

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

April 13, 2021

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
Petitioner

v.

VULCAN CONSTRUCTION
MATERIALS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2019-0237
A.C. No. 09-00445-496283

Mine: Blairsville Quarry

DECISION AND ORDER

Appearances: Roy Timothy Cornelius, non-attorney representative, for the Department of Labor and Winfield Murray, Esq., Department of Labor, observer to the hearing.

Christopher Sorrows, Safety & Health Manager at Vulcan for Georgia.

Before: Judge William B. Moran

In this proceeding upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), the Secretary alleges that the Respondent, Vulcan Construction Materials, LLC, violated 30 C.F.R. §56.14101(a)(3), a safety standard titled “Brakes.” The particular subsection cited provides that: “All braking systems installed on the equipment shall be maintained *in functional condition*.” (emphasis added). A virtual hearing was held on February 4, 2021.¹ The Secretary filed a post-hearing brief and a reply brief. The Respondent filed a post-hearing brief. All contentions were fully considered by the Court and are addressed in this Decision.

It is the Secretary’s contention that the Respondent violated the cited standard in that the braking system on the Respondent’s Ford L 8000 water truck was not being maintained in a functional condition on the basis that, when tested by the MSHA inspector, evidence will show that the airbrake valve had an audible air leak while the pedal was being engaged. Tr. 18-19. For the reasons which follow, the Court finds that the Secretary failed to meet his burden of proof in that the violation was not established by a preponderance of the evidence that the cited

¹ At the conclusion of the hearing, both representatives acknowledged having a full opportunity to present their respective sides in this litigation. Tr. 213.

truck was not maintained in functional condition. Accordingly, the violation unproven, this matter is **DISMISSED**.

Findings of Fact

Testimony began with MSHA Inspector Tommy Wright, who issued the subject citation. Wright has been an MSHA inspector for more than ten years and, prior to that he had approximately 25 years of employment in the mining industry. Tr. 24. The inspection took place at the Respondent's Blairsville quarry on June 26, 2021. The Respondent mines granite at that location. Tr. 36.

On that day, Wright issued Citation Number 9428093. The "Condition or Practice" section of the citation stated:

The braking system on the available for use Ford L8000 water truck, Co 34227, located on ready line is not being maintained in a functional condition. When tested, there is a brake air valve at center of the front tandem that has an audible present with the brake paddle [sic] engaged. Employees working in around this equipment were exposed to the possibility of injury, if the brakes were to fail. The truck passed a brake test making an accident unlikely.

Tr. 39; and text of Citation No. 9428093.

By using the term "audible," the inspector stated that meant there was an air leak. Tr. 39. The inspector conceded that the truck passed a brake test.² Tr. 40. However, he issued the citation because

the valve that was leaking was part of the braking system. The whole time ... the driver had his foot on the brake pedal with it engaged. There was a constant air leak, an audible air leak that I could hear and I could feel when I crawled up under the truck.

Id. It was the inspector's view that despite passing the brake test, based on his determination, he could not guarantee that the truck would pass the test again. *Id.*

The inspector did list the injury as unlikely to occur because "with the truck's engine running, the compressor was able to maintain the low power loss at the time of the inspection." Tr. 41. On the same basis, he concluded that it was not a "significant and substantial" violation. *Id.* Listing lost work days or restricted duty, the inspector's rationale was that "[i]n the event that brakes were to fail ..., the par[k] brake would set up, it could cause loss of control maybe the vehicle, injuries to the driver is in bruises; broken bones." Tr. 41. One person, the truck driver, would be affected, as there was no one else around at that time. *Id.* Negligence was marked as "low," given that the Respondent stated the truck was a backup and the driver had also done a pre-op on it. The driver stated that he didn't hear any air leaks. Tr. 42.

² The inspector described the test he conducted, stating, "[t]he truck was placed on an incline. The park brake was set, it would hold, you'd the release the par[k] brake and it came down the hill and he was able to stop the truck." Tr. 40.

The inspector believed that the truck was in violation of the standard he cited because “[t]he whole time the operator held his foot down on the brake, keeping it engaged. There was a constant audible air leak present at the valve. And when he release[d] them [sic] foot off the brake, the audible air leak stopped.” Tr. 42-43.

Turning to Government Ex. P 8, the inspector identified it as MSHA’s program policy manual. He referenced the applicable part of that manual for this matter stating:

standard 56\57.14101(a)(3) should be cited if a component or a portion of any braking system on the equipment is not maintained in a functional condition. Even though the braking system is in compliance with one or two above. It is important to note that *if the component or portion of either system renders the equipment incapable of stopping or holding itself with its typical load on the maximum grade it travels* the appropriate standard is 56\5714101(a)(1) or (2) should be cited.

Tr. 43 (emphasis added). The inspector affirmed that the valve he cited is a component of the cited truck’s braking system and is covered by the cited standard. Tr. 44.

