in broken bones or permanent disability such as a loss of a finger "if it went through the shive" (Tr. 22). He also believed that an injury would result if someone caught their clothing in the pinch points (Tr. 23). He was also concerned that someone would suffer injuries if he slipped and fell into the running V-belt drive, and would suffer non-fatal injuries resulting in lost work days or restricted duty (Tr. 23).

Mr. Laufenberg stated that it was unlikely that an injury would occur because a gate restricted access to the cited area, and it was unlikely that anyone would be there while the equipment was running (Tr. 24). The gate was located at the bottom of the stairs connecting the ground level to the elevated deck area, and he was informed that the gate was normally kept locked when the plant was in operation, and that the key to the locked gate was kept by the quarry supervisor Clifford Moenning (Tr. 24-25). Mr. Laufenberg confirmed that the gate was locked when he was at the plant, but he did not enter the area because he did not believe it was safe to do so while the equipment was in operation (Tr. 26).

Mr. Laufenberg identified Exhibit P-3, as a photograph of the locked gate leading to the No. 1 screen (Tr. 27). He did not measure the gate, but estimated that it was approximately 40 inches high and that there was wire mesh material around the gate access area (Tr. 29-30). He believed that it was possible for someone to climb over the fence (Tr. 31).

Mr. Laufenberg stated that someone would have occasion to be on the walkway for maintenance if there was a problem such as holes in the screens, which would affect the sizing of the materials, and he would possibly go there to check on the problem (Tr. 31-32). Mr. Laufenberg also believed that someone would be in the area for preventive, routine maintenance, such as lubrication of the machine parts, and that "most operations" do this on a daily basis. He did not know that the respondent performed such maintenance, was not aware of its maintenance schedule, and only generally knew from his experience that such equipment is greased. He did not know if the specific equipment in question was a greaseless or maintenance free operation (Tr. 33).

Mr. Laufenberg stated that depending on production, the respondent had 20 to 30 employees at its operation, and that one plant operator would be at the screening plant while it was running, and he would be located in a small control room. He stated that Mr. Moenning informed him that no one would be in the walkway area when the equipment was operating, and that the respondent's procedure was to shut the equipment down when maintenance was performed (Tr. 35). Mr. Laufenberg was not aware of any accidents at the respondent's operation as a result of unguarded equipment (Tr. 37).

Mr. Laufenberg confirmed that one person, namely the plant operator, would be affected by the unguarded equipment "if he was to go up there with the equipment running" (Tr. 37). He confirmed that he did not speak with the plant operator, and only spoke to Mr. Moenning (Tr. 38).

Mr. Laufenberg stated that his testimony with respect to the second citation he issued on the No. 2 screen would be the same as his testimony regarding the No. 1 screen, and the parties agreed that this was true (Tr. 39-40). He did not know for sure that it was possible to shut off one of the screens without shutting off the others, but stated "no" (Tr. 41).

Mr. Laufenberg confirmed his "moderate negligence" finding, and explained that he based this on the fact that MSHA had previously informed the respondent during a prior inspection in August, 1991, that the V-belt drive needed to be guarded, and that the gate at the No. 1 screen would no longer be considered a guard (Tr. 42). He stated that the respondent was informed of this by Inspector Joe Quartaro, and that he (Laufenberg) discussed this prior inspection with Mr. Moenning during his March, 1992, inspection (Tr. 42). He stated that Mr. Moenning informed him that it was his understanding when he discussed the matter with Mr. Quartaro in August, 1991, that the respondent would be allowed to provide guards for the equipment during the shutdown (Tr. 43). Mr. Laufenberg characterized a "shutdown" as "routine maintenance, shutdown for inclement weather during the winter" (Tr. 44).

Mr. Laufenberg further explained that Mr. Moenning told him that Mr. Quartero indicated that the repairs could he made "at their convenience, or when they shut down" because the guards needed to be built and no production would be lost during the shut down (Tr. 45).

Mr. Laufenberg confirmed that he issued the second citation No. 413553, on the No. 2 screen V-belt drive unit five minutes after the first citation, and that the No. 2 unit was the same as the No. 1 unit, and it was not guarded at all with a physical guard around the pinch points. He believed that a person could contact the unguarded No. 2 unit moving parts, and that the

conditions and hazard exposure for both screens was the same, that the relative location of both screens was the same, that both walkways were of the same width, and that access to the No. 2 screen was by a stairway and walkway (Tr. 51).

Mr. Laufenberg confirmed that his gravity findings for the No. 2 screen were the same as the No. 1 screen, and that an injury was unlikely because he believed the company has a policy that no one is to go up to that area when the equipment is running, and that a gate was located at the bottom of the stairs (Tr. 52). However, he believed that it was possible for someone to climb over the gate, and that his testimony regarding his belief that someone would be on the No. 2 screen walkway would be the same as his testimony regarding the No. 1 screen (Tr. 53).

Mr. Laufenberg stated that the citations were not abated by the termination date of April 14, 1992, and he learned of this when he returned to the mine site during his second fiscal year 1992, inspection. Mr. Moenning informed him at that time that the V-belt guards had not been built because of the prior agreement that this would be done after a shut down and at the respondent's convenience, and that twelve months had passed from August, 1991, until his second inspection in 1992, and the guards had not been installed (Tr. 56). Mr. Laufenberg concluded that there was no justification for extending the abatement time further, and he proceeded to issue section 104(b) orders for both screens on September 21, 1992, when he returned to the site (Tr. 56-57). He confirmed that Mr. Moenning informed him at that time that the screens were guarded by two locked gates that were kept locked all of the time and that he had the key (Tr. 58). He also stated that Mr. Moenning informed him that the screens were not physically guarded because MSHA had accepted the gates in the past (Tr. 58-59).

