

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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April 11, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 93-188-M  
Petitioner : A.C. No. 33-00394-05521  
v. :  
: Muskogee Dredge  
Mine  
ARKHOLA SAND & GRAVEL, INC. :  
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 94-174-M  
Petitioner : A.C. No. 34-00394-05525 A  
v. :  
: Muskogee Dredge Mine  
VERNON MCMAHON, Employed by :  
ARKHOLA SAND & GRAVEL, INC., :  
a Division of APAC-ARK, INC., :  
Respondent :

DECISION

Appearances: Jennifer L. Walls, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;  
Hugo Swan, Jr., Esq., McGlinchey Stafford Lang, Fort Smith, Arkansas, for the Respondents.

Before: Judge Feldman

This consolidated civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., (the Act). This matter concerns a conveyor belt accident that occurred on January 28, 1993, after the belt was prematurely restarted before a miner who had been performing maintenance could clear the belt. The Secretary, pursuant to section 105(a) of the Act, 30 U.S.C. ' 815(a), has filed petition for civil penalty against the corporate respondent (Arkhol) seeking to impose a \$1,000 civil penalty for Arkhol's alleged unwarrantable failure to comply with the mandatory safety standard in section 56.12016, 30 C.F.R. ' 56.12016. This mandatory safety standard 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 preventative devices shall be removed only by the persons who installed them or by authorized personnel.

The Secretary also sought to impose personal liability on Arkhola supervisor Vernon McMahon alleging that he "knowingly authorized, ordered or carried out" the violation of section 56.12016 as contemplated by section 110(c) of the Act, 30 U.S.C. § 820(c). Docket No. Cert 93-188-M had been stayed since November 22, 1993, pending completion of the Secretary's 110(c) investigation involving McMahon.

This matter was heard on February 7, 1995, in Tulsa, Oklahoma at which time Arkhola stipulated that it is a mine operator subject to the jurisdiction of the Act. On March 30, 1995, the Secretary filed a Motion to Withdraw Citation No. 3556635 issued to McMahon. The motion was based on the Secretary's conclusion that the testimony does not adequately reflect that McMahon knew or had reason to know that his subordinate, Tony O'Barron, would continue to violate Arkhola's lock out procedures shortly after McMahon had admonished O'Barron for disregarding those procedures. The Secretary's Motion seeking dismissal of the charge against McMahon shall be granted. The parties' post-hearing briefs addressing Citation No. 3556635 issued to Arkhola are of record.

#### Preliminary Findings of Fact

Arkhola operates a sand plant in Muskogee, Oklahoma wherein glass sand, construction sand and blasting sand are extracted from the Arkansas River. The operations include dredging sand from the riverbed and pumping the river sand into pits. Front-end loaders then transport the sand from the pits to a hopper for distribution onto a conveyor. The sand is conveyed into the first dryer (South Dryer) where water is removed. The sand proceeds to other conveyors for further cleaning drying and sorting.

The dryer conveyor operator activates the conveyor with controls in a concrete-block operations shack located in close proximity to the conveyor. The shack has windows on all four sides, one of which looks directly out on the dryer conveyor at the site of the conveyor belt accident. The conveyor controls are directly below the window. The main electrical control panel for the dryer conveyor, which was cited for not being locked out, is located in a building 30 feet from the operations shack. The dryer conveyor belt cannot be seen from this electrical control panel.

Arkhola's Muskogee facility is operated with three shifts. The subject conveyor belt accident occurred on January 28, 1993, during the second shift that begins at 2:00 p.m. and ends at 10 p.m. There are 8 to 12 employees working on this shift at plant locations covering

a large geographical area. On the afternoon of the accident, second shift employees Everett Staton and Tommy Duncan were assigned by Shift Foreman Vernon McMahon to a maintenance project in the area of the South Dryer. Staton and Duncan were instructed to contact first shift South Dryer operator Roy Kendrick for instructions regarding changing the "skirts" on the South Dryer's conveyor at the point where sand from the hopper falls onto the dryer's conveyor. The skirts guide the sand from the hopper to the conveyor to minimize spillage. Staton and Duncan were to remove and replace the old rubber skirting with new skirting. They were instructed to secure the assistance of Tony O'Barron, the second shift South Dryer operator.

