FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 15, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 95-203-M
	:	A. C. No. 23-02086-05503
v.	:	
	:	HWY 54 South Quarry
BECK MATERIALS COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Keith A. Wenzel, Esq., Inglish & Monaco, P.C., Jefferson City, Missouri, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) against the Beck Materials Company (Beck Materials) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petition charges Beck Materials with three violations of the mandatory standards found in 30 C.F.R. Part 56 and seeks civil penalties of $3500, as a result of a serious injury accident which occurred on December 7, 1994, at Beck Materials= Highway 54 South Quarry.

Pursuant to notice, this case was heard at Columbia, Missouri, on December 5, 1995. Both parties have subsequently filed written proposed findings of fact and conclusions of law, which I have considered along with the entire record in this case in arriving at the following decision.

STIPULATIONS

At the commencement of the hearing, the parties proffered a signed set of stipulations, dated December 5, 1995, which I accepted into the record (Tr. 5-6) as follows:

1. Beck Materials Company is engaged in mining and selling of limestone in the United States, and its mining operations affect interstate commerce.

2. Beck Materials Company is the owner and operator of Highway 54 South Quarry Mine, MSHA ID No. 23-02086. The Highway 54 South Quarry Mine is a limestone mine using conventional mining methods to drill and blast limestone.

3. Beck Materials Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (Athe 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 date and place 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. Doug Laird, Plant Foreman, was seriously injured at approximately 4:30 p.m., on December 7, 1994, when he slipped or tripped and fell onto a moving conveyor belt. His right arm was pulled between the drive pulley and the moving conveyor belt.

7. Mr. Laird had l year and l month total mining experience, all at the Beck Materials Mine.

8. 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.

9. The proposed penalties will not affect respondent=s ability to continue in business.

10. The operator demonstrated good faith in abating the violations.

11. Beck Materials Company is a limestone mine operator with 98,214 production hours worked in 1994. The mine employs about 10 miners who work 9 **2** hour shifts each day, 5 days per

week.

12. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the 2 years prior to the date of the citations.

FINDINGS, CONCLUSIONS AND DISCUSSION

On January 31, 1995, MSHA Inspector Robert D. Seelke, subsequent to an accident investigation, issued section 104(d)(1) Citation No. 4329266 to Beck Materials for a violation of 30 C.F.R. ' 56.12016[1] alleging that:

> At approx (sic) 4:30 pm on Dec. 7, 1994, plant foreman, Doug Laird, who was filling in as the plant operator, was seriously injured when his right arm was pulled between the drive pulley and the moving conveyor belt of the under scalping screen conveyor. The injured

[1]/ 30 C.F.R. ' 56.12016 provides: AElectrically 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.@

> employee elected to make adjustments to the tracking of the belt without deenergizing the conveyor system. While checking the adjustments the employee slipped or tripped while walking on the framework of the screen, bin, conveyor system and fell over the top of the side guard on the drive pulley. His right hand & arm contacted the moving conveyor which pulled his right arm into the pinch point of the drive pulley & conveyor belt. This is an unwarrantable failure.

On that same date, Inspector Seelke also issued section 104(d)(1) Order No. 4329267 to Beck Materials for a violation of 30 C.F.R. ' 56.11001[2] alleging that:

> At approx (sic) 4:30 pm on Dec. 7, 1994, plant foreman, Doug Laird, who was filling in as the plant operator, was seriously injured when his right arm was pulled between the drive pulley & the moving conveyor belt of the under scalping screen conveyor. The employee was not using a safe means of access to check the adjustments he had made on the belt. The injured elected to walk the 9" I-beam, that is part of the scalping screen and conveyor frame, to check the belt movement after making adjustments. While attempting to step from the 9" I-beam to the tail pulley guard of the #1 product belt he slipped or tripped and fell causing his right arm to contact the moving under scalping screen conveyor, which pulled his arm into the pinch point between the drive pulley and the belt. This is an unwarrantable failure.

