

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 8, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-97-M
Petitioner	:	A. C. No. 14-00164-05520
v.	:	
	:	Kansas Falls Quarry & Mill
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Barbour

This civil penalty proceeding involves a violation of 30 C.F.R. ' 56.14105, a mandatory safety standard for metal and nonmetal mines requiring in part that, ARepairs or maintenance of machinery or equipment . . . be performed only after the power is off, and the machinery or equipment blocked against hazardous motion@and that Apersons be effectively protected from hazardous motion.@

The case was heard by Commission Administrative Law Judge Roy J. Mauer, who concluded Walker Stone Company, Inc. (Walker) did not violate the standard (17 FMSHRC 600 (April 1995)). The Commission reversed the judge, found a violation, and remanded the proceeding for assessment of an appropriate civil penalty. (*Walker Stone Company, Inc.*, 19 FMSHRC 48 (January 1997)). Because Judge Maurer was due to leave the Commission, the remanded case was assigned to me.

THE FACTS

In its decision, the Commission=s summarized the facts:

On June 25, 1993, the primary impact crusher at Walker=s open-pit limestone quarry . . . became clogged with rock, causing its drive motor to stall. The . . . crusher is located below a hopper into which trucks dump loads of rock. The crusher is powered by a diesel motor, which turns a rotor inside the crusher. As the rotor turns, rock is tossed inside the crusher housing until it breaks into pieces small enough to drop out of the crusher onto a splash pan and conveyor belt, which transports the rock for further processing. When rock becomes lodged inside the crusher, it prevents the rotor from turning and stalls the drive motor, rendering the crusher inoperable until the rock is removed.

[W]hen . . . [rock clogged the crusher], the crusher operator, Roy Brooner, changed the signal light at the hopper from green to red to indicate to the truck drivers to stop dumping their loads and to help him unclog [it]. Truck drivers Danny Boisclair, Bill Scott and Frank Esterly arrived at the scene. Boisclair and Scott entered the interior of the crusher and, using a sledgehammer, broke up large boulders that were resting on top of the rotor. Upon their exiting the crusher, the crusher operator attempted to jog the rotor to see if it had been unclogged. The rotor did not turn, so Scott, after conferring with the crusher operator, went underneath the rotor to see if rock was lodged in the area of the splash pan. Unbeknownst to the crusher operator, Boisclair reentered the interior of the crusher. Easterly followed Boisclair but remained just outside the crusher. While Scott cleared rock from under the rotor, Boisclair used his hunting knife to remove rock that was lodged between the top of the rotor and the crusher housing. Easterly observed Scott working below and asked him if he needed help. Scott responded that he thought he had removed the rock that was clogging the rotor and that he was ready to leave. Easterly told Boisclair to hurry and get out of the crusher because Scott was done. Boisclair began to exit the crusher but, before he was out, Scott told the crusher operator that the rotor was clear and the crusher operator jogged the rotor. The rotor turned and Boisclair was pulled between the rotor and the crusher housing, causing massive injuries to his upper and lower torso that resulted in his death (19 FMSHRC at 49).

Following an investigation, the Secretary's Mine Safety and Health Administration (MSHA) charged Walker for a violation of section 56.14105 for failing to protect Boisclair from the hazardous motion of the rotor. In addition, the Secretary asserted that the violation was a significant and substantial contribution to a mine safety hazard. The Secretary proposed a civil penalty of \$9,000 for the violation.

In holding that section 56.14105 was not applicable to the facts under which Boisclair met his death, Judge Maurer found that the miners involved were not repairing or maintaining the crusher and thus that the standard, which specifically states it applies during A[r]epairs or maintenance of machinery or equipment,@was inapposite to the work done (17 FMSHRC at 604-605).

Reversing the judge, the Commission held that the standard Aclearly and unambiguously reach[ed] the facts@and that the removal of rock to restore the crusher to working condition was Acovered by the standard's broad phrase xrepairs or maintenance of machinery or equipment=@ (19 FMSHRC at 51). The Commission found a violation and found that the violation was a significant and substantial contribution to a mine safety hazard (Id. at 52-53).