After the skirting had been replaced, O'Barron contacted first shift Mechanic Welder Joe McCracken, who had been working on the elevator (a process further up the conveyor line) to ask McCracken if McCracken's repair work was completed to the point where McCracken could unlock the elevator so that sand could be processed through the system to check the skirting. McCracken replied affirmatively and went to unlock the elevator.

McMahon was not present in the area while the skirting was being replaced. However, McMahon arrived after the skirting was changed. McMahon was present when McCracken returned from unlocking the elevator and McMahon heard McCracken ask O'Barron if O'Barron had locked out the South Dryer conveyor belt for it was O'Barron's responsibility, as the dryer conveyor operator, to lock out the belt. O'Barron had a lock for locking out the conveyor at the electrical control panel and had received training in company lock out procedures.

When O'Barron replied that he had not locked out the belt, McCracken "blew up." McCracken told O'Barron, "If you work on the [expletive deleted] again, lock the S. O. B. out." (Tr. 154-155). Foreman McMahon was shocked by McCracken's strong language. However, he agreed with McCracken and added his own criticism. McMahon and McCracken testified that McMahon told O'Barron, "Yes, Tony, if you work on it again, lock it out before anybody works on it." (Tr. 36, 42, 45-46, 155, 157). McMahon believed that McCracken's strong admonishment and his own warning would be sufficient to impress upon O'Barron the importance of following lock out procedures. (Tr. 52-54, 106).

After the elevator was unlocked, sand was transported through the South Dryer conveyor system. The men determined the new skirts were not properly channeling the sand from the hopper onto the conveyor and the conveyor was again shut down. Although McMahon did not observe O'Barron lock out the conveyor, he assumed O'Barron would do so given the earlier incident. There is no evidence O'Barron did not lock out on this occasion. McMahon stayed to watch Staton and Duncan remove, cut and reinstall the skirting.

After reinstalling the skirting, the men could not restart the conveyor because an elevator fuse had blown. McCracken replaced the fuse and the conveyor was restarted. McMahon felt the repair was complete and returned to the office to attend to other duties. After McMahon left the area, the men concluded the second installation of the skirting was

unsatisfactory. Unknown to McMahon, the men decided to replace the skirting. O'Barron made the decision not to lock out because, as he admitted in his arbitration hearing, "[I] was just going to run a test that wasn't going to take long and I didn't think there was any need to lock out." (Tr. 186).

After Staton and Duncan once again replaced the skirting, O'Barron went into the operations shack to restart the conveyor. A few moments later, Staton remembered he had left a tool on the inside of the conveyor belt. As Staton stepped on the belt to retrieve the tool, O'Barron, without looking out the operations shack window to ensure that the conveyor was clear, activated the conveyor. Staton sustained serious injuries when he was flipped off the dryer conveyor to the ground.

Staton's accident was investigated by Bill Scarbrough, Arkhola's Director of Safety and Industrial Relations. As a result of this investigation, O'Barron was discharged for "willful negligence" under the plant's union contract. O'Barron's discharge was sustained in a union arbitration proceeding during which O'Barron admitted intentionally ignoring the company's lock out procedures and failing to look to see if the conveyor belt was clear before starting it.

Mine Safety and Health Inspector Norman LaValle investigated this incident. As a result of his investigation, on February 17, 1993, LaValle issued 104(a) Citation No. 3556635 citing a violation of section 56.12016 attributable to moderate negligence for Arkhola's failure to lock out the South Dryer conveyor at the time of Staton's injury at 6:10 p.m., on January 28, 1993. The citation was modified to a 104(d)(1) citation charging unwarrantable failure after it was learned in a March 5, 1993, health and safety conference that McMahon had cautioned O'Barron shortly before the accident for O'Barron's failure to lock out the conveyor.

### Further Findings and Conclusions

Section 104(a) of the Act requires that "[each citation shall be in writing and shall describe with particularity the nature of the violation. . . ." 104(d)(1) Citation No. 3556635 cited the following condition associated with the alleged violation of section 56.12016:

On 1-28-93 at 6:10 pm a lost time injury occurred to a maintenance employee while working on the south dryer raw feed conveyor installing conveyor skirt rubbers. After the job was completed the injured employee was crossing back over the conveyor when the conveyor was inadvertently started by the dryer plant operator. The maintenance man was flipped off the belt and when he landed on the ground he had suffered a fracture to his upper left leg. The distance from the conveyor belt to the ground level is

54 inches. The conveyor is provided with a stop cord device. The conveyor was not tagged and locked out by the employees while performing their jobs. (Emphasis added).

