FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 19, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-159-M
Petitioner	:	A.C. No. 31-01940-05542
v.	:	
	:	Triangle Quarry
WAKE STONE CORPORATION,	:	
Respondent	:	Docket No. SE 2000-160-M
	:	A.C. No. 31-02071-05514
	:	
	:	Nash County Quarry

DECISION

Appearances: Melody S. Wesson, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Birmingham, Alabama, for Petitioner;
Roland Massey, Safety/Human Services Director, Wake Stone Corporation, Knightdale, North Carolina, for Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor against Wake Stone Corporation pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petitions each allege a single violation of the Secretary's mandatory health and safety standards and propose civil penalties totaling $177.00. A hearing was held in Raleigh, North Carolina on February 15, 2001. For the reasons set forth below, I affirm the citations and assess penalties totaling $100.00.

The Evidence — Findings of Fact

On January 24, 2000, Thomas P. Clarkson, an inspector employed by the Department of Labor's Mine Safety and Health Administration (MSHA), inspected Respondent's Nash County Quarry. As he inspected a Caterpillar 796C haul truck, company number 8019, he observed that there were no guards for the alternator pulley and v-belt in the engine compartment and issued Citation No. 7792135, charging a violation of 30 C.F.R. § 56.14107(a), which provides:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels,

couplings, shafts, fan blades, and similar moving parts that can cause injury.

He concluded that the violation was "unlikely" to result in injury but that if an injury did occur, it would be permanently disabling. He assessed the degree of operator negligence as "moderate" and did not find the violation "significant and substantial."

The location of the alternator pulley and v-belt in the Caterpillar truck's engine compartment are clearly depicted in a series of pictures introduced into evidence as Respondent's Ex. 4. The truck is a very large vehicle and a man can easily stand between the left front tire and the engine compartment. The v-belt drives and the alternator pulley are located 12-14 inches inside one of the truck's frame members at approximately shoulder height and are directly accessible to anyone who might stand in that position.

On March 15, 2000, Darrell Brennan, another MSHA inspector, conducted an inspection of Respondent's Triangle Quarry. As he inspected a Euclid R-22, water haulage truck, company number 8008, he observed that the v-belt drives in the engine compartment were not guarded and issued Citation No. 7792816, also charging a violation of 30 C.F.R. § 56.14107(a). He determined that the violation was "reasonably likely" to result in an injury that would result in lost work days or restricted duty. He concluded that the violation was "significant and substantial" and assessed the degree of operator negligence as "moderate."

The Euclid R-22 truck is depicted in a series of pictures introduced into evidence as Respondent's Ex. 5. It is smaller than the Caterpillar truck and access to the left side of the engine compartment, where the v-belt and pulley are located, is restricted by a fender/headlight assembly and a hose reel that is mounted on the forwardmost part of the trucks' frame. In order to reach the v-belt and pulley, a person would have to stand in front of the fender and reach through the approximately 14 inch wide gap between the fender and the hose reel. The v-belt and pulley are located approximately 31 inches from the outermost edge of the hose reel. By standing sideways, however, a normal sized man could slip between the hose reel and the fender and get considerably closer to the v-belt/pulley.

Both inspectors based their assessment of the violation and gravity factors on the possibility that the truck's operator might come into contact with the v-belt/pulley while performing a pre-shift inspection of the truck or investigating a problem with the truck, such as a fluid leak or belt noise. They opined that the operators would likely attempt to diagnose any such problem before reporting it to a mechanic, in order to more fully inform the mechanic of the problem. They testified that they have written other citations for similar violations on mobile equipment, although not at Respondent's facility. The Secretary also introduced a listing of reported injuries involving v-belt drives and pulleys on mobile equipment in order to demonstrate that such injuries do, in fact, occur.

Wake Stone had purchased the Euclid R-22 truck in 1976 as a used vehicle and it did not have guards installed around the engine compartment v-belt drives. The hose reel was installed in 1986. The Caterpillar 796C truck had been purchased new in 1986. It did not have engine

compartment v-belt drive guards installed, nor were such items listed as optional equipment in the list of specifications for the truck. In order to abate the violation on the 796C truck, Respondent consulted the manufacturer's more recent publications and was able to identify a v-belt drive guard for a front end loader that would fit the truck. It was purchased and installed. The company had been inspected by MSHA at least twice a year and the absence of v-belt drive guards in the engine compartments of these trucks had never been cited as a violation in the past, nor had any of Respondent's employees been injured due to the absence of guards.

Conclusions of Law and Fact

Respondent contends, in essence, that its truck operators virtually never put themselves into a position where they could contact the v-belt/pulley assemblies in the trucks' engine. compartments and that there is no reasonable possibility of injury due to the absence of guards. The Secretary contends that truck operators or mechanics may, in fact, come into contact with the v-belt/pulley assemblies in examining or working on the engine.

In construing an analogous standard[1] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case]basis.

At issue in *Thompson* were citations issued for failure to guard cooling fan blades and air compressor belts and pulleys in the engine compartments of two Euclid R-50 dump trucks. The Commission affirmed the decision of an ALJ finding violations of the standard based on the possibility that a miner might come into contact with the exposed moving machine parts while

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[1] 30 C.F.R. § 77.400
(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

examining or working on the engines while they were idling. While the possibility of such contact was determined to be “minimal” it satisfied the “reasonably possible” test.