[2]/ 30 C.F.R. ' 56.11001 provides: ASafe means of access shall be provided and maintained to all working places.@

Additionally, the inspector issued section 104(a) Citation No. 4329268 to Beck Materials for a violation of 30 C.F.R. ' 56.14107(a)[3] alleging that:

> At approx (sic) 4:30 pm on Dec. 7, 1994, plant foreman, Doug Laird, who was filling in as the plant operator, was seriously injured when his right arm was pulled between the drive pulley and the moving conveyor belt of the under scalping screen conveyor. Upon investigation of the accident site it was concluded that the drive & the tail pullies (sic) of the conveyor were not sufficiently guarded to prevent contact with the pinch point.

On December 7, 1994, the date of the accident, the plant had crushed rock until early afternoon when due to rain, they ran out of dry material in the pit and had to shut the plant down. Danny Foster, the plant superintendent, sent some of the men home at that time, but kept Doug Laird, a plant foreman and the accident victim, there to do some work on the plant. More specifically, Laird was adjusting the under scalping screen conveyor belt[4] when

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[3]/ 30 C.F.R. ' 56.14107(a) provides in pertinent part that: AMoving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys. . . that can cause injury.@

[4]/ The under scalping screen conveyor is a horizontal in-house manufactured conveyor that Beck Materials Company manufactured in approximately 1989. The conveyor belt is 30-inches wide and the conveyor measures approximately 20-feet from the head pulley to the tail pulley. It is electrically powered and travels at approximately 250 feet per minute. The top of the conveyor belt is approximately 6 **2** feet above ground level.

he was injured.

Earlier that day, Laird and Andrew Mitchem, a loader operator, had attempted to make tracking adjustments to the belt, but were unable to get it to track properly. After the plant shut down, Laird testified that he went back to this task. He started just that one belt back up, went to the south side of the plant and got up on the framework where he could reach the adjustment screws and bolts. In order to climb up there, he utilized the wheels and axles that run underneath the plant and climbed from there to a 9-inch wide I-beam rail from where he could reach the adjustment screws and bolts. He testified that there was no ladder available to climb up there to make these adjustments.

He adjusted the belt several times, but he stated that the belt was not responding so he went back around to the other side of the plant to see if the belt was hanging up on anything but could not locate any problem. At this point, he climbed up onto the I-beam framework again and looked to see what might be holding the belt up. Not seeing anything blocking the conveyor belt, he was moving back along the I-beam framework of the bin and conveyor on the north side, getting ready to go back around to the other side and make further adjustments when he fell. His right hand was pulled up into the head pulley of the still running belt. As a result of the accident, his right shoulder and arm were amputated and he sustained a severe injury to his spinal cord which causes him chronic and severe pain. He is disabled from further employment.

Inspector Seelke issued Citation No. 4329266 because Laird had been making mechanical adjustments to the electrically powered equipment without deenergizing and locking out that equipment, all in violation of 30 C.F.R. ' 56.12016.

It is beyond dispute that the cited conveyor belt was in fact running and therefore not deenergized and locked out at the time of the accident, and it is also undisputed that Laird was performing mechanical work on it. Accordingly, that, without more, is sufficient to find that a violation of 30 C.F.R. ' 56.12016 occurred and I do so find.

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 U.S.C. ' 814(d)(l). 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 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).

In this case we do not have to deal with likelihoods, possibilities or probabilities. A serious injury accident did in fact occur, as a direct result of this violation and as a result of that accident, Laird was permanently disabled from gainful employment. I therefore find this cited violation to be

significant and substantial (AS&S@) and serious.

The Secretary also alleges the violation was the result of the respondent's "unwarrantable failure" to comply with the cited standard.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993).

Respondent=s defense to the Aunwarrantable failure@ charge contained in this citation is basically that Laird did not follow established company procedures in attempting to adjust the conveyor belt tracking. Several witnesses testified to the effect that respondent has a lock-out procedure in place and it has been addressed repeatedly over the years at safety meetings. However, that testimony aside, I find that that Aofficial@ policy was not actually being observed in practice. Mr. Laird very credibly testified that he was performing the tracking adjustments in the manner that he had been taught personally by Mr. Foster, the superintendent, that is, with the belt running. I therefore find and conclude that this violation occurred as a result of the aggravated negligence of the operator. Accordingly, Citation No. 4329266 will be affirmed herein, as issued, in its entirely.