Directed to Gov. Ex. P 2, the inspector identified it as the termination of the citation he issued. The citation was terminated the following day, on June 27, 2019. His termination noted that “[t]he cited air valve has now been replaced with a new one. When tested there is no longer an audible air leak present.” Tr. 45. He confirmed that the operator installed a new valve and that he could not hear any air leak thereafter. *Id.* The inspector was also asked about Gov. Ex. P 4, the notes he wrote that regarding this citation.³

The inspector reaffirmed that he had the driver check the brakes on a grade before he issued the citation in issue and that the brakes held on that grade. Tr. 51. He added that the driver shut the engine off and it was at that time that he inspected for air leaks on the brakes. *Id.* Continuing, he confirmed that he walked around the truck and checked canisters and the lines and valves and other things for leaks. He then informed mine personnel that he found an air leak on the truck, so advising the mechanic, Vulcan employee Jim Young, of this. *Id.* The inspector affirmed that he could hear air coming from the valve. *Id.* Elaborating, the inspector stated that he “crawled up under the truck” which had been secured so that it would not move, and he

³ As the notes read by the inspector were simply cumulative to his earlier testimony, they are included here only as a footnote. That reading reflected that

[a]vailable for use spare Ford L 8000 water truck, company number 34227, located under ready [line]. Brakes are not being maintained in a functional condition. When checked an audible air leak ... and when checked an air valve located at the center of the front (inaudible) has an audible air present when the foot brake is applied, this condition can expose the driver to a brake failure hazard. ... *The driver did a pre-op but did not hear the air leak.* Gravity is unlikely; passed a brake test with the engine running and the brakes applied it would hold air pressure making an accident unlikely. I marked it lost work days. Expected injuries would be bruises, broken bones, person affected is the driver. I marked it low negligence; not being used since brought back to the mining site.

Tr. 46-47 (emphasis added).

“could hear where the air was coming from. And [he] put [his] hand at the bottom of the valve and [he] could also feel it.” *Id.* The inspector affirmed that was a common way to detect a leak on a brake and that the leak was constant “[t]he whole time the driver had his foot on the brake with the pedal engaged; there was a constant air leak.” Tr. 52. He then added that “leaks only get worse. They don’t fix themselves.” *Id.* He further affirmed that, in his view, the valve he cited was a component of the brake system on the cited truck, stating, “Yes, sir. The only time there was an audible air leak there, it was a continuous air leak was when the operator, the truck driver had his foot on the brake and kept the brakes engaged.” *Id.*

Upon cross-examination, Mr. Chris Sorrows, a Safety & Health Manager for Vulcan, who is also not an attorney, asked about the inspector’s air brake training and knowledge and experience. In terms of the inspector’s training for air brakes, Wright stated it involved “[l]eaks, stroke, canisters, the type, the know what and how the stroke would be. Listen for air leaks, valves, how things should set up.” Tr. 55. Regarding the procedure he would employ from training to verify if there were any leaks on the system, the inspector responded, “[t]he driver would put his foot [on the] brake pedal and I’d walk around and check for the air leaks. . . . [the equipment] would be off [during the test].” Tr. 56.

Inspector Wright was asked if he did a threshold pressure test during the inspection. With the inspector not understanding the question, Mr. Sorrows then asked if he had the air calculation rate. Tr. 56. The Court then interceded, suggesting that the Respondent determine if the inspector was familiar with those terms. Mr. Sorrows then offered different words, employing slang terms for his question, describing it as a “stone or a pump test.” Tr. 57. The inspector responded that those tests were not done and in response to the Court, the inspector added that he did not know what a pressure threshold test was.⁴ *Id.*

When the inspector was then asked if he “verif[ied] an air calculation rate during [his] inspection,” the inspector answered that he is “not required to, no.”⁵ Tr. 58. The inspector was then asked how he verified that there was an air leak. He responded that “[t]he operator pushed the brake [] [a]nd the valve that I cited had an audible air leak present the whole time he had the brake pedal engaged. He held at constant pressure on it.” Tr. 59. Asked if he, Inspector Wright, was in the truck cab at the time of the inspection, the inspector answered, “[n]o, sir. I crawled up under the truck and heard the air leak and put my hand under the valve and felt it.” *Id.* For the purpose of a clearer understanding the Court asked if the truck was running, that is, whether the motor was running, or was the vehicle off when the inspector crawled under it. The inspector confirmed that the truck was off at that time. Tr. 60. When the inspector heard the audible leak, he did not take the vehicle out of service, but the operator did. *Id.* He added, in an apparent justification of his not removing the truck from service, that “[a]t the time of the inspection, the

⁴ Belatedly, an objection was made to the question on the basis that the MSHA inspector is “not a DOT [Department of Transportation] inspector.” Tr. 58. This was overruled, with the Court expressing “it’s appropriate for [the Respondent] to ask about the extent of [the inspector’s] knowledge regarding the citation, and in particular, the brake issue that’s in front of [the Court], so that objection is overruled.” *Id.*

⁵ The Court then advised the inspector that he was simply to answer the question posed, without adding a comment, such as whether he was required to perform such a test. The Court explained to him that his representative could follow-up on that issue, if he wished, during redirect. Tr. 58.

air compressor with the engine running was able to keep up with the air leak. It was like a hiss; a rapid loss of air.” Tr. 61.

