FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 97-60-M
Petitioner	:	A. C. No. 41-03717-05511
v.	:	
	:	Docket No. CENT 97-128-M
ARROW CRUSHED STONE, INC.,	:	A. C. No. 41-03717-05512
Respondent	:	
	:	Blum Quarry

DECISION

Appearances: Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, and Ronald M. Mesa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
John Whitehorn, Vice President, Arrow Crushed Stone, Inc., Cleburne, Texas, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 820(a). The petitions seek to impose a total civil penalty of $651.00 for eight alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the regulations. Six of the eight alleged violations were designated as non-significant and substantial (non-S&S) violations. These matters were heard on November 5, 1997, in Cleburne, Texas. John Whitehorn, Vice President of Arrow Crushed Stone, Inc., (ACS), appeared on behalf of the respondent corporation. The parties stipulated that ACS is a mine operator subject to the jurisdiction of the Act.

At the hearing, ACS withdrew its contest of the $50.00 civil penalty proposed for Citation Nos. 785293 and 785294 in Docket No. CENT 97-128-M. Thus, six citations remained for disposition. At the hearing, the parties were advised that I would defer my ruling on these citations pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 52-53). Accordingly, this decision formalizes the bench decision issued with respect to each of the contested citations. The bench decision vacated one citation, affirmed three non-S&S citations, and modified two citations characterized as significant and substantial by deleting the S&S designation. The total civil

penalty assessed in these matters for the eight citations, including the two citations for which the contest was withdrawn, is $380.00.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission=s standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator=s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator=s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

For penalty assessment purposes, the evidence reflects mitigating factors in that the respondent is a small to moderately sized operator that does not have a significant history of violations. (Gov. Ex. 1). The proposed civil penalties will not effect the respondent=s ability to remain in business, and the respondent rapidly abated the cited violations.

II. Findings and Conclusions

ACS=s Blum Quarry mine is a limestone facility located in Hill County, Texas, where limestone materials are extracted through the drilling and blasting process. The extracted is then

loaded and hauled to the crusher and screening area where the material is cleaned, crushed and sized. There are approximately nine people employed at the Blum Quarry.

A. Docket No. Cent 97-60-M

1. Citation No. 4448274

Mine Safety and Health Administration (MSHA) Inspector Melvin H. Robertson conducted a regular inspection of the Blum Quarry on April 11, 1996. Robertson was accompanied by Whitehorn. Robertson proceeded to inspect the electrical installations located in the crusher area. He observed the crusher was powered by a generator. There was a main disconnect switch at the generator that could be used to de-energize the crusher. The generator supplied power to an electrical enclosure mounted on stands located approximately 15 feet from the screening plant. The enclosure consisted of a large box containing starter controls for motors in the crusher and screening areas and a separate, smaller disconnect box, mounted on the east end side of the starter control box. The disconnect box was an alternative to using the generator disconnect switch as a means of de-energizing the crusher and screen motors. The doors on the starter box and disconnect box were closed. There were unlocked padlocks hanging on the doors that could be used to lock out the boxes.

Robertson determined that the disconnect box contained fuses energizing 480 volt current. Although there were no exposed electrical conductors in the starter box, the fuses in the disconnect box were connected to exposed power conductors (wires) in that there was neither protective insulation nor a face plate installed. Robertson noted the disconnect box did not contain a switch that automatically de-energized the box when the disconnect box door was opened. Robertson was concerned that an employee could accidentally contact the exposed energized wires in the disconnect box when attempting to operate the starter controls, or when attempting to access the disconnect box.

As a result of his observations, Robertson issued Citation No. 4448274 citing an alleged violation of the mandatory safety standard contained in section 56.1240, 30 C.F.R. ' 56.1240. This mandatory standard specifies that, Aoperating controls shall be installed so that they can be operated without danger of contact with energized conductors.@ Robertson opined that the violation was S&S because of the likelihood of serious or fatal injury in the event an individual came in contact with this 480 volt current.

The bench decision in Citation No 4448274 focused on the language and intent of the cited mandatory standard in section 56.1240. This mandatory standard primarily deals with the exposure of operating controls to energized conductors. Although Robertson was unable to clearly recall the contents of the larger starter control box, Robertson did not dispute Whitehorn=s testimony that this box contained shielded on-off switches and circuit breaker switches that were protected by a face plate. Each of the doors on the starter control box and disconnect box were closed. Given the separate location of the disconnect box on the side of the starter control box, it

is unlikely that anyone opening the door of the starter box to access the operating controls would be exposed to the exposed conductors in the closed disconnect box. In fact, Robertson apparently conceded that there was little likelihood of injury in the context of section 56.1240 stating, AI should have used a different standard number and wrote (sic) him two citations (a separate citation for the fuse disconnect box).@ (Tr. 47).