Thus, the January 28, 1993, accident, that purportedly occurred as a result of O'Barron's failure to lock out the conveyor, was the fundamental reason for issuing Citation No. 3556635 to McMahon and Arkhola. However, at trial, both inspector LaValle, and, MSHA Charlottesville, Virginia, Field Office Supervisor Dale Robert S. Laurent, conceded that O'Barron's failure to lock out the conveyor at the main electrical control panel located in a building 30 feet from the operations shack was not a contributing factor in this accident. (Tr. 113-115, 140-142). The site of the accident along the conveyor could not be seen from the main electrical control panel.

Rather, the operations shack, with its controls and windows overlooking the conveyor, is the proper site for determining if the area is clear before restarting the belt. The proximate cause of this accident was O'Barron's admitted failure to look through the operations shack window to make certain the belt was clear before consciously pushing the button to restart the conveyor. There is no evidence, as LaValle suggests in Citation No. 3556635, that O'Barron "inadvertently started" the dryer conveyor, or, that the accident was otherwise attributable to O'Barron's failure to lock out. A rather contributing factor was Sator's contributory negligence in climbing on the belt after it was apparent that maintenance was completed and the belt was cleared.

Having erroneously concluded the failure to lock out the conveyor caused the accident, inspector LaValle proceeded to cite the lock out mandatory standard in section 56.12016 which is not the applicable standard in this case. The basic purpose of section 56.12016, which is contained in Subpart K under the heading "electricity," is to protect miners from electrical hazards rather than mechanical hazards. This conclusion is based on Phelps Dodge Corporation v. FM SHRC, 681 F.2d 1189, 1192 (Ninth Cir. 1982), wherein the Court held the purpose of the provisions of section 56.12016 "is manifestly to prevent the accidental electrocution of mine workers."<sup>1</sup> In Phelps Dodge the Court noted the regulations immediately preceding the subject section set forth procedures to ensure that workers will not be exposed to energized wires. See sections 56.12001 through 56.12014. The Court also noted that the antecedent section to the subject section required that "power circuits be deenergized before work is done" on them. See section 56.12017. Finally, the Court concluded these regulations (Subpart K) "simply do not address the hazards arising from the accidental movement of electrical equipment while mechanical work is being done thereon." Id.

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<sup>1</sup> Phelps Dodge involved former section 55.12-16, 30 C.F.R. ' 55.12-16, which contained provisions that are identical to those found in section 56.12016.

Mandatory standards to prevent hazards associated with the movement of equipment are contained in Subpart M entitled "machinery and equipment." The correct mandatory standard given the circumstances of this case is found in Subpart M in section 56.14201(a), 30 C.F.R. ' 56.14201(a), entitled "conveyor start-up warnings." Section 56.14201(a) provides:

When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

Here, as noted above, O'Barron admitted in his arbitration proceeding testimony that "he did not look out the [operations shack] window to see where his fellow employees were before he pushed the button to turn on the conveyor belt." (Resp. Ex. 2, p. 5). While O'Barron's conduct would have provided a basis for Arkhola's liability under the strict liability application of the Act if section 56.14201(a) had been cited, O'Barron's negligence with respect to not ensuring the belt was clear, absent a showing of inadequate supervision, could not be imputed to Arkhola to establish an unwarrantable failure. Moreover, O'Barron's negligent act does provide a basis for establishing McMahon's personal liability under section 110(c) of the Act.

In summary, the gravity of violations is determined by whether there is a likelihood that the hazard contributed to by the violation will result in serious injury. Cement Division, National Gypsum Co., 3 FM SHRC 822, 825 (April 1981). In this case, it was the violation of section 56.14201(a), rather than cited section 56.12016, that contributed to the conveyor start-up hazard that resulted in Staton's injuries. Consequently, 104(d)(1) Citation No. 3556635, which cited an inapplicable mandatory standard, must be vacated.

#### ORDER

In view of the above, the Secretary's Motion to Withdraw Citation No. 3556635 as it applies to Vernon McMahon IS GRANTED and Docket No. CENT 94-174-M IS DISMISSED. IT IS FURTHER ORDERED that 104(d)(1) Citation No. 3556635 as it applies to Arkhola Sand & Gravel Company IS VACATED and Docket No. CENT 93-188-M IS DISMISSED.

Jerold Feldman  
Administrative Law Judge

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