Asked to identify the air valve he looked at, the inspector responded, “[i]t was at the center of the truck at the front tandem.” *Id.* There were two axles on this truck. *Id.* Asked if he agreed that the component he examined was “a service relay,” he answered it was not. Tr. 62. Asked if he was familiar with the components, in the way they operate, the inspector did not answer the question posed, instead only responding, “[t]o put it briefly (inaudible) put on the brake. You have (inaudible) any relief, as in would you let on put your foot on the brake and lay it off. But while you have continuous brake pressure the valve is not supposed to leak air.” *Id.* Then asked if he agreed that any fluctuation in the brake pedal would exhaust air, the inspector answered that would be true “if [the driver] let it off, not while he was holding the pressure.” *Id.*

Next, the inspector was asked if he used “any supporting agencies during [his] air brake inspections for guides,” to which he answered, “no.” Tr. 64. When then asked if “[d]uring mine training school was there any references back to a North American Standard CVSA, or any commercial motor vehicle inspections,” the inspector, instead of answering the question, responded that inspectors “are not required to have, that was just a reference.” Tr. 64-65. In a follow-up to that question, the inspector was then asked if there was “reference material for inspections.” The inspector responded that he “cannot enforce those.” Tr. 65. The Court then admonished the inspector that he was being “mildly combative” and that his role during cross-examination was to answer the question. In this instance, the Court advised the witness that the question he was being asked was if “there was [such] reference material that [he] came into contact with during [his] training” and his response was then “yes.” *Id.*

Wright was then asked upon terminating his citation how he verified that termination was appropriate.

They had the old air valve laying there and they put air valve on, and he fully engaged the brake pedal without the engine running, pressed the service brake pedal and held it down and there was no longer an audible air leak present at that valve, where the old valve was. The new one did not leak air.

Tr. 66. Asked if he crawled “back up under the truck and st[u]ck [his] hand to the bottom of the valve like [he] did the initial time,” Wright answered, “I did not stick my hand there. No.” *Id.* He then reaffirmed that he stuck his hand to the bottom of the valve at the time he first issued the alleged violation. Tr. 67.

Wright was then directed to Gov. Ex. P 10 and, asked to identify what is on that page, he responded, “a quick release valve.” *Id.* He was then asked, relating to the same diagram at that page, if he could explain the port and what's pictured on that page. The inspector answered that:

[i]t shows us supply port and upper body for the diaphragm, delivery port, a lower body port, a lock washer, sealing rings, exhaust port cap screw, another delivery port and mounting hose [and he then answered that the exhaust port on the valve is on] [t]he very bottom.

Id. In response to a follow-up question, the inspector answered that the location of his hand at the time he felt air exhausting was “[a]t the bottom.” *Id.*

The Secretary then called as his next witness, Fred Terry Marshall, to testify about the function of the subject air brake systems. Tr. 68. Mr. Marshall is employed by the Mine Safety and Health Administration, as a mechanical engineer within technical support. Tr. 70. He has 23 years of employment with MSHA's Technical Support, in Triadelphia, West Virginia. *Id.* He established that he has experience with airbrake systems on haulage trucks and the Court so finds.⁶ Tr. 71.

Mr. Marshall was first asked by the CLR to describe how brake systems work and for that purpose, the CLR made reference to Gov. Ex. P 9, *which the CLR described* as "some excerpts out of a Bendix quick reference catalog. Bendix is a manufacturer of air valves ..., as far as braking systems."⁷ Without laying any predicate, the CLR asked if the type of valve in Exhibit P 9 is "fairly common on the air brake systems on these haulage vehicles." Tr. 73. Witness Marshall responded "[t]he valve shown on page 30 is a -- the valve at the bottom of the page -- the second page of the Government's Exhibit is the valve *that was reported to me to have been replaced or installed on the water truck.* Or to terminate the citation that inspector Wright had issued. This is what they call a quick release valve. It's fairly simplistic as far as its purpose and functionality and composition." *Id.* (emphasis added).

The CLR then turned to Gov. Ex. P 10, asking Wright to identify it. The witness stated it was the service data sheet for the valve which appears at the bottom of the second page of Gov. Ex. P 9. That sheet explains how the valve works. Tr. 73-74. He then explained how the valve works, stating that the last page of Government Exhibit P 9 has maintenance kits for different air valves that Bendix offers and the picture to the left of it shows the two components that are in that maintenance kit. Tr. 74-75. Specifically, the witness was referring to Bendix QRN, valve maintenance kit, PC number 104463. Tr. 75.

Although the witness gave some detail about how the valve operates, in the Court's assessment, such information really has no value that the Court perceives in terms of resolving the issue before it. The witness then offered his view of the problem with the valve, stating, "[w]ell, in the balance mode, the diaphragm was not sealing up against the exhaust port adequately. Whether that was from a split in a diaphragm, a hole in the diaphragm or some kind of obstruction in there, I don't know." Tr. 78. He agreed that such a problem would cause the air to exhaust from that exhaust port in the bottom of that valve, when it is in the balance mode. In that mode, he added, the valve should not be exhausting air through the exhaust port. Tr. 79.

⁶ In that respect, speaking to his experience, he stated that it included, "[o]n haulage trucks, yes, both off highway and on highway type trucks that are used on line sites. Then, essentially involved in accident investigations. ... we assessed enforcement personnel in fatal and non-fatal accidents, if they request our systems. I've been doing those type[s] of accidents for almost my entire career." Tr. 71.

⁷ Perhaps because he is not an attorney, the CLR apparently did not understand that, as he was not a witness, he may not identify or describe the contents of an exhibit, at least for evidentiary purposes. In the Court's view, when the government employs non-attorney representative it diminishes the importance of proceedings involving the safety and health of our Nation's miners.