Although there was minimal likelihood of injury, the fact that the disconnect box was not padlocked, nor protected by an automatic shut-off switch engaged when the door was opened, provides a basis for concluding that contact with the exposed electrical conductors, while remote, could occur during the operation of the starter control switches. Accordingly, Citation No. 4448274 is affirmed. However, the citation is modified to delete the S&S designation. Given the reduced gravity of the cited condition, and, in consideration of the other penalty criteria in section 110(i) of the Act, 30 U.S.C. ' 820(i), the $147.00 civil penalty proposed by the Secretary shall be reduced to $50.00. (Tr. 53-55).

2. Citation No. 4448277

After examining the electrical installations, Robertson inspected the quarry area of the mine. At the time of his inspection there was no quarry activity in progress. Robertson described the mine as a single-bench quarry where vertical holes are drilled, filled with explosives, and blasted to loosen the rock. The material is then loaded into haulage trucks by a front-end loader and transported to the crushing area for processing.

The vertical holes are drilled by a rotary drill. The rotary drill has a large mast with a drill stem that contains a rotary bit that drills into the earth. The drill is designed with three hydraulic jacks to stabilize the drill. There is a hydraulic jack located in the front and two hydraulic jacks in the rear on each side of the drill mast. The jacks are constructed with an upper cylinder that travels vertically up and down a lower ram. The ram on each hydraulic jack is designed to sit on a rectangular, flat jack plate that ordinarily provides maximum stability.
The subject drill is depicted in a diagram admitted as Joint Exhibit 2.

Robertson observed the rotary drill parked on the bench. The drill was resting on the hydraulic jack rams with no rectangular jack plates at the feet of the jacks. Robertson opined that the lack of jack plates affected the drill=s stability and created a tipping hazard that exposed the drill operator to injury. Whitehorn testified that the jack rams, that have narrow contoured bottoms, provided greater stability than the flat, rectangular jack pads, because the rams dig into the bench and are superior to jack plates given the unevenness of the quarry floor. As a result of his observations, Robertson issued Citation No. 4448277 citing a non-S&S violation of section 56.14100(b), 30 C.F.R. ' 56.14100(b). This mandatory safety standard requires defects in equipment to be corrected in order to prevent personnel from exposure to hazards.

The bench decision in this citation noted mitigating circumstances, *i.e.*, uneven terrain that, in the operator=s judgement, made the jack plates unnecessary. While I am sensitive to

ACS=s assertion that it was exercising its judgement in this instance, on balance, an operator=s unilateral removal of safety equipment is done at the operator=s risk and constitutes a violation of the cited mandatory standard. The secretary has proposed a $50.00 civil penalty. Given the mitigating circumstances and low gravity of the cited condition, a civil penalty of $30.00 shall be imposed. (Tr. 73-75).

In view of the above, the total proposed civil penalty in Docket No. CENT 97-60-M is reduced from $197.00 to $80.00.

B. Docket No. CENT 97-128-M

1. Citation No. 4453270

Robertson, accompanied by Whitehorn, once again inspected the Blum Quarry facility on September 24, 1996. Robertson observed a water tank mounted on a Ford F-600 flatbed truck. The truck was parked in the maintenance yard in the general vicinity of the shop building. The truck is used for dust control of the roadway haulage areas. The truck was not tagged out of service. Upon inspecting the truck, Robertson determined the manually operated horn had been removed. He also concluded the parking brake was broken in that it could not be engaged.

With respect to the horn, Robertson issued Citation No. 4453270 citing a violation of the mandatory standard in section 56.14132(a) that requires manually operated horns on mobile equipment. Robertson concluded the cited condition was non-S&S.

Whitehorn does not dispute that the horn was inoperable. He stated the truck was recently purchased and was not in service. Whitehorn, however, admitted the truck was not tagged out of service. Robertson testified that, during the inspection, Whitehorn did not contend the truck was not in service.

