FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 14, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 2001-284-M
	:	A. C. No. 23-02207-05501
v.	:	
NELSON BROTHERS QUARRIES, Respondent	:	Jasper Quarry

DECISION

Appearances: Daniel J. Haupt, Conference & Litigation Representative, U.S. Department of Labor, Mine Safety & Health Administration, Dallas, Texas, on behalf of Petitioner;
Paul M. Nelson, President, Nelson Brothers Quarries, Jasper, Missouri, on behalf of Respondent.

Before Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994) *et seq.*, the "Act," charging Nelson Brothers Quarries (Nelson Brothers) with seven violations of mandatory standards and proposing civil penalties of $472.00, for those violations. The general issue before me is whether Nelson Brothers violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Both parties filed post hearing briefs. It is noted however that the brief of the Respondent, contains statements that are not supported by the trial record. To the extent that such statements are without such record support they cannot, of course, be given evidentiary weight.

Citation No. 6205045 alleges a violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

> The drive coupling for the electric water pump located in the pit was not guarded to prevent employee contact. The coupling and keyed shaft were approximately 6-inches long. This condition created an entanglement hazard to employees.

The cited standard, 30 C.F.R. § 56.14107(a), provides that "moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and take-up pulleys, flywheels, couplings, shafts, fan blades and similar moving parts that can cause injury." Wesley Hackworth, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified that on March 13, 2001, he was performing an inspection of the Jasper Quarry, accompanied by Paul Nelson, Nelson Brothers' President. According to Hackworth, the drive coupling for the electric water pump, located in the pit and used to drain water out of the west pit, was not guarded. The coupling was not smooth and 1/8 to 1/4 inch projections protruded from it. In addition a small keyed area on the shaft was exposed which also created an entanglement hazard .

Hackworth credibly testified that a person becoming entangled in the unguarded coupling could suffer permanently disabling injuries. He opined however that injuries were unlikely since no employees were required to be in the cited area. Within the above framework of evidence I conclude that the violation is proven as charged but that such violation was of low gravity. The Secretary's finding of low negligence, based on Mr. Nelson's good faith but incorrect belief that the coupling was smooth, is accepted for purposes of assessing a civil penalty herein.[1]

In reaching these conclusions I have not disregarded the testimony of Foreman Ralph Carter, that he was unable to see, in the Respondent's photographs in evidence (Exh. R-1 and R-2), any of the projections in the coupling described by Inspector Hackworth. Indeed, the cited photos do not appear to depict any projections. However, the photos also do not appear to show all 360 degrees of the shaft and, in particular, the area described by Hackworth in Petitioner's Exhibit No., 1 p. 2. Under the circumstances and in light of Inspector Hackworth's credible affirmative testimony I can give Carter's inability to see the violative conditions in the Respondent's photographs but little weight.

I have also not disregarded Mr. Nelson's argument, presented at hearing, that the cited standard is in conflict with the Occupational Safety and Health Administration's (OSHA) standard at 29 C.F.R. § 1910.219(h)(1)(i)(2) and that it therefore is incompatible with the "Interagency Agreement" between MSHA and OSHA, dated March 29, 1979. In particular, Mr. Nelson cites Section D of that agreement which provides as follows:

> MSHA and OSHA will endeavor to develop compatible safety and health standards, regulations and policies with respect to the mutual goals of the two organizations including joint rulemaking, where appropriate. This interagency coordination may also include cooperative training, shared use of facilities, and technical assistance.

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[1] The Secretary appears to have modified the inspector's initial findings of "moderate" negligence to "low" negligence.

The above statement does not, however, provide any basis to invalidate the standard cited herein. I also note that, while the OSHA standard cited by Mr. Nelson is more specific in describing the hazard to be protected against, the standards are not at all inconsistent. Under the circumstances the Respondent's arguments in this regard are rejected.

Citation No. 6205046, as amended, charges a violation of the standard at 30 C.F.R. § 56.12004, and alleges as follows:

> The 480-volt power cable supplying power to the electric water pump was not properly fitted at a female termination plug. The inner conductors were exposed out from the outer jacket and were clamped into the plug. There was no apparent damage to the insulation on the inner conductors. This condition created a hazard of the inner conductors being damaged and an employee being shocked.