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 a civil penalty of $1500, as proposed by the Secretary for this citation, is a reasonable and appropriate civil penalty that will serve to satisfy the public interest in this matter.

Inspector Seelke issued section 104(d)(1) Order No. 4329267 on January 31, 1995. He testified that Laird did not use a safe means of access to make or check the adjustments he had made on the belt. Several times Laird climbed up on or walked along the I-beam of the framework of the machinery to make adjustments to the belt or check those adjustments. In Seelke=s opinion, which I accept, a secured ladder should have been used to make and check the adjustments on both sides of the equipment. This becomes even more obvious when you consider that the belt was running at the time Laird was attempting to adjust the tracking on it. If Laird had used a safe means of access, such as a secured ladder, he would not have fallen onto the running belt.

There was testimony to the effect that ladders were available on the premises, but they were inside a trailer rather than in place on the equipment. Mr. Laird testified that no ladder was available to him, and he saw no other way to access the belt to make the needed adjustments other than to climb up onto the I-beam.

I find that there was a violation of the cited standard since no safe means of access was readily available and in any case, no safe means of access was used by Laird in this instance, even if one could argue that he should have gone wherever he had to to locate a suitable ladder.

Applying the Mathies test, I find that the violation is a significant and substantial one given that the lack of a safe means of access contributed to the serious injury sustained by Mr. Laird.

I also find that the negligence involved in this violation demonstrates aggravated conduct on the part of the operator and it is properly designated as an Aunwarrantable failure@ order. Mr. Foster, the mine superintendent, who did not appear to testify in this case, was on the premises at the time, knew that Laird was working alone and in fact, had personally instructed Laird at an earlier date regarding the procedure for adjusting the tracking on these belts, including making the adjustments without a ladder or other safe means of access to do so. Furthermore, on many previous occasions, Laird had observed Foster, and others, adjust the belts without deenergizing the equipment and without using a safe means of access to reach the adjustments on the equipment. Accordingly, Order No. 4329267 will be affirmed herein, as issued, in its entirety.

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 a civil penalty of $1000, as proposed by the Secretary for this order, will serve to satisfy the public interest in this matter.

Inspector Seelke also issued a section 104(a) citation on January 31, 1995, to Beck Materials (Citation No. 4329268). This was basically a guarding violation. Allegedly, the drive pulley on the under scalper conveyor was not sufficiently guarded.

The equipment was in fact guarded sufficiently for anyone approaching the pinch point from the ground, the more foreseeable hazard. The problem in this case and the reason that the inspector issued the citation was that an employee, Laird, found a way, by using the I-beam as a walkway, to get into the pinch point between the conveyor belt and the drive pulley of the under scalping screen conveyor despite the existing guarding.

The finding of violation follows from the fact that Laird did in fact make contact with the unguarded moving parts from above, no matter how difficult it might have been to foretell

that occurrence beforehand. Likewise, the violation is significant and substantial (AS&S@) simply because of the gravity of the occurrence and the resultant very serious injury to

Mr. Laird.

The only issue I take with the inspector who wrote the instant citation is that of the negligence factor contained in Block No. 11 of the citation. I am going to modify that negligence factor from Amoderate@ to Alow,@ based on what I perceive to be the relative unforseeability of contact with the pinch point from above the pulley as opposed to from the direction of the ground, from whence it was adequately guarded. With that modification, Citation No. 4329268 will be affirmed herein.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria contained in section 110(i) of the Act, I conclude and find that a civil penalty of $300 is a reasonable and appropriate civil penalty that will serve to satisfy the public interest in this matter.

ORDER

1. Citation No. 4329266 and Order No. 4329267 **ARE AFFIRMED**.

2. Citation No. 4329268, as modified herein, **IS AFFIRMED**.

3. The Beck Materials Company **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of $2800 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Keith A. Wenzel, Esq., Inglish & Monaco, P.C., 237 East High Street, Jefferson City, MO 65101 (Certified Mail)

dcp