FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 7, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 95-265-M
	:	A.C. No. 23-02068-05509
v.	:	
	:	Journagan Portable #12 MO
LEO JOURNAGAN CONSTRUCTION COMPANY, INC., Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 96-53-M
	:	A.C. No. 23-02068-05510-A
v.	:	
	:	Journagan Portable #12 MO
JAMES M. RAY, Employed by LEO JOURNAGAN CONSTRUCTION COMPANY, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Bradley S. Hiles, Esq., Peper, Martin, Jensen,

Before: Judge Amchan

Findings of Fact

Respondents= failure to deenergize the crusher

On March 28, 1995, MSHA representative Michael W. Marler conducted an inspection of Leo Journagan Construction Company=s portable crusher No. 12 in southwestern Missouri. While Marler was at the site, rocks became stuck in the crusher. Marler and

Journagan=s superintendent, James AMike@ Ray, drove to the top of a hill, just above the crusher (Tr. 247-48)[1]. When the inspector approached the crusher, he observed Journagan employee Steve Catron trying to unjam the rocks so that the crusher could operate again (Tr. 31-32).

Catron was straddling the crusher with his feet resting on metal plates located two inches above the jaws of the crusher. He was wearing a safety belt with a lifeline that was tied to a catwalk railing above him. Catron was using a five to six foot long metal bar to dislodge the rocks in the crusher (Tr. 32-33, 162-66, 187-88, 234, 294). The crusher was approximately six feet four inches in depth (Tr. 294). The jammed rocks extended up two feet from the bottom of the crusher (Tr. 296).

Although the crusher was not on, the electrical power to the crusher was not shut off and locked out. Earlier, when Catron and the crusher operator, Keith Garoutte, began to unjam the crusher they turned off the crusher controls and locked out the power at the generator trailer. However, to determine whether the crusher would work, Garoutte restored power to crusher (Tr. 182-83).

After the power was restored, Catron tried to move the rocks and then moved back from the crusher jaws. Garoutte watched him from a vantage point uphill at the doorway of the shed containing the crusher controls (Tr. 162-66, Exh. R-5). When Catron moved back from the jaws of the crusher, he would detach his safety belt from the catwalk railing and step up on the grizzly,[2] which

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[1] I credit Mr. Ray=s testimony that he went to the crusher with the inspector, over Inspector Marler=s testimony that Ray was at the crusher when he arrived (Tr. 96). I conclude that Ray would have a better recollection of his activities on the day in question.

[2] The grizzly is a flat metal plate with openings to

was located on the opposite side of the crusher jaws from the catwalk. He would then reattach his safety belt to a point above

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separate smaller rock from larger rock (Tr. 187, Exh. R-5). The grizzly was about 1-**2** feet above the metal plate on which Mr. Catron was standing (Tr. 295).

and behind him. Catron then signaled or told Garoutte to start the crusher (Tr. 192-195, 203, 225, 233-34). Garoutte entered the control shed and turned on the crusher.

Inspector Marler issued Respondent Citation/Order No. 4329462 alleging that the failure to lock out the power to the crusher posed an imminent danger under section 107(a) of the Act, and a Asignificant and substantial@ (S&S) violation of section 104(a) of the Act and 30 C.F.R. '56.12016. This regulation states:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it ... .

A $4,000 civil penalty was proposed by MSHA against Journagan and a $1,500 penalty against Mike Ray, pursuant to section 110(c) of the Act.

Although Ray may not have seen Catron straddling the crusher until Inspector Marler saw Catron, Journagan had tried before to dislodge rocks from the crusher with the machine energized (Tr. 169). Catron had dislodged rocks under these conditions even before Ray became his supervisor (Tr. 170). This was apparently a standard practice of Leo Journagan Construction Company. Ray had seen Catron try to dislodge rocks from the crusher with the machine energized 8 months earlier--in the presence of another MSHA inspector (Tr. 266-68).

Superintendent Ray disagreed with Marler that the failure to deenergize the crusher posed a hazard to Catron or that it vio - lated the standard, because Catron was tied off with a safety belt (Tr. 97-99). However, he immediately went to the generator trailer and deenergized the crusher.