At that point, the Court interceded, first explaining that one of its responsibilities is to develop a complete record. The Court asked the witness if it was true that he had never personally seen the cited truck. The witness affirmed that was true – he has never seen the truck in issue. *Id.* He next agreed that he was not present at the time when the inspector issued the citation and therefore he also never heard any air hissing, again because he was never present at the mine. Tr. 80. He then confirmed that he was not present when the replacement valve was installed on the truck either. *Id.* The witness then agreed that his testimony related, generally, to how these valves operate. That, the Court would note, namely, how the valves operate, is not and was not an issue in dispute in this case. *Witness Marshall further agreed that he had no knowledge of the nature or the manufacturer of the valve that was originally on the truck at the time of the citation issuance. Id.*

The witness then added, in the nature of a defense to his earlier statements, that “these quick release valves, they are fairly much the same across the board. As far as the different manufacturers historically, what you see here is what you're going to get in another manufacturer of this quick release valve. Again, this is a fairly simplistic, very low level type valve as far as what it's intended to do, and how it gets it done. So, this design has not changed much, you may see different variations of how the valve body is put together, or how large the valve body is, but the operation is similar.” Tr. 80-81.

The Court accepts that, in effect, based on the witness' testimony, once you've seen one quick release valve, you have seen them all. The Court's point is that, accepting that to be the case, it does not establish that the valve in this instance was in fact defective and further the witness has no basis to assert that the valve was defective, as he was never present. As the Court summed up the issue, the witness agreed that he could not know about the valve in question because he was never there, and therefore he did not know the source of the sound and it is only through secondhand information that he could surmise that the hissing noise came from that valve. Tr. 81. Asked if that was a fair synopsis of his testimony, the witness agreed that it was. *Id.*

The Secretary's non-attorney representative did not help himself when he tried to have the witness further explain about audible air leaks. The witness responded, referring to Ex P 10,

Okay, so I'm looking at the operation and linkage tests up in the left hand corner of that page. If you go to number two; it talks about how the test is conducted to determine an air leak. And it's using a soap solution type test, in the soap solution type test you essentially have water and soap mix together, and you are spraying it on the valve body or specific areas in order to determine if you can visually see any bubbles being generated. The bubbles being generated are not necessarily audible leaks or you cannot hear those bubbles being generated. This is a visual test. And the first part of the test is a test for the sealing ring in which you apply soap around the valve body pieces where they're connected together a soap solution and you're looking for any bubbles being generated. It says in this data sheet that there should not be any leaks at all in that area. As far as the exhaust port, and we're using that soap solution to spray into the exhaust port area with the service brake applied; and essentially you have to have it connected otherwise you would have air leaks coming out of the delivery ports also but you're testing that in the balanced position.

Again, where you're not supposed to have any leakage generally from the diaphragm and exhaust port area. So, the test there is a one inch bubble in three seconds at the exhaust port. Anything over that, it's a visual test. Anything over that is unacceptable for this test. In my opinion, the soap bubble test, anything that's going to fail the soap bubble test would not be audible at a distance from the valve.”

Tr. 85.

Thus, the witness agreed that he did not need that sub-level test to determine the audible air leak if one is checking it “from the side of the truck, especially if you're standing around the truck, actually under it. Any audible leak is going to fail the soap bubble test.” Tr.85-86.

The witness was then asked about Gov. Ex. P 13, which the witness described as the piping diagram for a typical tractor with an air brake system. It was created by the valve manufacturer, Meritor WABCO, as a troubleshooting guide. Meritor, like Bendix, “produces a variety of air valves for use on the braking systems of over-the-road type trucks.”⁸ Tr. 86-87. Asked if the valve depicted in the exhibit at page 11 had a leak could stop leaking without any repair to it, the witness answered with a qualified “no,” stating:

Generally, no. I mean, there are some times if -- cold environments, you can get some freezing in the exhaust valve or you can get contamination in the valve through content and say you have a bad compressor and you get sludge that comes through. You can have items in there that could be worked out at that stage.

Tr. 89-90. However, the witness, referring to the same exhibit, did remark that the exhibit instructs that “leaks when service brakes are applied need to be repaired or replace.” Tr. 91.

The Court would comment that it does not take issue with the witness’ view, nor his citation to the valve manufacturer referred to in Gov. Ex. P 13, nor that, if one has a service brake leak, it needs to be repaired. However, again, the question is whether the government established by a preponderance of the evidence that the cited truck had such a leak. Tr. 91. Although the Court accepts that, speaking hypothetically about these valves in general, a valve failure can be sudden and complete or it can be a “just a slow progressive failure,” that is not the critical issue in this case.

Assuming that it were to be established that the cited truck actually did have such a defective valve, the witness expressed “with the service brake applied, ... it's difficult to determine what exact impact that that air leak has on the capacity of the service brakes. It's

⁸ The witness went into some detail about the exhibit, but the value of this information is dubious to the issue before the Court, namely establishing that the cited water truck was not being maintained in a functional condition. Thus the witness’s testimony describing the piping diagram, as he expressed it, “just shows the location and some of their valves and how they're used in the system. There is a quick release valve in this and ... the exhibit [provides] an example of how it's used in the braking system or a typical use of it in the braking system.” The witness then went on describing how the valves are used in the braking system depicted in Gov. Ex. P 13. Tr. 87. While it may be viewed as all very interesting information, the Court finds that it is not of value to the issue in this case.

difficult to determine, but the key is, there is that you already know that you have an audible air leak. It's normal practice to go ahead and replace that valve when it's a low risk for failure.” Tr. 92.