Mr. Laufenberg stated that during his first inspection, Mr. Moenning's main objection to guarding the screens was the agreement that this could be done during the shut down, and that during his second inspection Mr. Moenning took the position that the gates were in place, that "we had accepted them in the past", and "also brought up the fact that, you know, we had that agreement, that they were going to do it" (Tr. 59). Mr. Laufenferg confirmed that he recommended that the citations be "specially assessed" because the respondent had been cited for not having the guards built, and did not do so (Tr. 60-61).

Mr. Laufenberg stated that he was not aware of any MSHA written policy approving a locked gate as an acceptable means of guarding moving machine parts. However, he explained that he was aware of the fact that MSHA supervisor McGee, of the Topeka Office, had attended a meeting in Denver, where an April, 1991, inspector's manual policy was discussed, (Exhibit P-11), and he explained the manual policy as follows at (Tr. 66-67; 72):

THE WITNESS: The April, '91 policy basically says we'll not accept it, that is what we are talking about here, the chain lock, chain restricted access. When Mr. McGee came back, we discussed this at a staff meeting.

THE COURT: What happened then?

THE WITNESS: He basically informed us that the district manager at that time was aware that he had knowledge that there were using chains, gates, as a guard to block access to certain pinch points. He informed the supervisors that if they were aware of the condition, that they were to instruct the inspectors to tell the mine operators that they were no longer going to be able to use a gate, that they could leave the gate, but they would also have to build the guards.

* * * * * * *

The inspectors were -- if they had any of those, that we were supposed to notify the mine operators they needed to follow the intent of new 1988 regulation, that the equipment itself be enclosed and guarded. That was the reason for the new policy. The inspectors were told if we had any of those, to give the operators an opportunity to guard them, and not cite them, but when we went back to evaluate the situation, to take whatever appropriate action we thought was necessary to get the equipment guarded.

Q. Do you know whether or not Walker Stone was informed of this change in policy?

A. Yes, I do.

Q. And I think it's been -- you have already testified to it, when did they receive this notification?

A. I was informed in September -- the last week in September of 1991, the meeting with Joe Quartaro and Jim McGee, and Jim McGee said that Walker Stone was informed in August, a month before our meeting, that they were informed that they were going to have to build these guards.

Mr. Laufenberg did not believe that the respondent exercised good faith compliance in this case because it took over twelve

months to complete the guarding and the guards were built only after the section 104(b) orders were issued (Tr. 76-77). He confirmed that the respondent was using the gates with the knowledge of MSHA inspectors, and that someone had accepted the gates as compliance in the past. Although there was no formal MSHA gate policy in the past approving their use, Mr. Laufenberg confirmed that the respondent had been cited in the past for not having gates, and after installing them, the citation was terminated (Tr. 78).

On cross-examination, Mr. Laufenberg stated that the guarding regulatory section 56.14107, has been in effect since the effective updated version effective August, 1988 (Tr. 79). He confirmed that the citations he issued in this case stated that "current MSHA policy does not allow for a gate to be used as a means to guard moving machine parts" (Tr. 79-80). He confirmed that the previously referred to provision cited as Exhibit P-11, refers to the use of chains as non-complying guards for moving machine parts, and that a chain is not a gate, and that this prior policy does not directly address locked gates (Tr. 80).

Mr. Laufenberg confirmed that it was his understanding that the respondent was cited on September 1, 1985, for having chains across walkways (Tr. 80-81). He confirmed that he inspected the respondent's operation in August, 1989, but did not cite the gates at that time became they were installed at that time to terminate a citation issued by another inspector (Tr. 82). He agreed that he would feel "comfortable" if he had abated such a citation by installing a gate, and that he would discuss such a situation with an inspector who wanted to cite him for the same condition at some future time (Tr. 82).

Mr. Laufenberg confirmed that he issued the citations in March, 1992, fixed the abatement time as April 14, 1992, and did not return to the mine until September, 1992. He did not believe that the cited conditions were serious because access to the cited areas was restricted by the locked gates (Tr. 83). He further confirmed that when he returned in September, 1992, Mr. Moenning told him that pursuant to the agreement the prior twelve months, the guards would be installed during the winter shutdown, but that there was no shutdown that year (Tr. 84). Conceding that there was no opportunity for the respondent to install the guards pursuant to the agreement because there was no shutdown, Mr. Laufenberg stated that he issued the citations because "I feel that there was an opportunity in that six-month period for them to fix it", and that this was a reasonable time to build the guards because they were ultimately built in four to five hours to abate the orders (Tr. 84-85).

Respondent's Testimony and Evidence

Clifford Moenning, respondent's plant manager, confirmed that he was served with the citations issued by the inspector. He stated that he informed the inspector that the guards would be installed when there was a winter shut down, but that no shutdowns occurred in 1991 or 1992, because the weather permitted the plant to remain in operation (Tr. 92). He confirmed that the respondent had previously received a citation No. 2392412, on September 11, 1985, for the same screen V-belt drives cited in this case, and at that time chains were installed across those areas with a sign prohibiting entry while the equipment was in operation (Exhibit R-A, Tr. 93). He further confirmed that this citation was abated by installing locked gates and screens over the stair rails so people could not climb over them (Tr. 94). These gates are higher than 40 feet, and they have not been changed since 1985 (Tr. 95).