Miners working beneath rocks in the crusher=s hopper

After Mr. Ray shut off the power to the crusher, he and Inspector Marler climbed up onto the catwalk just below the crusher. When they reached the catwalk they observed miners

Catron and Garoutte inside the crusher removing rocks from the machine. Above the miners, the crusher=s hopper was 3/4 full with slightly more than a truckload of rock sitting at an angle of 35 degrees to the horizontal (Tr. 207-08, 281).[3] The rocks, which extended to within a foot of the miners, ranged in size from dust-like particles to stones two inches in diameter (Tr. 55-56, 195).

There was no physical barrier between the rocks and the crusher. Inspector Marler advised Ray that he considered this situation to pose an imminent danger to Catron and Garoutte due to the likelihood that the rocks would slide into the crusher on top of them (Tr. 63-66). Ray argued that the rock pile in the hopper was stable. However, he immediately complied with the order and welded a piece of steel to the end of the grizzly in order to prevent rocks from sliding into the crusher.

Later Marler committed the imminent danger order to writing as Citation/Order No. 4329463. It alleged a violation of 30 C.F.R. ' 56.16002(a). That standard provides:

> Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be-
>
> > (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or

[3]I have credited Mr. Ray=s estimation of the slope over that of Mr. Catron=s 25-26 degrees (Tr. 212). Although Catron was in a better position to observe the slope of the rocks, Mr. Ray appears to have superior ability by virtue of his education and training to estimate the angle at which the rocks lay. Mr. Marler did not measure the slope (Tr. 108).

The quantity of rock in the feeder was estimated by Keith Garoutte to be approximately 25-30 tons (Tr. 340).

sliding of materials ...

The citation was characterized as AS&S@ and a $4,500 penalty was proposed against Leo Journagan Construction Company. Additionally, a $1,500 penalty was proposed against Mr. Ray pursuant to section 110(c) of the Act.

Although Ray did not order Catron and Garoutte into the crusher he knew they would climb down into the machine (Tr. 287). It was not uncommon for Journagan employees to remove rocks from a crusher with rocks overhead and it was not the company practice to install a barrier between the miners and the rocks in the hopper (Tr. 345).

Respondent Journagan violated the Act in failing to deenergize the crusher before allowing an employee to work above it.

Respondents= first argument is that section 56.12016 is inapplicable to this case because its employees were not performing Amechanical work@ within the meaning of the standard (Tr. 269). It further contends that the standard only applies to situations in which miners are exposed to a hazard of electrocution or electrical shock.

I conclude that the term Amechanical work@ must be construed broadly in a manner consistent with the purposes of the statute. Therefore, I find that it includes any work that enables electri - cally -powered equipment to operate in the manner in which it is intended to operate.

Loosening jammed rocks so that the crusher jaw will move is Amechanical work.@ To conclude otherwise would suggest that, even if Mr. Catron had not been protected by a safety belt and even if the controls to the crusher been left unprotected, no violation of the regulation would have occurred.

Respondent, relying on the decision in Phelps Dodge Corporation v. FMSHRC, 681 F. 2d 1189 (9th Cir. 1982), argues that section 56.12016 cannot be cited in situations where the only hazard is danger of being injured by moving machinery. This decision was followed by a Commission judge in Arkhola Sand & Gravel, Inc., 17 FMSHRC 593 (ALJ April 1995).

The Ninth Circuit found that ' 56.12016 (then numbered '55.12-16) did not address hazards arising from the accidental movement of machinery because it appears in a subpart entitled AElectricity@ and because the other regulations in that subpart address only the hazard of electrical shock. I decline to follow Phelps Dodge, a decision to which the Commission has never acceded[4].

The dissenting opinion of Circuit Judge Boochever, 681 F.2d at 1193, is far more compelling. He found that the plain language of the standard was clear and unambiguous and saw no reason to qualify its application on account of the title of the subpart in which the regulation was placed. I also agree with the dissent that the Commission should defer to an agency interpretation of the standard which appears to better effectuate the purposes of the Act, than one limiting its reach to situations in which there is a danger of electrical shock.

The fact that miner Catron was tied off at almost all times when he was above the energized crusher is not relevant to the issue of whether the standard was violated. Section 56.12016 requires that electrically powered equipment be deenergized before mechanical work is done--regardless of what other precautions are taken, to protect employees working on the equipment or to prevent reenergizing of the machinery, Ozark - Mahoning Company, 12 FMSHRC 376, 379 (March 1990). Thus, I find that
Leo Journagan violated the cited regulation.