Although Whitehorn maintains the truck was not in service, it was not tagged out of service. Moreover, Whitehorn failed to inform Robertson that the truck was not operational during Robertson=s inspection. Although Whitehorn now argues the truck was not being used, exculpatory statements initially made at trial, and not communicated to the inspector during the inspection, are afforded little evidentiary weight. Consequently, the bench decision in this matter affirmed Citation No. 4453270 as well as the $50.00 civil penalty proposed by the Secretary. (Tr. 94-95).

2. Citation No. 4453271

As noted above, Robertson also determined the water truck=s parking brake could not be engaged. Whitehorn does not allege the parking brake was operational. As a consequence, Robertson issued Citation No. 4453271 citing a non-S&S violation of section 56.14101(a)(2),

30 C.F.R. ' 14101(a)(2). This mandatory standard requires parking brakes capable of holding mobile equipment with its typical load on the maximum grade it travels. Robertson characterized the condition as non-S&S because the vehicle typically operated on level ground, and, because the vehicle could be steered into a bank or berm in the event the parking brake was applied and failed.

The bench decision noted the importance of a parking brake, commonly referred to as an Aemergency brake.@ As an emergency brake, a parking brake on a multi-ton vehicle is the method of last resort if the service brake fails. Defective parking brakes have been contributing factors in fatal accidents. *See, e.g., Fluor Daniel, Incorporated* 16 FMSHRC 2049 (October 1994) (ALJ), *rev=d on other grounds*, 18 FMSHRC 1143 (July 1996). While I do not agree with the non-S&S characterization of this condition, an administrative law judge cannot charge an operator with an S&S violation if the charge has not been brought by the Secretary. Accordingly, Citation No. 4453271 is affirmed as a non-S&S citation.

With respect to the appropriate penalty to be imposed, the Mine Act requires this Commission to make independent penalty determinations based upon the statutory penalty criteria in section 110(i) of the Act, despite the civil penalty proposed by the Secretary. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff=d*, 763 F.2d 1147 (7th Cir. 1984). The Secretary has proposed a $50.00 civil penalty. Taking into consideration the serious gravity of the defective parking brake condition, a civil penalty of $75.00 shall be imposed for Citation No. 4453271. Although I have exercised restraint in this negligible increase in penalty, the gravity of an inoperable emergency brake must not be understated. (Tr. 95-98).

3. Citation No. 7852921

MSHA Inspector Michael A. Davis inspected the Blum Quarry facility on February 19, 1997. Davis was accompanied by Darrell Hacker, ACS=s loader operator. Davis began his inspection in the shop area where he observed a Terex 7221B front-end loader that was undergoing engine repair. Davis inspected the seatbelt inside of the loader=s cab. Davis testified the seatbelt was designed to attach to the floor on each side of the operator=s seat by means of a plate and I-bolt. The seatbelt portions attached to the floor were then attached to the pedestal base of the seat through a clevis where these ends were met by, and attached to, a lapbelt. (See Gov. Ex. 6B, pg. 1 of 2). Davis surmised this method of seatbelt installation provided the optimum operator protection.

Davis observed the seatbelts were not attached to the seat as originally designed by the manufacturer. Rather, Davis noted that the seatbelts had been bolted down to the metal frame of the console floor in the cab=s compartment and they were not tethered to the seat. (See Gov. Ex. 7). Davis testified that this front-end loader normally traveled at speeds between 10 and 15 miles per hour.

Whitehorn testified that he had purchased the front-end loader with the seatbelts in the condition seen by Davis. Whitehorn maintained the seatbelts were securely bolted to the metal frame of the floor. He also stated the seatbelts had been installed in this way for several years and had never been previously cited by MSHA.

As a result of his observations, Davis issued Citation No. 7852921 citing a non-S&S violation of section 56.14130(i), 30 C.F.R. ' 56.14130(I). This mandatory standard provides, ASeat belts shall be *maintained in functional condition*, and replaced when necessary to assure proper performance.@ (Emphasis added). Davis characterized the cited condition as non-S&S because he believed it was unlikely that a disabling injury would occur. (Tr. 136). In essence, Davis conceded that the seatbelts bolted to the floor would provide protection, although he believed the protection to be less effective than that provided by the manufacturer=s method of seatbelt installation.