Mr. Moenning confirmed that Inspector Laufenberg inspected the plant in 1989, but did not cite the gates, and he could not remember discussing the gates with the inspector (Tr. 97). He stated that there are three other similar screens at other locations that he supervises. Two of the screens are guarded similar to the ones cited in this case and they are reached by a ladder which is removed to block access when work is performed on the screen. The third screen is a dry screen that is "guarded up above", and none of these screens have ever been physically guarded (Tr. 97-98).

Mr. Moenning explained how the guards were constructed on site and installed to abate the section 104(b) orders issued by the inspector, and he stated that it took six or seven hours to do this work with some difficulty because the guards had to be constructed to withstand the vibrations of the screens (Tr. 100).

On cross-examination, Mr. Moenning stated that he has a key to the locked gates in question, and that the operator who controls the screening machinery also has a key. If the operator has reason to go to those areas, he can unlock the gates, and go to the machinery areas. He confirmed that he or the operator is there at all times. The machinery is turned on and off by electrical buttons in the operator's control house, and the screens and parts can be turned off separately (Tr. 102).

Mr. Moenning confirmed that he was at the plant in August, 1991, when Inspector Quartaro conducted an inspection, and he confirmed that the inspector informed him that MSHA's Denver regional manager sent him a personal message stating that MSHA no longer considered gates as adequate guards for the screens. Mr. Moenning stated that he informed Mr. Walker that gates were no longer acceptable and they discussed providing the guards when there was a shut down (Tr. 103).

Mr. Moenning stated that he informed Mr. Walker about the citations issued by Inspector Laufenberg in March, 1992, and they discussed taking care of it during the shutdown time, and Mr. Walker "said we would take care of it in shutdown time" (Tr. 105). Mr. Moenning stated that he told Mr. Laufenberg that he had "already changed the same thing three times, I didn't know whether the law had changed or not", and that Mr. Laufenberg informed him that "they interpret the law different now than they did before" (Tr. 105). When asked for an explanation as to why the guards had not been provided from August, 1991, through March 19, 1992, Mr. Moenning stated as follows at (Tr. 105-106):

> A. We felt that we had abated slips on that, and -- from the prior time, and we felt it wasn't a danger area. There's no one works up there while that operation is in -- while the machine is in operation, and we didn't have any shutdown time, and we didn't feel it was an emergency time thing.

Mr. Moenning stated that when the inspector visited the site in August, 1991, he did not issue a citation, and the gates had remained in place from 1985 to 1991, and were there when Mr. Quartero came to the site (Tr. 108).

Mr. Moenning stated that in September, 1992, the plant operated six days a week, from 7:30 or 8:00 A.M. to 4:30 or 5:30 P.M. daily, including the winter, but depending on the workload and weather (Tr. 110). He confirmed that the equipment did not operate between closing time in the afternoon and the next morning, and he could not recall any shutdowns "that would take me down long enough to guard the screens" (Tr. 112). He confirmed that materials were on hand for building the guards and stated that "we build guards all the time" (Tr. 112). He stated that he never had any maintenance that would have required a shut down for several hours (Tr. 113).

Mr. Moening stated that Mr. Laufenberg never told him that he could wait until a shut down to fix the guards, that he had no agreement with Mr. Laufenberg, and that Mr. Laufenberg told him to "Fix it" (Tr. 114). Mr. Moenning further stated that when Mr. Laufenberg issued the March, 13, 1992, citations, he (Moenning) did not believe that he had the next seven months until winter to install the guards, but he did not believe that it was an emergency, and that "this was the third time that I had redid this for MSHA, without any law changing or anything else . . . We'd fixed it and like, they were satisfied with it for years" (Tr. 114-115).

Mr. Moenning stated that his workload was heavy after the citations were issued, and although he could not recall if Mr. Laufenberg told him that he would issue a section 104(b)

order when he returned if the citations were not abated, he stated that "he might have told me that" (Tr. 117).

David Walker, the respondent's owner-operator, stated that the plant was purchased in 1970, and when the Mine Act became effective in 1977, chains were in place to guard the screens in question, and he was cited for this and it was corrected. Subsequently, in August, 1991, Mr. Quartaro came to the mine, but did not issue a citation, and Mr. Moenning told him that Mr. Quartaro informed him that the gates on the stairs that accessed the screens were no longer acceptable and that every moving part on the screening tower had to be guarded (Tr. 119-120). The regulation had not changed at that time, and Mr. Moenning informed him that he agreed to guard each V-belt on the screening tower during the winter shutdown (Tr. 121). Mr. Walker stated that "I said fine . . . I didn't feel like we had to, because we already had an abated citation on the same guarding citation, but to get along with them we would do it" (Tr. 121). However, there was no winter shutdown and "we wanted to operate right through the winter," but that this was not common (Tr. 121).

Mr. Walker confirmed that Mr. Laufenberg inspected the plant in 1989, but did not cite the gates, and that no citations were issued for the gates since 1985, until Mr. Laufenberg cited them in March 1992 (Tr. 122). Mr. Walker stated that when Mr. Moenning informed him of the citations, he informed Mr. Moenning that "we have an agreement with them, that we'll fix them when we shut down. We haven't shut down, so I felt like our agreement was still good" (Tr. 123). Mr. Walker agreed that he had no agreement with Mr. Laufenberg, but believed that he had one with MSHA. When asked who he had the agreement with, Mr. Walker responded "I think the inspectors all speak for MSHA" (Tr. 123).