The violation was not significant and substantial

The Commission test for a "S&S" violation, as set

[4] In Ozark-Mahoning Company, 12 FMSHRC 376 (March 1990), the Commission affirmed a citation issued under '56.12016 in a situation in which miners were exposed to the danger of moving machinery, rather than electrical shock. In that case, it does not appear that the operator argued that the standard applies only to electrical hazards or made the Commission aware of the Court of Appeals decision in Phelps Dodge.

forth in Mathies Coal Co., supra, is 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.

I conclude that there was not a reasonable likelihood that the hazard contributed to by Journagan=s violation would result in injury. Miner Catron was tied off to a catwalk railing above him while trying to pry the jammed rocks loose. Moreover, the crusher controls were turned off while he was working. Operator Keith Garoutte was standing at the doorway of the control shed watching Catron. This makes it unlikely that anyone else would activate the crusher while Catron was standing over it.

While tied off, Catron could only fall 1-**2** to 2 feet (Tr. 81-82, 190, 254). If Catron fell this distance he could not have gotten caught between the jaws of the crusher, one of which moves and one of which is stationary (Tr. 84). His feet could possibly have brushed the movable jaw (Tr. 190, 254).

Even if the miner=s feet touched the moveable jaw, it is unlikely that he would be hurt--even if the jaw moved. The jaw moves much further at the bottom of the crusher than at the top. At the top of the crusher the jaw moves only about an inch (Tr. 254-55). The jaw also takes a few seconds to move once it is activated (Tr. 264).

Catron did unhook his safety belt when he stepped up to the grizzly and it is possible that he could have fallen while switching positions. It is also possible that the crusher could have been activated at such a moment due to misunderstandings with Garoutte or due to an electrical fault. However, I conclude that such possibilities do not make injury reasonably likely.

Superintendent Ray is not subject to civil penalty under section 110(c) of the Act

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, any agent of the operator who Aknowingly authorized, ordered, or carried out such violation@ shall be subject to civil penalty. The Commission has held that a violation under section 110(c) involves aggravated conduct, not ordinary negligence, Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994).

While Mr. Ray clearly had reason to know that his employees would be working on the crusher without it being deenergized, I conclude that his conduct was not aggravated. The procedure employed by miners on the day of the inspection and implicitly condoned by superintendent Ray was Journagan=s normal procedure (Tr. 169-170). It was not a practice initiated by Ray (Tr. 170).

More importantly, I find that Ray had a reasonable good faith belief that miners were adequately protected by wearing a safety belt that was tied off above them. Mr. Catron was tied off for all but a very brief period, during which it was very unlikely he would fall and that the jaw of the crusher would move. I therefore vacate the penalty proposed under section 110(c) with regards to Citation No. 4329462.

A $500 Civil Penalty is Assessed against Leo Journagan Construction Company for its violation of '56.12016

Section 110(i) requires consideration of the following six criteria in assessing a civil penalty under the Act:

Size of the operator: Leo Journagan is a relatively small mine operator. Other things being equal, this would support a smaller penalty than for a large operator.

Effect on the operator=s ability to stay in business: The parties stipulated that the proposed penalties would not compromise Journagan=s ability to continue in business (Tr. 11).

Good Faith demonstrated in rapidly abating the citation: The civil penalty should account for the fact that superintendent Ray immediately deenergized the crusher when informed of the violation by inspector Marler.

Previous History of Violations: The Secretary introduced, as it does in every civil penalty case, a computer printout purporting to show the number of penalties assessed against Respondent and those paid (Exh. P-1). This document indicates that between March 28, 1993 and March 27, 1995, Journagan paid $4,124.00 in civil penalties for 23 violations. One of these penalties was assessed for a citation which alleged a violation of section 56.12016 for failure to lock out a conveyor belt (Tr. 171-72, 302).

Exhibit P-1 is of no value to me in assessing a civil penalty. I do not know whether Respondent has more violations than one would reasonably expect for an operator its size, less violations or about the same number. There has been no suggestion made as to how the information in this summary is relevant to assessing a penalty in the instant case.

However, I conclude the prior violation for failure to lock out the conveyor is relevant. A somewhat higher penalty should be assessed on account of this citation.

Negligence: Respondent was negligent in allowing miners to work over the crusher when it was not deenergized and locked out. However, its negligence was Amoderate@ given the effective pre-cautions it did take to prevent injury. Furthermore, Respondent was apparently under the impression from a prior MSHA inspection that its: procedure complied with the Act (Tr. 201-02, 266-68).