The cited standard, 30 C.F.R. § 56.12004, provides in relevant part that "electrical conductors exposed to mechanical damage shall be protected."

Inspector Hackworth testified that the inner conductors were indeed exposed as identified in the photograph in evidence (Exh. P-2). Although no bare wires were exposed, the insulation on the wires was soft and could be damaged from pump vibrations or from repeated unplugging. Hackworth opined that the condition would not likely cause injury since there was no apparent damage or exposed wires. He noted however, that if the wires should become exposed there was a hazard of fatal injuries by electrocution. The testimony of Foreman Carter, that the electrical wiring was deenergized before being handled and that it was the unwritten company policy that employees do not touch the plug until the wires are deenergized, reinforces the Secretary's conclusion that the cited condition was of low gravity. While the operator's evidence does tend to reduce the exposure potential, and I agree that gravity was low, I do not find sufficient credible evidence to negate the violation itself.

Even assuming, *arguendo*, that the condition created no hazard, as Respondent argues in its brief, it is the established law that the Mine Act imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. *See Allied Products Inc.*, 666 F.2d 890, 892-93 (5th Cir. 1982).

Inspector Hackworth found the operator chargeable with low negligence since the condition was not highly visible. I accept those findings, which are supported by the record, for purposes of assessing a civil penalty.

Citation No. 6205047, as amended, alleges a violation of the standard at 30 C.F.R. § 56.12040 and charges as follows:

> There were three filler plates missing from the 120 volt breaker box in the crusher control booth. The breakers in the box were in use except for one. This condition created a shock hazard to employees when turning the breakers on or off.

The cited standard, 30 C.F.R. § 56.12040, provides that "operating controls shall be installed so that they can be operated without danger of contact with energized conductors." Inspector Hackworth testified that he observed that three filler plates were missing from the 120-volt breaker box in the crusher control booth. The existence of this condition is not disputed by the operator and accordingly the violation is proven as charged. Hackworth described the hazard created by the cited condition as exposure of employees to electrical shock when turning the breakers on and off. According to Hackworth there was a hazard of shock or electrocution if any employee's fingers should slip or an employee could fall with his hand contacting the energized conductors. Hackworth concluded, however, that injuries were unlikely explaining that the door to the breaker box was kept closed and that the exposed openings were small.

The testimony of Foreman Carter confirms the low gravity of the violation. Carter testified that the circuit breaker was located on a wall behind the crusher control operator and that it was company policy to keep the door shut on the breaker box. Carter also testified that when occasional work is performed on the electrical system it is company policy to shut down the main power source.

Respondent argues in its post hearing brief that the cited circuit breaker box does not have "operating controls" within the meaning of the cited standard. Inspector Hackworth credibly testified however that the tags or handles (little red handles) on the breakers constituted "operating controls." There is no contrary evidence and Respondent's argument is accordingly without record support. To the extent Respondent also argues based other alleged evidence not in the record, those arguments must also be rejected.

The Secretary found low operator negligence apparently based on the fact this was the mine's first inspection. This finding is accepted for purposes of assessing a civil penalty.

Citation No. 6205048 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14112(b) and charges as follows:

> The top and back sections of the guards for the self cleaning tail pulley on the 7-8 concrete conveyor were off missing. The guards had been removed for cleaning and were not put back on. The condition was highly visible and should have been noticed and corrected. This condition created an entanglement hazard to employees.

The cited standard, 30 C.F.R. § 56.14112(b), provides as relevant hereto that "guards shall be securely in place while machinery is being operated . . ." Inspector Hackworth testified, and it

is undisputed, that the guards had been removed from the tail pulley for cleaning and had not been replaced at the time of his inspection. Since it is undisputed that the cited guards were not in place while the conveyor was in operation the violation must be affirmed.