Mr. Walker stated that he decided to comply in December, 1992, when he ordinarily shut down, and that he did so after calling the local MSHA district manager in Topeka, who informed him that "he was ordered by the district manager to write it" (Tr. 124). Mr. Walker explained his understanding of the agreement as follows at (Tr. 125):

> THE WITNESS: We had agreed to comply with their request. I felt like we already had it guarded, we already have an abated citation that says it's okay. They said, "Okay, we do it when we have time," because this has been okay for five or six years, or whatever.

Mr. Walker stated that "I don't think regulation by policy is legal", and when reminded that "policy is not the law", he responded "I understand that, they changed the policy" (Tr. 125-126). Respondent's counsel stated that "The MSHA

allowed compliance, that is the whole issue", but he agreed that this is not a legal defense, and Mr. Walker believed that it was (Tr. 126).

Mr. Walker believed that he had a verbal agreement with the inspector (Quartaro) "to fix it when we shut down" and to change the method of guarding during the shutdown. He stated that he never received any written notification that gates were not acceptable and that "all I had was the word of an inspector, that they weren't going to accept it any more, and we agreed to fix it" (Tr. 127).

On cross-examination, Mr. Walker reviewed the language of section 56.14107(a), and he believed that it allows for the use of gate guarding because "the machine part is not accessible, it doesn't have to be guarded" (Tr. 130). He mentioned a guarding exception if the equipment is seven feet off the ground and inaccessible, but conceded that the two cited pinch points were not seven feet from the walkways (Tr. 131). He stated that he has never attempted to file a petition for modification of the standard, and did not know about this provision (Tr. 131).

Mr. Walker confirmed that he was aware of the fact that in August, 1991, Inspector Quartaro informed Mr. Moenning that the use of gates were no longer sufficient to guard the equipment in question, and that he discussed this with Mr. Moenning. It was Mr. Walker's recollection that Mr. Moenning told him about his conversation with Mr. Quartaro, and it was his understanding that he could wait until the winter shutdown to install the guards, and he guessed that Mr. Quartaro assumed the winter shutdown time frame (Tr. 134-135). He denied knowing that Mr. Quartaro had stated that the next time an inspector came to the mine he would be cited if the equipment was not guarded (Tr. 135).

Mr. Walker confirmed that he was aware of the citations issued by Inspector Laufenberg in March, 1992, and he stated "I felt comfortable with our abated citation. I didn't think you could come change the rules in the middle of the game and get fined for it" (Tr. 136). He further explained that he relied on the agreement and that he would abate the citations and change the guarding when the operation shut down. He believed that he could do this at his convenience, and that it was very possible that if he did not shut down for the winter, he would have waited until the next year to install the guards. He further relied on his belief that no changes in the regulation had occurred since 1985, and his view that the gates constituted compliance because they restricted access to the area and meet the purpose of the regulation (Tr. 136-138).

Mr. Walker stated that after the citations were issued by Mr. Laufenberg, he instructed Mr. Moenning to make the repairs "if he had time at any time, even if it was before the winter

shutdown" (Tr. 138). Mr. Walker did not believe he had to guard the screens by the scheduled abatement time because "You get extensions all the time" (Tr. 139). Mr. Walker did not believe that the section 104(b) orders should have been issued, and he stated that he tried to protest them (Tr. 139). He further stated that if he had not received the orders he would not have installed the guards and would have waited to do this during the next shutdown because he believed that the gates were in compliance, and his belief in this regard is based on the fact that the initial citation he received was abated after the gates were installed (Tr. 139-141). He further explained as follows at (Tr. 144-145):

Q. You are saying you feel comfortable with the abated citation in the face of an inspector coming and telling you that the policy has changed, that you need to guard it, you still feel comfortable with the abated citation?

A. It's true that I felt protected, but I also agreed to change it.

Q. But did you agree to change it as soon as you could?

A. As soon as it was convenient for us to do that.

Q. Wasn't this convenience rather loose? I mean, you said earlier that you didn't really know what MSHA assumed, but did you realize that your idea of convenience would not being line with what MSHA's idea of convenience was?

A. That's very possible.

Q. In other words, you know by not abating the citation that you were not doing what MSHA asked you to do?

A. That's correct. I also felt like it was not regulation, it was policy.

Q. And that was prior to the citation being issued, is that correct?

A. That's right.

Q. After the citation was issued, you still didn't abate the citation?

A. No, because I still felt like it was policy, not regulation.

Q. All of this time were not these two V-belt pinch points -- I should say the two V-belts still unguarded?

A. They were still unguarded by those guards, they were guarded by a locked gate.

MSHA Inspector Joseph Quartaro was called in rebuttal by the petitioner and he confirmed that he inspected the mine in August, 1991, and that he spoke with Mr. Moenning and informed him that he was relaying a message from his supervisor and district manager that gates were no longer acceptable and that the equipment itself would have to be guarded. Mr. Quartaro stated that Mr. Moenning became upset and alluded to "some sort of an agreement that the gate was supposed to be all right" (Tr. 148). Mr. Quartaro informed Mr. Moenning that he would be cited on the next inspection if the equipment was not guarded, and Mr. Moenning reiterated "that it was always all right before, and now they are changing it again, and that he didn't think that they should have to do it" (Tr. 149). Mr. Quartaro further explained as follows at (Tr. 149-150):

Q. Okay. What else did he say? Did he say when he would change them?

A. Well, I think it came up, you know, when he had to change them, and I think I said something to the effect he didn't have to stop right now and do it, he could do it when they were down.

