FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-110-M
Petitioner	:	A. C. No. 14-00164-05539
v.	:	
	:	Docket No. CENT 2000-198-M
WALKER STONE COMPANY,	:	A.C. No. 14-00164-05540
INCORPORATED,	:	
Respondent	:	
	:	Kansas Falls Quarry & Mill

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing, Troup, Kaus & Ryan, L.C., Junction City, Kansas, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Walker Stone Company, Incorporated (Walker Stone). The petitions sought to impose a total civil penalty of $507.00 for four alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. Two of the four alleged violative conditions were characterized as significant and substantial (S&S) in nature. This matter was heard on January 23, 2001, in Fort Riley, Kansas.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the four citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. At the conclusion of the hearing, the parties waived the filing of briefs. (Tr. 222). This written decision formalizes the bench decision issued with respect to the contested citations. Although Citation No. 7927263 was vacated in the bench decision, following the January 23, 2001, hearing, the Secretary filed a motion to withdraw Citation No. 7927263. The Secretary's motion, which is not opposed by

Walker Stone, is timely inasmuch as it was filed prior to the issuance of this written decision which finalizes the bench decision. Accordingly, the Secretary's motion to withdraw Citation No. 7927263 **IS GRANTED**.

With respect to the remaining three citations, this written decision contains an edited version of the bench decision issued at trial with added references to pertinent case law. The bench decision affirmed the three citations and imposed a total civil penalty of $323.00.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (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).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria 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., Inc.*, 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

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. In determining the appropriate civil penalty to be assessed, Section 110(i) provides, in pertinent part:

> 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.

Walker Stone is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that Walker Stone has a good compliance history with respect to previous violations in that, although it was cited for seventeen violations of mandatory health and safety standards during the previous two years preceding the issuance of the citations in issue, only one of the cited conditions was designated as S&S (Gov. Ex. 1); that Walker Stone abated the cited conditions in a timely manner; and that the $507.00 total civil penalty initially proposed by the Secretary in these matters will not effect Walker Stone's ability to continue in business.

II. Findings and Conclusions

Walker Stone is a moderately small mine operator that has approximately 32 employees at its Kansas Falls Quarry and Mill. The facility is an open pit crushing operation that is located in Dickinson County, Kansas. At the quarry, material is extracted and crushed into various grades of gravel. The citations that are the subject of these proceedings were issued on September 23 and September 27, 1999, by Mine Safety and Health Administration (MSHA) Inspector James William Timmons, who is assigned to the Topeka, Kansas Field Office. The citations were issued during the course of Timmons' regular bi-yearly inspection of Walker Stone's Kansas Falls Quarry and Mill facility.

A. Citation No. 7927258

Inspector Timmons conducted his regular bi-annual "01 inspection" of the Kansas Falls Quarry and Mill from September 22 through September 27, 1999. Upon arriving at the mine, Timmons met with Clifford Moenning, Walker Stone's supervisor. At Timmons' request, Moenning provided company records for review including training records, fire extinguisher inspection reports, electrical records, and accident and injury reports. Timmons testified he routinely reviews reports of accidents that occurred since the last mine inspection to determine if there were any violations of safety standards. (Tr. 113-15).

Part 50 of the Secretary's regulations governs accident notification requirements. For example, a mine operator must notify MSHA immediately after a fatal accident or an accident that results in life threatening injuries. 30 C.F.R. §§ 50.2(h) (1) and (2) and 50.10. Accidents involving occupational injuries that are not life threatening must be reported to MSHA on Accident Report Form 7000-1 within ten working days after the occupational injury occurs. 30 C.F.R. § 50.20(a).

Timmons noted a Mine Accident and Injury Report (MSHA FORM 7000-1) completed on July 19, 1999. (Gov. Ex. 3). The accident report concerned a right hand injury sustained by to Richard A. Orkzesik, a skid loader operator, on July 10, 1999. The accident occurred when Orkzesik attempted to clean mud and debris from the conveyor's return idler roller with a shovel. The moving belt caught the shovel before Orkzesik could let go catching Orkzesik's hand between the roller and the belt. As a result, Orkzesik suffered bruising and swelling to his right thumb and forefinger.