According to Hackworth there was an entanglement hazard presented by the violation since the pulley had wings and splines on it. He concluded that it was reasonably likely for an employee to become entangled since the area was readily accessible to employees. Foreman Carter testified however that the cited area was effectively inaccessible. To gain access one would have to "climb over things" to get to it. According to Carter it was therefore unlikely for someone to walk into or fall into this area. Carter also testified that he had never seen anyone in the plant area and employees are not allowed in that area while the plant is in operation. Moreover, according to Carter, if a customer should stray into the plant area the operator shuts the plant down. He also noted that maintenance is not performed while the plant is in operation. When the plant is started the operator waits for the startup signal and no one is then in the plant.

In light of Mr. Carter's first hand knowledge as to the plant operations I give his testimony significant weight and conclude that indeed, the cited area was generally not easily accessible and that therefore injuries from the unguarded tail pulley were not reasonably likely. Under the circumstances I do not find that the violation was "significant and substantial." In her post-hearing brief the Secretary appears to now concede the issue also based upon Foreman Carter's greater knowledge of the operating conditions.

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that 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 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (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 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.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to

abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

I do find however that the violation was the result of significant operator negligence. It is not disputed that the guards had been removed for the purposes of cleaning the area and had not been replaced for a week. Respondent Nelson, also admitted that he had been in the area during the startup and under such circumstances should have seen the absence of the guards - - an obvious condition according to Inspector Hackworth. The condition was abated by replacing the guards.

Citation No. 6205050 alleges a violation of the standard at 30 C.F.R. § 56.20003(a) and charges as follows:

> The motor control trailer was not kept clean and orderly. The floor of the trailer was cluttered with tools, extension cords, nuts, bolts and belt splicing materials. The materials were in the middle and west end of the trailer. This condtion [*sic*] created a trip or fall hazard to employees.

The cited standard, 30 C.F.R. § 56.20003(a), provides that at all mining operations "workplaces, passageways, store rooms and service rooms shall be kept clean and orderly."

Inspector Hackworth testified that in the motor control trailer he found a number of items laying on the floor including, as depicted in his diagram, nuts, bolts, hand tools, extension cords, belt fasteners and plates used for splicing belts. According to Hackworth the items were readily visible and presented a slipping, tripping and falling hazard. The items were located in the middle of the floor and affected access to the trailer. He concluded that injuries were reasonably likely to an employee who might slip or fall in attempting to retrieve tools or parts and that the injuries would likely result in lost work days and restricted duty, from strains, sprains and twisted ankles.

According to Foreman Carter, the trailer is entered twice daily, usually by way of the side door, to turn the power on and off. In addition, once or twice a week one would turn left to reach for parts or tools. Carter admitted that the floor was cluttered but maintained that there was walking space in between the clutter and that it took him only 20 minutes to clean it up. Carter also observed that the condition had existed for several weeks and that he was sure that everyone knew that the material was on the floor.

The Secretary in her post-hearing brief now concedes that Carter had greater knowledge of the conditions and requests a corresponding modification of the citation and penalty. While I do find that a violation in fact existed as charged, under the circumstances I find that the violation was neither "significant and substantial" nor of significant gravity.

Hackworth concluded that the operator was moderately negligent because the condition was readily visible. This finding is not disputed and is accepted for purposes of assessing a penalty. Carter also acknowledged that the cluttered condition had existed for a couple of weeks and this acknowledgment further supports these negligence findings.

Citation No. 6205051, alleges a violation of the standard at 30 C.F.R. § 56.12001 and charges as follows:

> The screening conveyer disconnect box was not provided with proper fuse protection. There were three different size fuses in the disconnect box. There was one-20 amp fuse, one-25 amp fuse and one-30 amp fuse. This condition created a hazard of an employee being injured should the circuit protection fail to break the circuit.

The cited standard, 30 C.F.R. § 56.12001, provides that "circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity."

Inspector Hackworth testified that the disconnect box indeed did not have proper fuse protection for the screening conveyer circuit which had a ten-horse power motor. According to Inspector Hackworth the National Electrical Code, the accepted industry standard, provides that a 24.5-ampere fuse would be required under the circumstances. A 30-ampere fuse was being used here. According to Hackworth such a fuse would not break the circuit in the presence of an excessive overload. Based on Hackworth's credible testimony I find that the violation is proven as charged.