Q. When you said they could do it when they were down --

A. Uh-huh.

Q. -- what did that mean to you?

A. To me, that meant when they were not producing, at -- you know, perhaps after work or on weekends, during breakdowns, or whatever, you know. I think he understood what I meant by down. You know, we've worked together many times, and he's been inspected many times, and I felt that he understood what I mean by that.

Q. So would you say -- did you come to any agreement that he did not have to fix the guards until a winter shutdown?

A. I don't remember any such agreement as that, no. I said, as I remember, that they can do it when they were down. Now, if he wants to say that mean, you know, during winter shutdown, I -- you know, I don't know as that necessarily is correct.

Mr. Quartaro did not believe that it was reasonable for Mr. Moenning to assume that he could wait until the following spring to install the guards. In response to a question as to what he would have done if Mr. Moenning had asked if he could wait until the winter shutdown to install the guards, Mr. Quartaro responded that he would have told Mr. Moenning that "you ought to get it done by the first available down time that you had" (Tr. 154). Mr. Quartaro further explained as follows at (Tr. 156):

Q. Okay. When you had the conversation in August, did you have an understanding with Mr. Moenning that they, Walker Stone, could wait to put the guards on until their shutdown, even if they didn't shut down for two years?

A. No.

Q. Did you have any understanding that they would not get cited because you had told them that they did not have to fix the guards until they shut down, even if that time -- even if there was no definite time of shutdown?

A. No, because as I stated earlier, I think what I said was that it had to be done prior to the next inspection. You know, the next inspection, done any time.

Mr. Quartaro believed that the "next inspection" after his visit could have been anytime after October 1, 1991, through December (Tr. 157-158).

On cross-examination, Mr. Quartaro stated that "the message he conveyed" in August, 1991, to Mr. Moenning was oral and there was nothing in writing, and that neither he or Mr. Moenning explained what was meant by "when the mine was down" (Tr. 159).

Mr. Quartaro could not recall that any specific time or date when the guarding had to be in place was mentioned, and he did not state any specific time for compliance (Tr. 160).

With regard to his instructions concerning the discontinued acceptance of gates as compliance with the guarding requirements of the regulation in question, Mr. Quartaro stated that the decision was apparently made at the MSHA Denver district meeting, and he explained further as follows at (Tr. 164):

> THE WITNESS: That information was brought back to us by our supervisor and told to us. You know, when they do that, well, then if you go to someplace and they have a gate there, and then it becomes our job to tell him. And at that time, by the way, we were also told that because it was a change in policy, that you weren't to issue a citation at that time, you were only to tell them, and give them this fair amount of time to comply before a citation would be issued.

Mr. Quartaro could not recall that any written instructions followed the verbal communication to him. He confirmed that he was aware at that time that gates were being used as guards and that this was acceptable because of MSHA'S policy or "understanding", and he would not cite an operator for using a gate at that time (Tr. 165-166).

Petitioner's Arguments

The petitioner argues that the evidence establishes that the cited moving machine parts were not guarded by an enclosure to prevent persons from coming in contact with the machine pinch points. The petitioner takes note of the fact that the respondent does not claim that section 56.14107(a), does not apply to the cited equipment. In response to the respondent's defense that it complied with the regulation by installing a locked gate, the petitioner asserts that while the gate may have restricted access to the equipment, it was not an adequate guard and did not physically prevent anyone from coming into contact with the moving machine parts.

The petitioner concedes that while the presence of a gate may affect the likelihood of an injury, it cannot satisfy the requirements of section 56.14107(a), because nothing will prevent a person from coming in contact with the moving machine parts once a person gains access to the area. The petitioner cites inspector Laufenberg's testimony that it was possible for someone to climb over the gate, that someone could be at the equipment checking it for routine maintenance, and that two employees had keys to the gate and could have gained access to the equipment.

Citing the "unpredictability of human behavior", the petitioner concludes that an employee might attempt to save time and lubricate the machinery while it was operating, rather than shutting the machine down.

The petitioner points out that Mr. Walker and Mr. Moenning were aware of the fact that Inspector Quartaro had notified them in August, 1991, that using gates as guards would no longer be acceptable. The petitioner acknowledges that Mr. Quartaro informed them that they did not need to immediately shut down the equipment, and could unit until the plant shut down, but also stated that the equipment would have to be guarded by the next inspection or a citation would be issued. The petitioner further points out that Mr. Quartaro did not state that the respondent could install the guards at its convenience, and that he meant that the guards could be installed after work, on week-ends, or when there was a break-down, and that Mr. Quartaro believed that the respondent knew what he meant. Further, the petitioner cites Mr. Walker's testimony that by interpreting Mr. Quartaro's words to mean that he could install the guards when he thought it was convenient, he was not doing what MSHA requested.

The petitioner concludes that once faced with a citation and a time for abatement, the respondent was required to abate the condition within the allotted time, and if it disagreed with the citation, it had a right to a hearing on whether the citations were properly issued. By refusing to cooperate with the inspectors and to reject MSHA's determination that the cited conditions constituted violations, the petitioner concludes that the respondent acted in bad faith. The petitioner further concludes that the respondent could have taken the approximately four hours to construct and install the guards, and points out that it had six months to build and install the guards on the screens, not counting the six months that it was aware that it was not in compliance, and that Mr. Walker testified that he would not have complied with the citations without the issuance of the Section 104(b) orders. Under these circumstances, the petitioner believes that the section 104(b) orders were justified, and that the special penalty assessments were warranted.