Gravity: Given the fact that Mr. Catron was tied off, except when moving from the crusher to the grizzly, injury was very unlikely to occur. However, it was possible and, if it occurred, an injury was likely to be very serious, or fatal. First, there was a chance that Mr. Catron could fall or enter the crusher and that Mr. Garoutte could activate it due to miscommunication. The facts of my recent decision in Stillwater Mining Company, 18 FMSHRC 34, 35-36 (ALJ 1996) present just such a situation. In Stillwater, a miner misunderstood the instructions of his partner and closed a chute gate on him, fracturing his pelvis.

Another case indicating the seriousness of the hazard presented by the instant violation is Price Construction, Inc., 7 FMSHRC 661 (ALJ Melick 1985). There, the failure to lock-out the power to the rollers of a crushing machine, and miscommunication between miners resulted in the traumatic amputation of the legs of an experienced miner.

The Secretary has also alleged that the violation created a danger that Mr. Catron would be injured by the bar he was using to pry the rocks in the crusher. Inspector Marler contends that if the crusher started, the bar could snap or that Catron could have fallen on the bar and been impaled. I am not persuaded that such a hazard existed.

Assessment: Having considering the penalty criteria in section 110(i), I assess a $500 civil penalty for this violation.

The Secretary has not established a violation of section 56.16002(a)

In order to establish a violation of ' 56.16002(a) the Secretary must establish that miners Catron and Garoutte were Aexposed to entrapment by the caving or sliding of materials ... .@ I conclude that the Secretary has failed to do so. The fact that the miners were working downhill from a hopper filled with 25-30 tons of rock does not establish that the material might cave-in or slide on top of them.

Materials tend to move until they obtain a slope at which they will stop moving, sometimes referred to as the Aangle of repose.@ The Secretary has not established that the rocks in the hopper had not reached the angle of repose. In fact, Respondent=s evidence tends to prove that the rocks would not slide.

Inspector Marler did not measure the angle at which the rocks lay in the hopper (Tr. 108). I have credited Mr. Ray=s testimony that the rocks were at an angle of about 35 degrees from the horizontal, which is generally regarded a relatively

flat slope . I also credit Ray=s testimony that prior to the time that the miners entered the crusher, the action of the feeder to the hopper had flattened the angle to one at which the rocks would not move further (Tr. 273-281).

I further note that 35 degrees is one degree steeper than the slope required by OSHA to protect workers in excavations dug in the least stable type of soil, 29 C.F.R. Section 1926.652(b)(1), and Table B-1. This indicates that a slope of 35 degrees would generally not expose employees to entrapment by caving or sliding.

The rocks in the hopper extended to within a foot or two of the crusher (Tr. 61, 195, 220). When removing rocks from the crusher, Catron and Garoutte threw the smaller stones on the pile in the hopper and stacked the larger rocks (Tr. 340-41). However, I find the record insufficient to establish that whatever alterations this made in the slope of the rocks created a hazard to the miners.

It was not Respondent=s general practice to install a barrier between rocks in a hopper and miners working to unjam a crusher (Tr. 345). It is unclear from this record what the general industry practice is with regard to barricading rocks in a hopper which has already flattened the slope of the rocks.

If the record established that industry practice was to barricade the rocks in the hopper in a situation like the instant one, I would be likely to find that Respondent violated section 56.16002(a). Such evidence would indicate that a reasonably prudent mine operator would recognize a danger from sliding or caving materials, see Ideal Cement Co., 12 FMSHRC 2409 (November 1990). However, on the instant record, I am unable to draw such an inference and conclude that a violation of this standard has not been established.

Although photographic exhibits P-2 and P-3 indicate that the rocks in the hopper were at a fairly steep angle, it has not been established that these photos accurately depict the slope of the rocks (Tr. 108, 229-231, 283).

ORDER

Citation No. 4329462 is **AFFIRMED** as a non-S&S violation of the Act. A $500 civil penalty is assessed against Leo Journagan Construction Company for this violation.

The penalty proposed for James Michael Ray under section 110(c) of the Act on account of Citation No. 4329462 is **VACATED**.

Citation No. 4329463 and the penalties proposed therefor against Leo Journagan Construction Company and against James Michael Ray are **VACATED.**

Leo Journagan Construction Company shall pay the assessed $500 civil penalty within thirty days of this decision.

Arthur J. Amchan
Administrative Law Judge

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