In its post-hearing brief Respondent argues that the National Electric Code actually permits a 31.5 ampere fuse. Respondent also encloses a portion of a document (not introduced at hearing) purporting to be extracted from the National Electric Code. Respondent failed however to support this argument at the evidentiary hearing with the necessary testimony, under oath and subject to cross examination, and with properly authenticated documentary evidence. I therefore cannot give any weight to the Respondent's argument herein.

Hackworth found gravity to be low and injuries unlikely because a short or fault would have to occur with an employee near the motor circuit in order to cause injuries. If an injury occurred however, the electrical shock could result in fatal injuries. Hackworth found the operator chargeable with moderate negligence since it had received two warnings in a prior compliance assistance visit regarding the same condition. Within this framework of evidence I find that the violation is proven as charged, that gravity was low and that negligence was moderate.

Citation No. 6205053 alleges a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

> The backup alarm on the Caterpillar D8K Dozer, was not maintained in functional condition. The wire to the battery was pulled lose and the alarm would not work. This condition created a hazard to an employee being backed over by the dozer.

The cited standard, 30 C.F.R. § 56.14132(a) provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

Inspector Hackworth testified without contradiction that the backup alarm on the cited dozer would not sound when the dozer was placed in reverse. It appears that the wire connections to the battery had corroded, causing the malfunction. Respondent argues in its brief that it should not be charged with violations resulting from corrosion because that is something beyond its control. No evidence has been presented however to suggest that corrosion cannot be controlled through proper maintenance or that such a condition could not be discovered upon proper inspection. In any event it is the well-established law that violations under the Act may be found regardless of whether the operator is at fault. *See e.g., Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). Accordingly I find the violation proven as charged.

Hackworth found that the violation was of low gravity concluding that injuries were unlikely since the equipment operated in an area where there were no other employees. He did note, however, that injuries could be fatal if a pedestrian was run over. Hackworth also found the operator chargeable with low negligence in reliance upon Mr. Nelson's statement that the alarm was functioning the last time the dozer was driven. The violative condition was abated when Carter repaired the alarm by clipping off the corroded end of the wire conductor and reconnecting it. According to Carter, this procedure took only two minutes. The inspector's findings of gravity and negligence are accepted for purposes of assessing a civil penalty herein.

Civil Penalties

Under Section 110(i) of the Act, Commission judges must consider the following criteria in assessing a civil penalty; the operator's history of previous violations, the appropriateness of such penalties to the size of the business of the operator charged, whether the operator was negligent, the affect 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.

The gravity and negligence relating to each violation have previously been discussed. Respondent has a significant history of violations as evidenced by Petitioner's Exhibit No. 8. It has been stipulated that the operator herein is a metal/non-metal mine operator with 1,960 hours worked in the last two quarters of the year 2000. The operator is therefore small in size. There is no dispute that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. The operator has the burden of proving that a particular civil

penalty would affect its ability to remain in business. *Broken Hill Mining Co.*, 19 FMSHRC 673 (April 1997). In the absence of specific proof that the penalties would affect the operator's ability to continue in business it is presumed that there would be no such adverse affect. See *Sellersburg Stone Company*, 5 FMSHRC 287 (March 1983) *aff'd* 736 F.2d 1147 (7th Cir. 1984).

ORDER

Citations No. 6205048 and 6205050 are hereby modified to delete the "significant and substantial" findings. All remaining citations are affirmed and Nelson Brothers Quarries is directed to pay the following civil penalties within 40 days of the date of this decision: Citation No. 6205045 - $55, Citation No. 6205046 - $55, Citation No. 6205047 - $55, Citation No. 6205048 - $75, Citation No. 6205050 - $65, Citation No. 6205051 - $55, Citation No. 6205053 - $55.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Daniel J. Haupt. Conference & Litigation Representative, U.S. Dept. of Labor, Mine Safety and Health Administration (MSHA), 1100 Commerce Street, Room 4C50, Dallas, TX 75242-0499

Paul M. Nelson, President, Nelson Brothers Quarries, P.O. Box 334, Jasper, MO 64755