Respondent's Arguments

The respondent does not dispute the fact that the cited screen v-belt drives were not individually physically guarded from contact. It contends that the drives were "guarded" by locked gates at the bottom of the access stairs leading to the equipment, and relies on the fact that this method of guarding had been inspected by MSHA for a number of years without any citation being issued.

The respondent acknowledges that during an MSHA inspection in August, 1991, it was advised that the use of locked gates as a guarding method for the equipment in question was no longer acceptable to MSHA. Respondent asserts that it agreed that it would change the method of guarding when the plant shut down for the winter. However, the plant did not shut down for the winter, and during a subsequent inspection on March 19, 1992, the respondent was cited for failure to properly guard the cited belt drive units. Subsequently, on September 21, 1992, the inspector who issued the citations returned to the mine, and after finding that the conditions had not been abated and the guards were not installed, he issued section 104(b) orders shutting down the cited equipment. The guards were provided and the orders were terminated the next day.

The respondent takes the position that based on more than three years of MSHA inspections without citation for the use of locked gates, and without a change in the regulation, its method of guarding the cited equipment with gates was in compliance with the regulation. In further support of this position, the respondent cites Inspector Laufenberg's testimony that there had been no change in the regulation since 1988, and that locked gates to prevent access had been acceptable and passed inspection.

The respondent cites the testimony of Inspector Quartaro confirming the fact that MSHA supervisors informed inspectors of the change in the interpretation of the regulation which led to the citations in this case, but it takes the position that a change in interpretation without notice and opportunity for hearing is not a lawful change in the regulation.

The respondent asserts that all of the witnesses testified to the conversation between Mr. Moenning and the inspectors "which resulted in an agreement" that it could change the method of guarding "to meet this new interpretation" when the plant shut down for the winter. However, between August, 1991, "when this new interpretation was first announced", and March, 1992, when the citations were issued, the plant had not shut down for the winter and continued to operate.

The respondent asserts that Inspectors Quartaro and Laufenberg did not deny that the respondent had been told it could change the method of guarding during the winter shutdown, and that the only evidence in support of the citations is that "their supervisors" felt that sufficient time had past to enable the respondent to change the method of guarding. Respondent contends that this ignored MSHA's concurrence that the change could be made during a shutdown even though no plant shut down occurred, and that Mr. Walker believed that that inspectors intended that the change in the guarding method be made when the plant shut down. Under all of these circumstances, the

respondent suggests that no violations occurred. However, if the citations are affirmed, and relying on the purported MSHA "agreement", and the decision in Moline Consumers Company, 15 FMSHRC 1954 (September 1993), the respondent further suggests that minimum assessments be made for the violations.

## Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 56.14107(a), which provides as follows:

> 56.14107 Moving machine parts.
>
> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

MSHA's Program Policy Manual, June 18, 1991, with respect to the interpretation and application of section 56.14107(a), states in relevant part as follows (Exhibit P-11):

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.

In Yaple Creek Sand & Gravel, 11 FMSHRC 1471 (August 1989), Judge Morris found that a gate 4 to 5 feet from an unguarded chain drive assembly on a hopper feeder conveyor belt did not satisfy the guarding requirements of section 56.14001 (redesignated 56.14107).

In Moline Consumers Company, 12 FMSHRC 1953 (October 1990), I affirmed a citation issued on June 21, 1989, for a violation of the guarding requirements of section 56.14107, because of the mine operator's failure to physically guard a crusher V-belt drive motor. The cited equipment was being "guarded" by a gate normally equipped with a padlock, but the gate was partially opened and unlocked at the time the inspector observed the condition.

In the Moline Consumers case, although the operator conceded that the cited equipment was not individually physically guarded and constituted a violation of section 56.14107, it relied on the fact that the MSHA district that inspected its operation accepted a gate as compliance with the regulation, and it challenged

MSHA's position that the gate must be kept secured with a bolt and nut rather than a padlock and key. The operator also relied on the fact that in another MSHA district where it operated, it had not been cited for guarding equipment with padlocks rather than bolts. The inspector who issued the initial citation, the inspector who issued the follow-up section 104(b) order, and their supervisor all confirmed that at that point in time their district accepted gates secured by bolts as compliance with section 56.14107, but did not accept gates secured only by padlocks. Indeed, after the section 104(b) order was issued, the operator installed a physical guard over the cited belt drive to abate the order, but was subsequently permitted to remove the guard and allowed to continue to use the bolted gate as a means of guarding. Out of an apparent abundance of caution, the operator also used a padlock to secure the gate and posted warning signs.

In Moline Consumers, I noted that MSHA's Program Policy Manual, July 1, 1988, contained no reference to the use of locked or bolted gates as a means of complying with the guarding requirements of former section 56.14001, but did mention the fact that the use of chains at walkways and travelways near moving machine parts was unacceptable. I also noted that an MSHA publication guide relating to equipment guarding relied on in part by the operator also stated that moving machine parts must be individually guarded rather than restricting access by installing railings.

In a subsequent Moline Consumers Company case, 15 FMSHRC 1954 (September 1993), Commission Judge Gerold Feldman rejected the operator's use of perimeter fencing to guard a jaw crusher with drive assembly pinch points, as compliance with the guarding requirements of section 56.14107(a). The fencing in question was similar to that used at the Moline Consumers operation that was the subject of my case. Judge Feldman ruled that it was clear from the plain and unambiguous words of the regulation, that moving machines parts must be individually physically guarded and that the use of area guarding, such as fencing, does not meet the standard. Judge Feldman also concluded that it was clear that the intent of the standard is to protect individuals from moving machine parts rather than the machine itself, and he cited two U.S. Labor Department Petition for Modification decisions concerning section 56.14107, concluding that area guarding is only an alternative to the required guarding of moving parts found in that regulation.