The bench decision noted that MSHA is not estopped from citing a violative condition simply because the condition was not cited during previous inspections. However, here the issue is whether a seatbelt securely bolted to a metal frame on the cab floor constitutes a seatbelt Ain functional condition.@ As a threshold matter, even Davis concluded the seatbelt was functional in that he concluded it was unlikely to fail. An operator=s modification of equipment is not a *per se* violation of the Secretary=s mandatory safety standards. Thus, an operator is permitted to modify equipment provided that the modification is reasonable and not hazardous. For example, an operator can replace a manufacturer installed guard at a pinch point with a substitute screen provided that the screen is securely in place and, that the screen guard serves its intended protective purpose. So too, an operator can alter the bolting location of a seatbelt, particularly in a vehicle that routinely does not exceed approximately 15 miles per hour, as long as the seatbelt continues to provide effective protection.

The Secretary has the burden of proof with respect to the fact of occurrence of a violation. The seatbelt was securely bolted in place to a metal frame on the floor. There is no adequate basis for concluding that the seatbelt, as installed, did not provide adequate protection or was not otherwise Afunctional@ as contemplated by section 56.14130(2)(i). Accordingly, Citation No. 7852921 shall be vacated. (Tr. 156-60).

4. Citation No. 7852922

During the course of Davis= February 19, 1997, inspection of the shop area, Davis observed an employee working in the plant area who was Asweeping around tables@ and Adoing a lot of clean-up in the shop.@ (Tr. 166). As Davis approached, Davis concluded the individual was not wearing hard-toed boots because the front of the shoes were flat. Davis asked him about his footwear and confirmed he was not wearing protective boots.

Davis noted unsecured, heavy objects on a work table in the vicinity where this person was sweeping. Davis opined these heavy objects could fall off the table onto this individual=s feet.

The objects on the work table and other areas in the shop are depicted in three photographs admitted in evidence. (*See* Gov. Ex. 10). Davis was also concerned because he concluded, in addition to sweeping, this employee=s job duties also included carrying heavy tools and objects.

Davis issued Citation No. 7852922 citing a violation of the mandatory safety standard in section 56.15003, 30 C.F.R. ' 56.15003. This safety standard requires miners to wear protective footwear when in an area of a mine or plant Awhere a hazard exists which could cause injury to the feet.@ Davis characterized the cited condition as S&S because he conclude it was reasonably likely that an object would fall off the table, or be dropped, on this employee=s foot.

ACS does not dispute the fact of occurrence of the violation. However, ACS contests the S&S designation. (Tr. 172-73).

The bench decision noted that, with respect to protective footwear, the likelihood of a significant injury causing event, *i.e.*, an object falling on a foot, must be evaluated in the context of the job duties performed by the cited employee. Here, the individual was sweeping the shop. The photographs in Gov. Ex. 3 depict heavy objects placed securely on a well supported work bench. There is no basis for concluding that it was likely that an object would fall off the work bench and strike this employee=s foot while he was sweeping. The Secretary has also failed to establish that this individual routinely lifted heavy objects, or, that he did not wear protective footwear when doing so.

Accordingly the S&S designation in Citation No. 7852922 shall be deleted. The Secretary has proposed a civil penalty of $204.00 for this citation. In view of the deletion of the S&S designation and the resultant reduction in the gravity of the cited condition, a civil penalty of $75.00 is imposed. (Tr. 173-76).

5. Citation Nos. 7852923 and 7852924

At the hearing, ACS withdrew its contest of non-S&S Citation Nos. 7852923 and 7852924. Consequently, ACS has agreed to pay the $50.00 civil penalty proposed by the Secretary for each of these citations.

In summary, the total proposed civil penalty in Docket No. CENT 97-128-M is reduced from $454.00 to $300.00.

ORDER

In view of the above, **IT IS ORDERED THAT**:

1. Citation No. 4448274 in Docket No. CENT 97-60-M, and Citation No. 7852922 in Docket No. CENT 97-128-M, **ARE MODIFIED** to delete the significant and substantial designations.

2. Citation No. 7852921 in Docket No. CENT 97-128-M **IS VACATED**.

3. Arrow Crushed Stone, Inc., **SHALL PAY** to the Mine Safety and Health Administration, within 30 days of the date of this decision, **a total civil penalty of $380.00** satisfaction of the citations in issue, and, upon timely receipt of payment, Docket Nos. CENT 97-60-M and CENT 97-128-M **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Thomas A. Paige, Esq, Office of the Solicitor, U.S. Department of Labor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail).

Ronald M. Mesa, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, 1110 Commerce Street, Room 4C50, Dallas, TX 75242 (Certified Mail)

John Whitehorn, Vice President, Arrow Crushed Stone, Inc., Rt. 7, Box 108, Cleburne, TX 76031 (Certified Mail)

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