FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 18, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. WALKER STONE COMPANY, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. CENT 94-126-M A. C. No. 14-00164-05522 Kansas Falls Quarry & Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CLIFF MOENNING, Employed by WALKER STONE COMPANY, INC., Respondent	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-213-M A. C. No. 14-00164-05526 A Kansas Falls Quarry & Mill

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, Junction City, Kansas, for Respondents.

Before: Judge Maurer

STATEMENT OF THE CASE

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (Secretary) against the Walker Stone Company, Inc., (Walker Stone) and Mr. Cliff Moenning pursuant to section 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. The petitions allege that Walker Stone violated the mandatory standard found at 30 C.F.R. ' 56.12016 and that

Mr. Moenning, as an agent of the corporate operator, knowingly authorized, ordered or carried out that violation. The Secretary

seeks civil penalties of $1500 against Walker Stone and $700 from Mr. Moenning.

Pursuant to notice, these cases were heard at Fort Riley, Kansas, on November 8 and 29-30, 1995.[1]

On November 16, 1993, MSHA Inspector Eldon E. Ramage issued section 104(d)(1) Citation No. 4332602 to Walker Stone alleging that:

> Three (3) employees were observed preforming (sic) repair work on the electrical powered log washer. The electrical power was not deenergized and locked out to prevent an accidental starting of the log washer with out (sic) the knowledge of the persons preforming (sic) the repairs. One person was working on and in the gear drive system. There was (sic) two employees working on the ground.

The standard cited, 30 C.F.R. ' 56.12016, provides:

> 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. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

[1]/ There was also a deposition taken by telephone on December 5, 1995, of Albert Boisclair which the parties have stipulated was for trial purposes, and which has been incorporated into the transcript of this hearing.

STIPULATIONS

At the commencement of the hearing, the parties proffered a signed set of 17 stipulations, dated November 8, 1995, which I accepted into the record (Tr. 10) as follows:

1. Walker Stone, Inc. is engaged in mining and selling construction aggregates and road building materials.

2. Walker Stone, Inc. is the owner and operator of Kansas Falls Quarry and Mill, MSHA I.D. No. 14-00164.

3. Walker Stone, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 801 et seq. (Athe Act@).

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of respondent corporation on the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondents and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

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

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

9. Walker Stone, Inc. had 54,977 hours of work in 1992.

10. The certified copy of the MSHA Assessed Violations History (dated April 8, 1993) accurately reflects the history of this mine for the two years prior to the date of the citation. Respondents object to the portion of the certified copy of the MSHA Assessed Violations History which depicts a history in excess of the two years prior to the issuance of the citation.

11. The inspection giving rise to the subject proceedings occurred on November 16, 1993, at Walker Stone=s Kansas Falls Quarry and Mill.

12. Cliff Moenning is employed by Walker Stone Company, Inc., as the Plant Supervisor and Crusher Foreman.

13. The log washer was not in operation at the time the citation was issued.

14. The log washer was not reassembled until after the citation was issued.

15. At the time the subject citation was issued, the log washer was disassembled as follows: The gear drive shaft had been removed from the gear box; and the log washer V-belts had been removed between the motor and the gear box.

16. The paddles and the drive gear would not turn without the V-belts in place and the motor energized.

17. The V-belts were not reinstalled until after the citation was issued.

FINDINGS, CONCLUSIONS, AND DISCUSSION

The so-called log washer is not used to wash logs. Rather, it is an electrically-powered piece of machinery used to clean the rock aggregate. Very basically, aggregate comes in one end and a system of gears and paddles moves it to the other end through a water trough.

For a couple of days prior to the MSHA inspection, the log washer had been down with a broken counter shaft, which is described as a shaft between two gear boxes. To remedy this

situation, Roger Beecham, the maintenance supervisor, testified that 2 days or so before the citation at bar was issued, he deenergized and locked out the circuit breaker for the log washer

while he removed the broken shaft. He also removed the V-belts from the motor, thereby mechanically disconnecting the electrical motor from the drive gear. When he departed the job site, he removed his lock from the circuit breaker box because he might need it if he had an electrical problem somewhere else. The broken shaft was then taken to a machine shop for repair. Mr. Beecham, for personal reasons, was not available for work when the shaft was returned and therefore, Mr. Sayers was called at home on the evening of November 15, 1993, by Mr. Moenning and told to replace the shaft and get the log washer reassembled the following day, the date the citation was issued.

Mr. Sayers, a mechanic, assisted by Mr. Frederick, began the job of reassembling the log washer early on the morning of the 16th. They did not lock out the equipment before starting to work on it because they both assumed it was locked out already. It was not, as discovered by the inspector at 9:15 a.m., after they had already been working on it for about an hour. Presumably, if the inspector had not intervened at that time, they would have continued to reassemble the machinery on through to completion, without locking it out.

Walker Stone disputes the violation of the standard on the basis that the log washer was not completely reassembled until after the citation was issued. More particularly, they point out that basically, nothing would move until such time as the V-belts were back in place and the motor energized with the on-off switch. However, because the regulatory scheme employed by MSHA assumes continued normal mining operations, I conclude that their defense more properly goes to the issue of gravity (i.e., AS&S@) than to the basic underlying violation of the cited mandatory standard.