After reviewing the Orkzesik injury report, Timmons issued Citation No. 7927258 for an alleged violation of the mandatory safety standard in section 56.12016 that requires, in pertinent part, that electrically powered equipment shall be deenergized and locked out before maintenance is performed on such equipment. (Gov. 2). The citation was terminated on the same day after Timmons assured himself that Orkzesik had been trained in the importance of locking out equipment. Timmons designated the violation as S&S because of the likelihood of serious injury to the extremities of maintenance personnel exposed to the pinch points of moving equipment.

Although the negligence attributable to Walker Stone was initially determined to be moderate, Citation No. 7927258 was modified on September 24, 1999, to reduce the degree of negligence to low based on information provided to Timmons by the victim of the accident. Orkzesik told Timmons that Walker Stone had a lock out and tag out policy and that he had been trained to deenergize and lock out equipment on two occasions. Orkzesik stated that he knew better, but on the day of the accident he was in a hurry. (Tr. 39). Although David Walker, the President of Walker Stone, and supervisor Moenning were present during Timmons' September 24, 1999, interview of Orkzesik, Timmons' opined that Orkzesik did not appear to be intimidated in that his responses appeared forthright and that he admitted the accident was his fault. (Tr. 55-56). The Secretary seeks to impose a civil penalty of $224.00 for Citation No. 7927258.

Walker Stone does not dispute the facts surrounding the accident. However it objects to the citation because Timmons did not observe the violation. Rather, Timmons used Walker Stone's admissions in its accident report to establish the cited violation. Thus, Walker Stone challenges the citation because the cited violation was not personally observed by Timmons, and because the citation is based on a "self incriminating" accident report that Walker Stone is required to file with MSHA pursuant to 30 C.F.R. § 50.20(a). In essence, Walker Stone argues that such use of routine accident reports will have a chilling effect on a mine operators' willingness to file accident reports.

The bench decision noted that Walker Stone does not deny the facts surrounding the cited violation of section 56.12016 in that it admits Orkzesik attempted to perform maintenance work on the electrically powered conveyor without deenergizing the belt and locking out the equipment. However, as a threshold matter, Walker Stone asserts that the cited violation is not supportable because Inspector Timmons did not personally observe the violation. It is well established that an MSHA inspector may cite a violation based on his reconstruction of past events. Thus, contrary to Walker Stone's assertions, an inspector does not have to personally observe a violation of a mandatory safety standard to conclude that a violation had occurred. *Emerald Mines Co. v. FMSHRC*, 863 F. 2d 51, 57 (D.C. Cir. 1988). Thus, the Secretary has demonstrated the fact of occurrence of the cited violation.

Turning to the issue of significant and substantial, it is obvious that the violation, *i.e.*, the failure to deenergize and lock out electrical equipment, significantly and substantially contributed to the cause and effect of the hazard, *i.e.*, the exposure of extremities to injury. Thus, Citation No. 7927258 was properly designated as significant and substantial.

The next issue to be addressed is negligence. The Mine Act is a strict liability statute. Thus, mine operators are liable without regard to fault. *Sewell Coal Co. v. FMSHRC*, 686 F. 2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989). In this regard, in *Ideal Cement Co.*, 13 FMSHRC 1346, 1351, the Commission noted that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." *See also Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754, 757-58 (May 1992). Consequently, Walker Stone is liable despite Orkzesik's admission that he knowingly violated the company's lock out policy because he was in a hurry.

Under the penalty criteria in section 110(i) of the Mine Act, the degree of an operator's negligence, or lack thereof, is a factor to be considered in assessing the appropriate civil penalty. *Asarco, Inc.*, 8 FMSHRC at 1636. While Orkzesik's misconduct is not a defense to liability, the circumstances surrounding Orkzesik's conduct are relevant in determining whether Orkzesik's negligence should be imputed to Walker Stone. Ordinarily, the conduct of a rank-and-file miner is not imputable to the operator in determining the degree of negligence for penalty purposes. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Rather, it is the adequacy of the mine operator's supervision, training and discipline that are the relevant factors to be considered. *Id.; Western Fuels-Utah, Inc.*, 10 FMSHRC at 261.

