FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-228-M
Petitioner	:	A. C. No. 14-01560-05511
v.	:	
	:	
WALKER STONE COMPANY INC.,	:	
Respondent	:	Portable Plant #4

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troop, LLP, Junction City, Kansas, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor against the Walker Stone Company (Walker) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging one violation of the mandatory standard at 30 C.F.R. § 56.14130(g) and seeking a civil penalty of $104.00 for that violation. The general issue before me is whether Walker committed the violation as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at bar, No. 7926770, alleges a "significant and substantial" violation of the noted standard and charges as follows:

> The operator of the D-8K Cat dozer, Company No. 8PI was operating the dozer a [*sic*] the reclaim area and not wearing his seatbelt. The dozer had a RPOS [*sic*] with no cab and was working on a [*sic*] incline at the time of inspection. The employee had been trained and knew that a seatbelt is required to be worn when the dozer is in operation. A seatbelt is needed and required to prevent injury in the event of an emergency.

The cited standard, 30 C.F.R. § 56.14130(g), provides as relevant hereto that "seatbelts shall be worn by the equipment operator."

Walker does not dispute the violation but challenges the Secretary's "significant and

substantial" and gravity findings. According to Inspector James Timmons of the Mine Safety and Health Administration (MSHA), he was performing an inspection at Portable Plant No. 4 on March 30, 1999, when he observed a bulldozer at the reclamation site working on a grade while its operator was not wearing a seatbelt. The bulldozer, a D-8K Caterpillar model, was according to Inspector Timmons, operating in an area including "inclines and rough terrain." The bulldozer had rollover protection bars but no cab. Timmons concluded that the violation was "significant and substantial" because it would be reasonably likely for there to be a fatality in the event of an emergency such as a rollover. Timmons also opined that if the bulldozer should suddenly stop or if the operator should fall out of the cab onto the crawlers he could also suffer injury. The bulldozer could suddenly stop if the blade should drop to the ground or if the brakes were inadvertently activated.

The bulldozer operator admitted that he was required to wear a seatbelt and that he had been trained to wear it. He nevertheless felt that he could escape injury by jumping if the bulldozer turned over and that he could do so more easily without a seatbelt.

Foreman Scott Litke testified that the bulldozer operator had in fact been trained to wear his seatbelt and the training records in evidence support his testimony (See Resp.'s Exh. No. 4, Page 2, Item 13). Litke opined that, at worst, there was only a four-to-one incline in the area in which the bulldozer was then operating and there were no conditions that could cause a rollover. Litke also noted however that the bulldozer operator had failed a drug test earlier in March, before the instant violation, and subsequently resigned after again failing a drug test. Litke had previously observed this employee operating a bulldozer without his seatbelt and warned him to put it on. This event occurred the same week that he had been trained. The employee was not disciplined.

David Walker, Chief Executive Officer of Walker Stone Company, also testified that all employees are trained to wear seatbelts. Walker also opined that the conditions present at the time of the violation were neither hazardous nor "significant and substantial." He noted that the area in which the bulldozer was operating was "too flat" and observed that they had never had a bulldozer turn over in the history of their operations. Walker did acknowledged however, that it could be hazardous if the bulldozer was working on a highwall. He noted that there was in fact another location on the mine property at which this bulldozer could have been working on a five to six-foot highwall. He observed however that the ground was very stable at the highwall.

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).

Under the facts of this case, particularly wherein this bulldozer could be expected to be working above a five or six-foot highwall, the violation was clearly "significant and substantial" and of high gravity. Although there is evidence that this employee had previously been warned about failing to use his seatbelt, the Secretary attributes only low negligence to the operator. In light of its previous efforts to train and warn this employee about the need to wear his seat belt I would agree with the Secretary's assessment. The operator is small to medium in size and has no prior history of the violation charged herein. The history is otherwise unremarkable with a modest number primarily of "$50.00" violations. There is no dispute that the violation herein was timely abated by instructing the employee to wear his seatbelt. Under all the circumstances a civil penalty of $75.00 is appropriate.

ORDER

Citation No. 7926770 is affirmed with its "significant and substantial" findings and the Walker Stone Company is hereby directed to pay a civil penalty of $75.00 within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

David S. Walker, President, Walker Stone Company, Inc., Box 563, Chapman, KS 67431 (Certified Mail)

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