In Highlands County Board of Commissioners, 14 FMSHRC 270, 291 (February 1992), I affirmed a violation of section 56.14107(a), after concluding that the specific and unequivocal language of the regulation requires guarding for any of the enumerated moving machine parts, and that the obvious intent of the regulation is to prevent contact with a moving part.

In Overland Sand and Gravel, 14 FMSHRC 1337, 1341 (August 1992), Commission Judge David Barbour affirmed a violation of section 56.14107(a), after concluding that a padlocked chain stretched across an access stairway leading to an unguarded screening device used to screen gravel did not constitute adequate guarding within the meaning of the regulation.

I conclude and find that the clear and unambiguous language found in section 56.14107(a), which states in relevant part that "moving machine parts shall be guarded to protect persons from contacting" the enumerated and "similar moving parts" requires that such parts be individually physically guarded, and that the use of perimeter or area guarding, such as fences or locked gates, as a means of preventing or impeding access to the equipment, does not comply with the standard. Since the obvious intent of the standard is to prevent injuries to anyone who may, for whatever reason, come in contact with an exposed moving machine part, I cannot conclude that requiring a guard at the specific location of the moving machine part to prevent contact by anyone who may have gained authorized or unauthorized access to the equipment, is unreasonable. The respondent does not dispute the fact that the cited screen V-belt drives were not individually physically guarded from contact.

In the course of the hearing, the respondent's counsel stated that the respondent decided to litigate the citations "as a matter of principle" because locked gates had been accepted as compliance in the past as a matter of policy (Tr. 63-64). In this regard, the respondent asserted that MSHA's policy change in the interpretation and application of section 57.14107(a), with respect to the use of locked gates as a means of compliance, was unlawful because it was accomplished without notice and hearing. The respondent's arguments are rejected. The respondent has acknowledged that it was advised in August, 1991, seven months before the citations were issued, that the use of locked gates as a guarding method were no longer acceptable, and the fact that MSHA's office may have made that decision without formal notice and hearing does not warrant the vacation of the citations. I conclude and find that normal APA rulemaking was not required because no mandatory safety regulation was involved.

I find no evidence that MSHA's past acceptance of locked gates as a means of compliance with the standard was in writing, or incorporated as part of its official policy manual. The written policy of record simply states that the use of chains across a walkway or travelway was not acceptable and no mention is made of locked gates. The evidence establishes that the respondent was cited for a guarding violation on September 11, 1985 (exhibit R-A), because it had "guarded" its V-belt screen drives with a chain and a sign placed across the walkway leading to those areas. The citation was abated after the respondent removed the chain and installed a locked gate as a means of

blocking access to the cited equipment. The respondent obviously views the abatement as MSHA's "policy" acceptance of locked gates as a means of compliance, particularly since the use of the gates were not challenged during subsequent MSHA inspections. However, in the context of a litigated case, the question of whether or not the use of a gate complies with section 57.14107(a), is a matter for adjudication by the Commission and its trial judges. Local MSHA policy directives, or policy manual guidelines, are not officially promulgated regulatory standards or rules of law binding on the Commission or the trial judge. See: Old Ben Coal Company, 2 FMSHRC 2806, 2809 (October 1980); Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982); King Knob Coal Co., 3 FMSHRC 1417 (June 1981). However, any confusion resulting from inconsistent policy interpretations and applications may mitigate the respondent's level of negligence and the civil penalty assessment for the violation.

The respondent's suggestion that the citations should be vacated because it had an "agreement" with MSHA that it could construct and install the required guarding at its convenience during any winter shutdown after August, 1991, when it was first informed that MSHA would no longer accept locked gates as equipment guarding is rejected. I find no credible probative evidence of any binding agreement between MSHA and the respondent that permitted the respondent to wait indefinitely for a winter season severe enough to cause it to shut down its operation, thereby providing a "convenient" time for it to comply with the requirements of section 56.14107(a). I conclude and find that the respondent was obliged to abate the citations issued by Inspector Laufenberg within the time fixed for abatement, and there is no evidence that Mr. Laufenberg was a party to any "agreement". Indeed, Mr. Moenning admitted that no such agreement existed, and that Mr. Laufenberg did not tell him that he could unit until a shut down occurred before guarding the equipment. Mr. Moenning also confirmed that at the time the citations were issued, he did not believe that he had the next seven months until winter to install the guards (Tr. 114-115).

Insofar as any "agreement" with Inspector Quartaro is concerned, I find no credible evidence to support any reasonable conclusion that Mr. Quartaro agreed to any "open ended" time frame within which the respondent could comply and install the guards at the time he visited the mine in August, 1991, and informed the respondent that locked gates were no longer acceptable. Although Mr. Quartaro may not have informed Mr. Moenning of any specific time for compliance, and simply advised him that the guards could be installed during "the first available down time", I find credible Mr. Quartaro's testimony that the guards would have to be installed by the next inspection which would have occurred during the last quarter of 1991. I find incredible the respondent's suggestion that in the absence of any winter shut downs, it could have waited indefinitely to

comply and install the guards. I also find incredible Mr. Walker's reliance on the prior abatement of the September 11, 1985, citation as an excuse for not complying with the citations issued by Inspector Laufenberg on March 19, 1992.