Here, the Secretary does not contend that Walker Stone's supervision, training or discipline of Orkzesik was lacking. Orkzesik simply disregarded his lock out training as well as known company policy. Consequently, there is no basis for imputing Orkzesik's negligence to Walker Stone. Accordingly, the negligence attributable to Walker Stone in Citation

No. 7927258 for the cited lock out violation of the Secretary's mandatory safety standard is reduced from low negligence to no negligence. **In view of Walker Stone's lack of negligence the $224.00 civil penalty initially proposed by the Secretary for Citation No. 7927258 shall be reduced to $120.00.**

As a final matter, Walker Stone objects to Timmons' reliance on Accident Form 7000-1 because it is "self-incriminating." Section 103(a) of the Mine Act, 30 U.S.C. § 813(a), authorizes the Secretary to conduct inspections to determine if there are violations of mandatory safety regulations. Section 103(d) of the Act, 30 U.S.C. § 813(d), requires mine operators to keep accident records and to make such records available to MSHA inspectors. While I am sensitive to Walker Stone's concern that MSHA's reliance on routine accident reports to impose civil liability may provide mine operators with a disincentive to strictly comply with MSHA's accident reporting requirements, I cannot conclude that Timmons' reliance on the accident report to support the cited violation is inconsistent with the Secretary's statutory mandate. However, use of accident reports to support citations must comply with the provisions of section 104(a) of the Act, 30 U.S.C. § 814(a), that require that citations must be issued "with reasonable promptness." Here, Timmons testified he only reviews reports of accidents that were made since the last mine inspection. In the instant case, the citation was issued approximately two months after the accident. Under such circumstances, the citation was issued reasonably promptly. (Tr. 223-33).

B. Citation No. 7927264

During the course of reviewing the accident reports on September 27, 1999, Timmons noted a truck accident that had occurred approximately one week before on September 16, 1999. (Gov. 6). The accident occurred when Oscar Garza, who had been hired by Walker Stone just three weeks before, lost control of his loaded 50 ton Caterpillar haulage truck that was traveling from the pit to the crusher. The haulage truck was driven off of the road as Garza was attempting to negotiate a curve on a decline, causing the truck to tip over on its side. Garza was wearing a seat belt and escaped serious injury. Garza sustained a laceration of his right ear and bruises on his right shoulder and both legs.

After reviewing the accident report, Timmons spoke to Garza and determined that Garza had received two days training at Walker Stone. Garza's previous truck driving experience reportedly consisted of "some experience" driving an oil truck in the National Guard. (Tr. 89). As a result of the information he obtained, Timmons issued Citation No. 7927264 on September 27, 1999, citing a violation of the mandatory safety standard in section 56.9101, 30 C.F.R. § 56.9101, that requires operators of mobile equipment to control the equipment while it is in motion. (Gov. Ex. 4). Timmons designated the violation as S&S given the potential injuries that could occur to the operator as a consequence of this multi-ton vehicle's rollover. Timmons characterized Walker Stone's negligence as low apparently because Garza had been given some training, and because Garza stated he had some experience.

Clifford Moenning, Walker Stone's supervisor, testified Garza told him "he didn't know anything" about why the accident happened. (Tr. 131-32). Moenning concluded Garza had fallen asleep at the wheel. Moenning testified that it is normal for newly hired truck drivers to receive one to two days training. Moenning further testified that he "believe[d] [Garza] did have some truck driving experience, but not on that large a truck." (Tr. 133, 140).

The circumstances of this accident that resulted from Garza's failure to control this multi-ton haulage truck obviously support the cited violation, as well as its significant and substantial nature. The bench decision noted the previous discussion of strict liability and imputed negligence. Here, a newly hired truck driver, with questionable truck driving experience in the National Guard, rather than suitable commercial driving experience, drove a multi-ton haulage truck off the road shortly after he was hired. When an mine operator entrusts an employee with exclusive possession and control of heavy duty equipment, the mine operator must be held accountable for ensuring that the employee is qualified to operate the equipment by virtue of adequate training and experience. In fact, Walker Stone conceded the mine operator must be held responsible for determining when a truck driver is qualified. (Tr. 145-47).

Moenning's exculpatory conjecture that Garza fell asleep is entitled to little weight. Rather, given Garza's lack of substantial truck driving experience, the brevity of his training, and his manifest inability to control the truck, it is apparent that Garza was not adequately trained or supervised. As previously discussed, under such circumstances, ordinarily Garza's negligence should be imputed to Walker Stone.