Again, even assuming that the air valve was defective, the witness acknowledged that one could try to “fix it through just trying to cycle the brake.” *Id.* The Court notes that initially the inspector did not determine if such a procedure would fix the issue he believed to exist. On re-direct he did assert that he “afforded them the opportunity to pump the brakes at least three times to see if there was any contaminant inside the brake valve or inside that valve, that it would blow it out and seal.” Tr. 206.

Upon cross-examination, the witness stated that has never received any certifications regarding air brakes. Tr. 95, 96. He has had a class on commercial braking systems, though it was not a certification. *Id.* Asked if he was familiar with the techniques and procedures in doing air brake inspections, the witness answered “generally familiar.” *Id.* Asked to elaborate, he expressed, “I mean, on the job training, I've done inspections with MSHA enforcement before; part of what we did a while back, I can't remember exact time frame or date. But there was a time where the off highway or over-the-road type trucks, were an emphasis for coal mine safety and health. And I was involved in different programs over those years to conduct field inspections to assist enforcement conducting field inspections.” Tr. 96.

Oddly, the witness was never provided with a diagram or picture of the component that was cited. Tr. 96-97. Other aspects of the witness' testimony did not, in the Court's view, advance the critical question of the functionality of the cited truck's brakes.⁹

Beyond the comment in footnote 9, it did seem to the Court that the witness was unable to directly answer several of the Respondent's questions. For example, asked if “any fluctuation in the treadle valve would cause the service relay valve to exhaust air, the witness responded with a question of his own, inquiring if the question was “about a service relay valve attached to the foot pedal.” Tr. 100. The Respondent reminded the witness that the question was about the “service relay valve that that we're here for today.” *Id.* Respondent then inquired of the witness if any fluctuation in the treadle valve will exhaust air. The witness responded that “[i]f a foot pedal was attached to a service relay valve, the service relay valve would exhaust air based off of the foot valve telling it to. However, the quick release valve we are talking about today is not a service relay valve.” *Id.* The witness did acknowledge that, while *not any* fluctuation in the terminal valve would cause air to disperse, “distinct movement of releasing the foot pedal would cause release of air.” *Id.*

⁹ For example, when witness Wright was asked “where does the air go after the treadle valve is depressurized, where does the air go, he responded “[t]he air from the service brake chambers flows back through the quick release out to atmosphere. The air from the quick release back to the foot pedal flows out of the foot pedal exhaust.” Tr. 99. Asked if he agreed that the service relay valve exhaust would help regulate the pressure going into the diaphragm to keep it from bursting, the witness asked for the question to be repeated. Tr. 99. Reframed, the witness was asked the purpose of the service relay valve for the cited truck. The Court was surprised by the inability to answer the basic question, but the witness expressed that he did not understand because the question referred to two separate types of valves. Tr. 99-100.

Asked if he ever completed a pressure threshold test or net loss calculation in his experience, the witness Wright posed a question in return, asking “what did the respondent “mean by a pressure threshold test.” Tr. 101. The witness then did respond that he has completed an air loss rate test. *Id.* Responding to the question asking how such a test is completed, the witness answered, “if we're talking about service [brakes], there's two different modes. Just a general air loss test. One is with the brake applied, the service brakes applied, and one is with it released. So, as far as what you're checking for, you have the engine shut off, and you're applying, find the brake and checking two things. You're ... checking the amount of air seepage or leakage out of the vehicle. ... And then you would also check it with the service brake applied, essentially looking at a PSI drop per minute.” Tr. 101-102.

He was then asked if he agreed that air components on the cited truck are different from haul trucks and loaders, the witness stated that he didn't believe they were very different. The vehicle doesn't matter in terms of their function as a valve. Tr. 102. While the Respondent asked if Gov. Ex. 13 related to a different manufacturer than the one cited, the witness responded that the layout of the systems are “the same as far as the piping diagrams, [adding that] there are components, for example, the quick release valve that we are talking about today, has been used for 50 years in different pieces of mobile mining equipment.” Tr. 103. Marshall's point was that such quick release valves have “been used in mobile equipment for half a century.” *Id.* Elaborating, the witness stated “this quick release valve, it's been used in mobile equipment for half a century. It's used in other mining environments as far as mining equipment, stationary type of equipment. It's the simplest valve that you can have in an air brake system. And it's been around and it's used off-highway, it's used on-highway. I've seen them used in front-end loaders, rigid frame haul trucks, articulated haul trucks. The list goes on and on. So, It's been around. They're not exclusive. This particular valve is not exclusive to on-highway trucks.” *Id.*

The Court does not take issue with any of witness Marshall's general statements about how these valves operate, nor that they are commonly used, nor that they have been in use for a long time.¹⁰ However, the Court's overriding point about the wealth of Mr. Marshall's testimony is that it doesn't advance the Secretary's case in terms of proving that the braking system on the cited Ford L 8000 water truck was not being maintained in a functional condition.