The respondent's assertion that the citations should not have been issued because its method of guarding the cited equipment had not been previously cited by MSHA inspectors is rejected. I conclude and find that the fact that Inspector Quartaro did not issue a citation when he inspected the mine in August, 1991, or that other inspectors did not cite the use of gates as guarding devices in the past, did not estop Inspector Laufenberg from issuing the citations during his March 19, 1992, inspection. While the absence of prior citations may be relevant to the issue of negligence, it is not controlling on the issue as to whether or not there was a violation.

It is clear that the lack of previous enforcement does not support a claim of estoppel. Commission Judges have consistently held that the lack of prior inspections and the lack of prior citations does not estop an inspector from issuing citations during subsequent inspections. See: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Sevtex Materials Company, 5 FMSHRC 520 (April 1986); Southway Construction Co., 6 FMSHRC 2426 (October 1984). Further, in the case of Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Court of Appeals for the Tenth Circuit, in affirming the Commission's decision at 5 FMSHRC 1400 (August 1983), stated in relevant part as follows at 3 MSHC 1588:

> As this court has observed, "courts invoke the doctrine of estoppel against the government with great reluctance". . . .Application of the doctrine is justified only where "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation" . . . .Equitable estoppel "may not be used to contradict a clear Congressional mandate,". . .as undoubtedly would be the case were we to apply it here . . . .
>
> Although the record reflects some confusion surrounding MSHA's approval of Emery's training plan, as a general rule "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law" . . . .

On the basis of the foregoing findings and conclusions, I conclude and find that the petitioner has established the violations by a clear preponderance of the evidence adduced in this case. Accordingly, the disputed citations ARE AFFIRMED.

The Section 104(b) Orders

Although Mr. Walker stated that he attempted to contest the two section 104(b) orders that were issued because of the respondent's failure to timely abate the cited conditions, there is no evidence that he did in fact timely contest the orders pursuant to section 105(d) of the Act and Commission Rule 20, 29 C.F.R. 2700.20. Consequently, the two section 104(b) orders are not in issue in this civil penalty proceeding except to the extent that they may be relevant to the respondent's good faith compliance and the civil penalties assessed for the violations.

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

The parties stipulated that the respondent is a small operator and that payment of the proposed civil penalty assessments will not adversely affect its ability to continue in business.

History of Prior Violations

An MSHA computer print-out reflects that for the period of March 19, 1990, to March 18, 1992, the respondent paid civil penalty assessments of $192 for five (5) citations, four (4) of which were "single-penalty" citations. It was not cited for any violations of section 56.14107 (exhibit 1). The print-out further reflects that prior to March 19, 1990, the respondent paid $1,235, for thirty-three (33) citations, eight (8) of which were "single penalty" citations. Six (6) prior citations of section 56.14107, are noted, but no further information was forthcoming from the petitioner with respect to these citations. I conclude and find that the respondent has a good compliance record and that additional increases in the assessments on the basis of this record are not warranted.

Gravity

The inspector found that the violations were not significant and substantial (S&S). I take note of the fact that access to the unguarded equipment in question was restricted by the locked gates in question, and the inspector found it unlikely that anyone would be in the immediate equipment area while the equipment was in operation. Under the circumstances, I agree with the inspector's non-S&S findings, and I conclude and find that the violations were non-serious.

Negligence

Inspector Laufenberg determined that the violations were the result of moderate negligence on the part of the respondent, and he based his findings on the fact that the respondent was advised

as early as August, 1991, by Inspector Quataro that the equipment needed to be guarded and that locked gates would no longer be acceptable to MSHA. On the facts of this case, I agree with the inspector's negligence finding and I conclude and find that the violations were the result of the respondent's failure to exercise reasonable care.

Good Faith Compliance

After careful consideration of all of the evidence and testimony in this case I conclude and find that the respondent failed to exercise good faith compliance in timely abating the citations. Although I can sympathize with the respondent's frustration with respect to MSHA's prior enforcement interpretations regarding to the use of gates as a guarding method, the fact remains that the respondent was notified in August, 1991, that gates were no longer acceptable.

I can further understand the respondent's subsequent reliance on the fact that MSHA may have taken a rather benign interest in citing the respondent for using a locked gate, and the respondent's belief that Inspector Quartaro "agreed" that the guards could be installed during a shut down time which may not have been clearly defined. However, once the citations were issued by Inspector Laufenberg on March 13, 1992, and he instructed Mr. Moenning to "fix it", without any reference to any shutdown time frame, the respondent was compelled to guard the equipment within the abatement time fixed by Mr. Laufenberg. Mr. Moenning admitted that he did not believe he could unit until a winter shut down to abate the citations, but no further action was taken even though four or five additional months past beyond the April 14, 1992, abatement time fixed by the inspector.

Mr. Moenning admitted that materials were on hand to construct the guards, and he confirmed that they were routinely constructed. However, compliance was finally achieved only after Inspector Laufenberg issued the section 104(b) orders, taking the equipment out of service, and they were terminated the following day after the equipment was guarded.

Civil Penalty Assessments

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

| Citation No. | Date | 30 C.F.R. Section | Assessment |
|---|---|---|---|
| 4123442 | 3/19/92 | 56.14107(a) | $350 |
| 4123553 | 3/19/92 | 56.1410(a) | $350 |

## ORDER

The respondent IS ORDERED to pay the aforementioned civil penalty assessments, and payment shall be made to the petitioner (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

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