However, here, for reasons best known to the Secretary, MSHA has characterized Walker Stone's negligence as low. Although I do not view Garza's reported National Guard experience or his brief training as mitigating factors, I will not disturb the low negligence attributed to Walker Stone by the Secretary in the subject citation. **Accordingly, Citation No. 7927264 is affirmed and Walker Stone shall pay the $173.00 civil penalty initially proposed by the Secretary.** (Tr. 233-37).

C. Citation No. 7927262

On September 23, 1999, Timmons inspected a magazine that stored explosives. The magazine consisted of a metal shed with a steel door that was built into the side of a hill. The shed measurements were approximately six feet tall by six feet long by eight feet wide. Timmons observed 63 boxes of 2 ½ by 16 inch slurry explosives that were stacked on the floor of the magazine. Each box weighed approximately 55 pounds. Timmons noted that the metal shell of the magazine had deteriorated and water was leaking into the magazine. Timmons observed someone lift a box of explosives from the ground. The box was water logged causing the bottom to fall out spilling the slurry explosives on the floor.

As a result of Timmons' observations, Timmons issued Citation No. 7927262 citing a violation of the mandatory standard in section 56.6132(a)(7), 30 C.F.R. § 566132(a)(7), that requires magazines to be kept clean and dry inside. Timmons designated the violation as non-significant and substantial (non-S&S) because the magazine only contained water slurry explosives that are designed to use in water. The water based slurry consists of hexamine sodium nitrate, nitrate acid and an aluminum based water jell. Larry Tappana, a technical representative employed by Slurry Explosives Corporation, Walker Stone's explosives supplier, testified that slurry explosives are "cap sensitive" which means there is no danger of explosion unless they are connected to, and detonated by, blasting caps. Timmons viewed the violation as a housekeeping violation rather than a significant hazard because there were no blasting caps stored in the magazine. Although the violation was characterized as poor housekeeping unlikely to cause injury, Timmons noted on Citation No. 7927262 that if injury were to occur, it was likely that it would be fatal.

Timmons explained that nitroglycerin based explosives stored in a wet environment could deteriorate and become unstable. He also stated that blasting caps stored in a wet environment could cause misfires. Since neither nitroglycerin based explosives nor blasting caps were stored in the subject magazine, Timmons considered the violation as non-S&S. The citation was terminated after a new magazine was constructed.

The bench decision noted that the undisputed evidence is that the interior of the magazine was wet due to water leakage. The plain language of the Secretary's cited mandatory standard requires that magazines be kept clean and dry. Moreover, the testimony reflects that The Bureau of Alcohol, Tobacco and Firearms (ATF) regulations also prohibit wet magazines. Finally, Tappana, a technical representative employed by Walker Stone's explosives supplier, who was Walker Stone's witness, testified it is industry practice to keep magazines dry. (Tr. 185). While the Secretary's interpretation of her own regulations normally is entitled to deference as long as the interpretation is reasonable and promotes safety, here, deference is not in issue because the meaning of the regulation is clear. The regulation requires a dry magazine. The subject magazine was wet. Accordingly, the Secretary has demonstrated the fact of occurrence of the cited section 56.6132(a)(7) violation.

With regard to gravity, the violation has been designated as non-S&S. However, Citation No. 7927262 notes that in the unlikely event of injury, such injury would be fatal. The testimony does not support Timmons' conclusion of the possibility of fatal injuries. Exposing the water based slurry product to wet conditions does not contribute to any additional hazard. Nor is there any evidence that the wet magazine could contribute to an unplanned explosion. **Consequently, the gravity of the section 56.6132(a)(7) violation is reduced to low and the $55.00 civil penalty initially proposed by the Secretary for Citation No. 7927262 is reduced to $30.00.** (Tr. 237-40).

As previously noted, the Secretary's motion to withdraw Citation No. 7927263 has been granted. Consequently, Citation No. 7927263 shall be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7927258, 7927264, and 7927262 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Citation No. 7927263 **IS VACATED**.

IT IS FURTHER ORDERED that Walker Stone Company, Inc., **shall pay a total civil penalty of $323.00** in satisfaction of Citation Nos. 7927258, 7927264, and 7927262. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. CENT 2000-110-M and CENT 2000-198-M **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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