¹⁰ Exploring the value of Gov. Ex. 13, the Court inquired of Mr. Marshall, if he knew “whether the cited truck here, the Ford L 8000 water truck ... whether that truck has the Meritor WABCO arrangement in that truck physically?” Tr. 105. The Court clarified that it was asking if the cited truck had that Meritor WABCO brand. The witness answered he did not know. Tr. 105. Thus, the witness then agreed that his testimony was “speaking generally about how valves operate commonly in equipment such as this. He admitted to not knowing the exact system in the cited truck, but he added, “[t]he setup as far as the quick release around the service brake chambers is universal; similar.” *Id.* The Court then inquired whether Marshall had a diagram of the cited truck and noting that the exhibit related to a Meritor WABCO and that he did not have a schematic for the cited truck. Marshall agreed he had no schematic diagram for the cited truck, while repeating that “the basic systems are somewhat standardized.” Tr. 106.

On redirect, witness Marshall was asked to explain the difference between the quick release valve and a service relay valve. Though the response appears in this footnote¹¹ the Court does not believe it advances the issue in need of resolution, namely did the Secretary establish that the brakes were not functional.

Attempting to focus the inquiry on that critical question of whether the brakes were established to be non-functional, the Court then inquired of Mr. Marshall, “[i]f one is standing in front of a truck, such as the water truck, in this cited instance, can air hissing from the area of the engine compartment only be attributable to a problem with a quick release valve or are there other sources that could be the potential source of hearing air hissing?” Tr. 110. The witness then asked for the question to be repeated. The Court, in response, rephrased its question, noting “that the inspector heard a sound of air hissing. And so my question is very simply, can the sound of air hissing from the engine compartment of a truck such as this be attributable to any other source other than a quick release valve? Can other things produce hissing besides a quick release valve or not?” Tr. 111. Marshall responded that “[o]ther things can produce hissing. However, a key thing here is to remember that an audible leak with the service brake applied is a red flag that needs to be addressed.” *Id.* The Court responded, taking note that without detracting from Mr. Marshall’s additional, nonresponsive, answer, that he was admitting that there are other sources of air hissing. Marshall then conceded, “[i]n general, yes, absolutely. ...

¹¹ This testimony too was all very interesting but of no moment to the issue for disposition. Thus the response of witness Marshall is repeated here but only for the sake of completeness in setting forth the record. He responded that

at least in the service brake side; the service relay valve is intended to apply the brakes quicker than what you would have if you had a direct connection versus the quick release is intended to release the brakes quicker. So, the service relay valve is used, again, similar to the quick release valve which is closer to where the brake ends are near the axles. The control valve sends a signal to the relay valve in order to apply the brakes, at least in the service brake system. So, the source of air which is supplying the service relay valve is closer to the relay valve. So, the air that's being pushed out to the service brakes downstream of the service brake relay valve is being supplied by a tank that's closer to the service relay valve. It doesn't have to go through the foot valve 10 in this case, all the way down to the service brake chambers. The tank air is being supplied to the relay valve. So, the tank air is being supplied from the relay valve to the chambers versus through the foot pedal. So, there is a distinct difference between what I consider to be a service relay valve and quick release valve.

Tr. 109. Asking for clarification, the CLR then asked if “that service release valve is something that is used to cut the distance which would actually cut the time that it takes for those brakes to actually engage.” *Id.* The witness responded that the valve “applies the brakes quicker by shortening the length of travel that the air has to go through the lines.” *Id.*

[b]ut yes, there can be other leaks in other parts to the system that would attribute to a similar noise. Tr. 112 (emphasis added).¹²

The Respondent then began its defense, calling Mr. Marty Rolfe. Tr. 118. By virtue of his background and experience, Rolfe established himself as a braking inspector for commercial motor vehicle inspections. Tr. 122-124 and Respondent's Ex. 6A, show that Rolfe has extensive background in matters of brakes. Elaborating upon his background, Rolfe stated he began working for Vulcan in January 2018, where his

primary job, [] was to perform systematic inspections on our operator contractors. And to obviously maintain a safety record. This is complying with [] all applicable law around commercial motor vehicles and operating roadways. Within a year of my employment in commercial motor vehicles, I was asked to move to the actual company side and do the same type of work along with the company vehicles. We have a large commercial fleet obviously here in Vulcan, so I moved to the company side and started dealing with actual company vehicles rather than contractor vehicles. And I've been here on the company side ever since.

Tr. 125.

Respondent's Exhibit 6C, Mr. Rolfe's training, was then admitted without objection. *Id.* Rolfe stated that it reflects his "certification that [he] received in 2002 from the North American Standard inspection of driver examinations. It allows [him] to conduct level three inspections. These levels encompass examination of drivers, the actual inspection of the commercial vehicle, which also includes inspection on a commercial motor vehicle and including the air brake system. *Id.* In particular,

Level one inspection would be the most thorough inspection that you would do on a commercial motor vehicle; where you would check basically bumper to bumper. But you would include an air brake system, if that truck was so equipped, and that you would inspect each component of that air brake system and you would check the functionality of the air brake system separate from what would be done in level two.