PROCEEDINGS ON REMAND

On remand, I ordered the parties to determine if they were able to agree upon an appropriate penalty and, if not, to advise me in writing, and with pertinent cites to the record, of the penalty ... [each proposed] (Order On Remand (February 18, 1997)).

Noting that Judge Maurer assessed a penalty of \$7,500 for another violation that was associated with the fatality C a violation that was not before the Commission on review C the Secretary asserted that Athe failure to protect against hazardous movement . . . was the proximate cause of a miner's death and suggested that the penalty should be Aat least \$7,500" (Letter of Secretary's Counsel (March 17, 1997)). Counsel for Walker countered that the company had a good faith belief the language of the standard was inapplicable to the facts and that Boisclair violated measures in place at the time of the accident to prevent unauthorized entry into the crusher while employees were trying to dislodge rock. Counsel stated that a penalty of \$100 was appropriate (Letter of Counsel (March 14, 1997)).

DETERMINATION OF THE PENALTY

The Commission recently has reminded its judges that while they have broad discretion in assessing civil penalties, their assessments must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act (30 U.S.C. ' 820(i) (Jim Walter Resources, Inc., 19 FMSHRC _ (Docket No. SE 95-459), slip op. 3, (March 27, 1997)).

The parties stipulated to two of the statutory penalty criteria, namely that the penalty would not affect Walker's ability to continue in business and that Walker demonstrated good faith in abating the violation (17 FMSHRC at 601). They also stipulated that Walker had 54,977 man-hours of production in 1992, a level of production that I find makes Walker a small operator. Finally, they agreed that Petitioner's Exhibit 18, which indicates that in the 2 years preceding the subject accident Walker was cited for 30 violations of various standards, reflects Walker's applicable history of previous violations (Id.). Given that Walker is a small operator, I find this is a medium size history. The remaining criteria are the gravity of the violation and the negligence of Walker in causing it.

It is obvious that the violation was extremely serious. It was a cause of Boisclair's death. It is not as obvious to what extent the company was negligent.

Walker violated the standard when it failed to turn off the power to the crusher and to block it against motion while miners, including Boisclair, were attempting to break up and remove rocks clogging the crusher and when it failed to protect Boisclair from the hazardous movement of the rotor. The fact that Walker may have believed the standard did not apply to the circumstances, does not excuse the company's failure. The Commission found that the language

of the standard clearly and unambiguously applied to breaking up and removing rocks clogging the crusher (19 FMSHRC at 51). The company should have known this, and in failing to implement the standard so as to protect the miners, the company failed to exhibit the care required by the circumstances.

Nevertheless, Walker's negligence was mitigated, at least in part, by the fact that Boisclair, for reasons known only to himself, put himself in harm's way in violation of at least two company directives. Walker had a policy of not permitting one person to work above another (Tr. 202-203). Had Boisclair complied with this policy and not worked above Scott, Boisclair would not have needed protection from the hazardous movement of the rotor. Further, the company had a policy that the crusher could not be entered without letting the crusher operator know (Tr. 229). Had Brooner been told that Boisclair was in the crusher, Brooner never would put the rotor into motion.

Judge Maurer observed that in this case there is plenty of negligence . . . to go around (17 FMSHRC at 607). While it is true that Boisclair would not have been killed had he complied with company policy, it is equally true he would not have been killed had the company complied with the standard. In my view, as in Judge Maurer's, Boisclair's negligence lessens the degree of, but does not excuse, the company's failure. Like Judge Maurer, I find that Walker is chargeable with ordinary negligence.

In assessing a civil penalty, I have considered the company's small size and its good faith abatement as well as its medium size history of previous violations. Standing alone these factors would warrant a small to medium size penalty. However, they are overridden by the extreme seriousness of the violation and the fact that Boisclair would not have died, but for the company's negligent violation of the standard.

Accordingly, I find that a civil penalty of \$7,500 is appropriate, and I note that this assessment will not affect Walker's ability to continue in business.

ORDER

Walker is ORDERED to pay a civil penalty of \$7,500 for the violation of section 56.14105 as set forth in Citation No. 4337450 and to do so within 30 days of the date of this decision.

David F. Barbour
Administrative Law Judge

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