The respondents themselves admit that the power source for the log washer was controlled by a circuit breaker and that this circuit breaker was in the Aon@ position at the time of the subject inspection and citation (Respondent=s Proposed Finding of Fact No. 10).

It is also undisputed by all that the log washer was in fact not locked out at the time the inspector cited it, and at least two individuals (Sayers and Frederick) were in fact working on it.

Accordingly, I find that a violation of 30 C.F.R. ' 56.12016 occurred as charged. It is simply indisputable that the log washer should have been positively deenergized at the circuit breaker and locked out by Sayers or Frederick before they started

working on it, just as Beecham did 2 days earlier when he worked on the machinery. Their failure to do so amounted to a violation of the cited standard.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. ' 814(d)(l). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Applying the Mathies test, I conclude that there is not a reasonable likelihood that the hazard contributed to by the violation here would have resulted in a serious injury. This is so because as is generally acknowledged, there is no danger if the mechanism cannot move, and in this case the log washer ultimately was controlled by an on-off switch, found in the Aoff@ position, which was located on the second floor of the control house, a mere 30 feet from the log washer and no one was in the control house during the reassembly of the log washer, until the arrival of the inspection party.

Even presuming, as is reasonable to do in this case, that the circuit breaker would not have been turned to the Aoff@ position or locked out at any time during the reassembly process without the inspector=s intervention, the fact remains as the respondents= repeatedly emphasized, that neither the paddles nor any of the drive gears could turn until the V-belts had been reinstalled and the off-on switch moved to the Aon@ position. In point of fact, the V-belts were the very last item replaced on the log washer during reassembly and the off-on switch was never activated and remained in the Aoff@ position until such time as the reassembly was complete and the equipment was ready to be test run.

Accordingly, I find that it has not been established that an injury producing event was reasonably likely to have occurred and

therefore, it is concluded that the violation found herein, was not significant and substantial (AS&S@).

Inasmuch as Citation No. 4332602 does not recite an AS&S@ violation, it must be modified to a citation issued under section 104(a) of the Act.

I also disagree with the negligence factor contained in the citation. The Commission has long held that the conduct of a rank-and-file miner is not imputable to the mine operator in determining negligence for penalty purposes. Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982). In this case, the direct negligence contributing to the violation is attributable to Messrs. Sayers and Frederick, particularly Mr. Sayers, who was nominally in charge of the reassembly project. Sayers and Frederick both neglected to check the status of the circuit breaker and lock it out in the Aoff@ position as they acknowledged they were both trained to do. They both testified that they Aassumed@ someone else had performed that function and they admitted they simply did not check it. It is noteworthy that both are rank-and-file miners, with no management responsibilities.

I attribute Amoderate@ negligence to the quarry foreman personally and Walker Stone generally for the inattention to detail and lack of supervision over these maintenance personnel that permitted this violation to occur.

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

THE SECTION 110(c) CASE

The Commission has defined the term Aknowingly@ that appears in section 110(c) of the Act[2] in Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff:d, 689 F.2d 623 (6th Cir. 1982) as follows:

> AKnowingly@, as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

It is true that Moenning is the quarry foreman and, as such, is an agent of the corporation. It is also true that Moenning did not instruct Sayers to lock out the log washer:s circuit breaker after deenergizing the circuit. However, he credibly testified that he assumed Sayers would do so on his own. I find that to be not an unreasonable assumption, even though it turned out to be erroneous in this instance. Nor had Moenning either during his telephone conversation with Sayers the previous evening, or the two or three times that he passed by the vicinity of the log washer that morning, directed Sayers or Frederick to deenergize and lock out the equipment. Neither did he personally ever check that it was deenergized and locked out.

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[2]/ Section 110(c) of the Mine Act provides, in pertinent part, that: AWhenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties. . . .@

Still, Sayers, Frederick, and even Boisclair, who was also generally in the area and was the Aoperator@ of the log washer, had all been trained to deenergize and lock out the equipment prior to working on it. The fact that they did not do it cannot be laid off onto Moenning. Moenning had no actual knowledge that the log washer was not locked out, nor did he have any particular reason to know or even suspect that to be the case. Furthermore, he credibly testified that he had neither approved of, authorized, or directed the failure of Sayers, et al, to comply with the standard. Rather, he testified that there were indeed lock out procedures in effect at the quarry and management, including himself, expected the miners to utilize them.

In sum, there is no evidence that Moenning=s conduct was reckless, intentional or involved aggravated conduct beyond ordinary negligence. Accordingly, I conclude that Mr. Moenning did not knowingly carry out the violation found herein and is therefore not personally liable pursuant to section 110(c) of the Mine Act.

ORDER

l. Citation No. 4332602 **IS MODIFIED** to delete the AS&S@ finding and, as modified to a section 104(a) citation, **IS AFFIRMED**.

2. The Walker Stone Company, Inc. **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of $300 within 30 days of the date of this decision.

3. The civil penalty petition against Clifford Moenning **IS DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

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

Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, 819 North Washington Street, P. O. Box 187, Junction City, Kansas 66441 (Certified Mail)

dcp