¹² As a follow-up the Court asked, it if is true that "even some air hissing noises may be normal or expected, not a sign of a defect?" Marshall responded,

Again, getting back to when the service brake is applied, and you have an air leak in the service brake system, that's an issue. You can have other leaks but that doesn't mean that those are good leaks. I mean, under normal conditions you have air releasing cyclically, as far as from the compressor, in the engine compartment. There's air dryers on the front of the truck that cycle periodically. But those aren't necessarily near where the valves cited in the citation was located according to the notes that I read and possibly the citation itself.

Tr. 112. Thus, the witness identified two other sources for leaks, such as the compressor *in the engine compartment* and air dryers on the front of the truck. Tr. 112. The Court's point is that the witness conceded there can be other sources of air hissing and, perhaps of equal importance, Marshall's testimony was in the nature of generic information about braking system valves.

Tr. 126-128.

Rolfe continues to actively perform brake inspections, stating he “conduct[s] [] brake inspections on air brakes whether they're on mine equipment or [not] ... There's no difference in inspecting.” Tr. 129. Rolfe identified Respondent’s Exhibit 6 E as his “certificate from the Federal Motor Carrier Safety Administration granting me the authority to conduct and at the time, enforce laws on any commercial motor vehicle, here in the United States.” Tr. 130. The Court noted, and Rolfe confirmed, that the exhibit reflects he “successfully completed dealing with standard level one ... [which is] the ultimate level under inspections.” *Id.*

Turning to the citation in issue, Rolfe was asked about the remark in that citation that “when tested, there is [an] air valve at the center front tandem.” Tr. 131; Citation No. 9428093. Preliminarily, Rolfe affirmed that he has seen and inspected the cited truck. Tr. 132. This occurred within two or three days after the citation was issued. *Id.* Rolfe stated that he did a level one inspection of the truck at that time. Tr. 133. At that time the citation had been terminated. Rolfe asked that the valve be kept with the truck. In performing his level one inspection, Rolfe informed that he “was a little confused by the nomenclature on the inspector[’s] citation. The citation states that the inspector tested the air brake valve, but Rolfe saw no air loss calculation written anywhere on the citation. Then the brake valve had to be located.” Tr. 133-134.

Rolfe then went on to explain that

[a] brake valve is a general umbrella terminology. [The valve in issue in this case] happens to be a service relay valve. But also I had to determine the location of it because the inspector wrote that it was in the center of the front tandems. *That's not an accurate configuration of this truck.*

Tr. 134. (emphasis added).

He continued,

[w]hen I hear the center of the front tandems, I expected the truck to be a five-axle truck or greater. I found this to be a three-axle truck. So, it was actually on the number two, this truck had one set of tandems. The tandem set is two axles within 48 inches of each other. So, this was not a five-ax[le] or more, it was actually a three-axle truck. And I was able to locate the specific component on the number two axle because obviously, it was a new component. It wasn't dirty. And ... I was able to recognize it as a service relay valve, the components that came off the truck. And upon inspection of the truck, I found that the integrity and the adequacy of the brake system was within the specs of the manufacturer's standards as well as the commercial safety vehicle glances at a service criteria.

Tr. 134-135.

Explaining further, Rolfe stated,

So, then after that, I went to the component that was removed from the truck. I was able to inspect the body of the component. I found that it was not cracked; it was not damaged by being struck by [] a foreign object. I was able to inspect the

delivery port of the vehicle. The delivery was port proper. There was no knurling on the threads. The actual fitting that they screwed into the delivery port, those threads were proper, not rusted, not knurled, they were not replaced. I went to the supply port. The supply port is where the service line actually supplies the service relay valve with its initial air. Again, there was no cheeping, no knurling of the threads. The fittings that supply the supply port, those fittings were proper. They weren't knurled, they weren't rusted or anything like that. Next, I went to the control ports; same thing, the control ports are actually a little bit different in configuration as they provide air out to the brake chambers. Those control ports, same thing, the threads were not knurled. There was no evidence the air was escaping. *When air escapes, just like water, it's going to leave residue, it's going to move dirt around, it's going to leave traces and evidence that the air is escaping.* Those control service ports were in proper condition, no cracking, no bending, no cracking, no missing ports or anything like that. Then I went to the exhaust port because the service relay valve is designed to exhaust air as well. It keeps the air brake system from becoming over pressurized to the point that you essentially blow your diaphragms and your brake chambers. And your brake chamber[] is where the pneumatic energy is turned into mechanical energy to apply your brakes on your commercial vehicle. The exhaust port was not worn, it was out burned, it was not cracked, it was not full of material; it wasn't blocked. If it was blocked, the consequence of that, that I would expect to see is an over pressurization of the brake chambers to the point the diaphragms will be ruptured. Or it would try to push air out of the control ports, which I would see evidence of. *So, I was able to actually inspect the component, even though I didn't get to see the functionality because it was removed from the truck. I was actually able to examine and see evidence that it didn't appear to be defective at all.*

Tr. 135-136 (emphasis added).