I similarly find that, while the possibility of contact and injury presented by the unguarded v-belt/pulley assemblies was minimal, contact and injury was reasonably possible within the meaning of *Thompson*. There is no question that the v-belt/pulley assemblies were accessible to a miner or mechanic standing near the engine compartments of the subject trucks. The inspectors described a plausible scenario of a driver exploring some problem with a truck’s engine and contacting the v-belt/pulley with a hand or clothing. A mechanic examining the engine while idling, even though trained to work in such conditions, could also inadvertently contact the unguarded v-belt/pulley resulting in injury.

Respondent also contends that the obligation imposed by the standard is to maintain guards furnished with the equipment, not to install new guards, except where an unusual hazard is presented. However, that contention is based only upon MSHA’s past enforcement practices at its facilities and a citation to dicta in an ALJ opinion that appears to be at odds with an earlier opinion by the same ALJ.[2] It also ignores other ALJ decisions finding violations of this or a related standard based upon the failure to install guards on moving machine parts in the engine compartments of vehicles that were manufactured without such guards. *See*, *Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1102-03 (Oct. 1999) (ALJ); *Riverton Corp.*, 16 FMSHRC 2082 (Oct. 1994) (ALJ); *Power Operating Co.*, 16 FMSHRC 591, 595 (May 1994) (ALJ). Respondent’s contention is unfounded. *Thompson* and the cited ALJ opinions make clear that guards are required where contact and injury is reasonably possible.

Citation No. 7792816 - Significant and Substantial

In issuing Citation No. 7792816, Inspector Brennan determined that the violation was significant and substantial. A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon 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 Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained:

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[2] Compare *Newmont Gold Co.*, 19 FMSHRC 1640, 1642-43 (Oct. 1997) (ALJ) (stating in dicta that promulgators of standard intended that, except in a rare and exceptional case, there would be no requirement to supplement the existing guards that the manufacturer of a truck had installed in and around the truck’s engine area) with *Walsenburg Sand & Gravel Co.*, 11 FMSHRC 2233, 2237-38 (Nov. 1989) (ALJ) (finding of violation for inadequate guarding of engine fan blade on road grader).

> 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. (footnote omitted)

See also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The critical issue here is whether there was a reasonable likelihood that the hazard contributed to will result in an injury. As noted above, Respondent has voiced concern about the consistency of MSHA's enforcement actions, noting that the conditions cited have existed for many years and have never before been cited. Respondent's concerns about consistency are further highlighted by differences in the two citations at issue here. Inspector Clarkson determined that it was "unlikely" that an injury would result from the violation he cited with respect to the Caterpillar 796C truck and concluded that the violation was not significant and substantial. Inspector Brennan, on the other hand, found that the violation on the Euclid R-22 truck was "reasonably likely" to result in an injury and was significant and substantial. The Secretary's representative explained that the difference in the gravity assessments was based upon the degree of accessibility. However, it is apparent from the pictures and related testimony that the v-belt/pulley assembly on the R-22 truck was considerably less accessible than that on the 796C truck cited by Inspector Clarkson.

I agree with Respondent and Inspector Clarkson that it is unlikely that an injury would result from the cited violations and find that the violation charged in Citation No. 7792816 was not significant and substantial.

Negligence

I find that the negligence of the operator with respect to these violations was low. It is undisputed that guards were not installed on the v-belt/pulley assemblies by the manufacturers of the trucks in question and that Respondent purchased the trucks in the cited condition. It is also undisputed that the violations were not cited in numerous prior MSHA inspections and that no injuries have resulted to Respondent's employees from the cited conditions. As noted above, I have found that the possibility of injury presented by the violations was minimal, or unlikely. Moreover, that portion of MSHA's Program Policy Manual addressing the standard here at issue, makes no reference to mobile equipment. Only recently has MSHA apparently issued any

specific guidance on applicability of the standard to mobile equipment.[3] While there have been prior decisions by Commission ALJ's finding violations under circumstances similar to those presented here, I find that the degree of operator negligence with respect to these citations was low.

The Appropriate Penalties

The assessment sheets reflect that Respondent's quarries are medium sized and part of a small controlling entity. The assessment sheets also show that in the 24 months preceding the subject inspection that the Triangle Quarry had been inspected on 23 days and that only 11 citations had been written and that the Nash County Quarry had been issued only 4 violations in 15 inspection days, both very good records. The violations were promptly abated. Findings on the gravity and negligence associated with each sustained citation are also noted above.

Upon consideration of the factors itemized in § 100(i) of the Act, I impose the following penalties, which are appropriate to the size of Respondent's business. As to Citation No. 7792135, I assess a penalty of $50.00, slightly lower than the penalty proposed by the Secretary because of the finding that the operator's negligence was low. As to Citation No. 7792816, I also assess a penalty of $50.00, a reduction from the proposed penalty of $122.00, because of the finding that the violation was not significant and substantial and that the degree of negligence was low.

ORDER

Based upon the foregoing, Citations numbered 7792135 and 7792816 are affirmed, as modified, and Respondent is ordered to pay a civil penalty of $100.00 within 30 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

Melody S. Wesson, Conference & Litigation Representative, U.S. Department of Labor, MSHA,

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[3] The Secretary attempted to introduce into evidence an excerpt from a revision to an MSHA guarding guide, or book, to show that machine parts on mobile equipment need to be guarded to prevent contact during inspection and maintenance activities. Respondent's objection to the exhibit was sustained because the revision was not adopted and printed until late in the year 2000, after these citations had been issued.

135 Gemini Circle, Suite 212, Birmingham, AL 35209 (Certified Mail)

Roland Massey, Safety Director, Theodore D. Bratton, President, Wake Stone Corporation, P.O. Box 190, Knightdale, NC 27545 (Certified Mail)

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