The Court then interrupted for the purpose of clarification of the record, asking if it is accurate that when Rolfe came upon the scene, and saw the truck, the repair had been made and therefore he never saw the truck before the repair had been made. Rolfe confirmed that was the case. Rolfe also confirmed that there was a new service relay valve installed on the truck at that time. Tr. 137. He then confirmed that the service relay valve he saw was the one that had been removed from the cited truck. Tr. 138. Asking if the Court correctly characterized that Rolfe, upon examining the valve which had been removed, found nothing wrong with the valve, Rolfe agreed that was the case. *Id.*

Rolfe then explained how he performs an air brake inspection. He maintained that to check the functionality and integrity of an airbrake system, one performs a threshold pressure test.¹³ This is the test used for all commercial motor vehicle operators. Tr. 139. The test provides an air loss calculation that allows one “to determine the air pressure balance, and whether or not the air brake system has a faulty component somewhere in it that is leaking air.” *Id.* This is the preferred test because it is a simple test that an inspector can perform. Tr. 139-

¹³ Rolfe noted that in slang, the test may be called a “stop test,” a “brake pump down test,” or simply a “brake test.” Tr 139.

140. As he expressed it, “it will reveal whether or not the air brake system has an air leak within the system somewhere. Once you determine an air loss calculation, then if you find it necessary, you can chase down that component. It’s a very elementary preliminary test to do.” Tr. 140. It is important, Rolfe maintained, that the inspector does the test on his own, because if someone sits in the driver’s seat while the inspector walks around the truck, any fluctuation of pressure on the treadle valve will cause exhausting of air. The treadle valve is actuated by the brake pedal. *Id.* He noted, as an example, if one is next to a commercial vehicle at a red light, one will hear that air exhaust, but it does not mean that the brake is not functioning correctly. Instead, it may only “mean that the driver has let up on the brake pedal a little bit.” *Id.*

Thus, Rolfe summed up that, in his view, if one wants “to verify if an air brake system has a leak of any kind, you must do a threshold pressure test and generate that air loss calculation.” *Id.*

Asked if there is “any range of air loss that you can have before a brake system is deemed non-functioning,” Rolfe answered that “[a] lot of times the range will be set by the manufacturer. A search criteria notes the air loss rate. But it also notes that an air loss rate must be done when a truck’s at a certain configuration. You can’t have the parking brakes applied. You must have your brakes released, so all of your air brake systems can actuate. So, what we do is we calculate it over a one-minute period. The initial test ... is an actuation of the entire brake system completely released from the parking configuration. And then you will generate an air loss rate. Tr. 141.

Asked if Rolfe found any information of MSHA “using other guidelines, such as FMCSA, CVSA, out of service criteria as resources to complete any inspections,” Rolfe responded that he had located case law showing such use. Tr. 142. Rolfe then proceeded to identify the documents he located which he believed supported the contention that MSHA has used other guidelines in completing such inspections. The Court required the witness to explain the basis for contending that Respondent’s exhibits were relevant to the Court’s determination of the issue of brake functionality. Tr. 145.

Rolfe first identified Respondent’s Exhibit 3A, wherein an MSHA inspector speaking to a citation, measured the stroke distance on a push rod to determine the thickness of each brake. That method, Rolfe asserted, only exists from FMCSA [Federal Motor Carrier Safety Administration] regulations. *Id.* Rolfe added that the MSHA inspector stated he relied upon the North American out of service criteria guideline for commercial motor vehicles. That means, Rolfe contended, that “in order to determine that this vehicle ... actually had non-functioning brake systems, [the inspector] had to go to the CVSA out of service criteria.” Tr. 146.

The non-attorney CLR objected to the admission of Respondent’s Ex. [4]A on the basis that it was an administrative law judge decision and that the decision was overturned by the Commission. Tr. 147. The Court noted that the claim that the decision of the judge was overturned might not have reversed the limited purpose for which Rolfe cited it. Therefore, depending on the scope of the Commission’s ruling

the fact that this may have been reversed by [t]he Commission is not necessarily the end of the story, because [the Court] would have to read what [t]he Commission said; what the basis of their reversal was, and then determine if the point that Mr. Rolfe made about the decision still stands.

Tr. 148.

Upon examining the cited administrative law judge decision, *Nally & Hamilton Enterprises*, (June 2009) (ALJ), the Court notes that the CLR *completely failed* to understand the Commission's reversal. The Commission sent back only *one* of the citations involved in that decision and that one dealt with a back-up alarm, not brakes. There was one citation addressing brakes and the decision by the Administrative Law Judge finding that the Secretary failed to show that the truck had inadequate brakes was *not* disturbed, *nor even challenged*, upon appeal. And therefore, in fact, the Respondent is correct in noting the judge's remarks that

During his inspection, [the inspector] conducted a brake function test on the Mack lube truck. [The inspector] asked the operator of the truck to operate the engine until a maximum of 120 psi was achieved which pressurized the braking system. The truck operator was then requested to turn off the truck engine, place the transmission in low gear, and release the parking brake. [The inspector] then walked around the truck and measured the stroke distance on the brake push rods to determine the effectiveness of each brake. Excess travel of the push rod causes metal to contact metal that results in a loss of compression. This condition is corrected by adjusting the slack adjuster to limit the push rod travel to under two inches. **[The inspector] testified that he relied on the North America out-of-service criteria guideline for commercial vehicles.**

31 FMSHRC 689 at *4 (emphasis added) (citation omitted).

This is yet another dismaying example of the problems attendant to having non-attorneys attempt to practice law in mine safety and health matters. Government representatives who do not have a license to practice law should not be engaged in the practice of law.

Turning to Respondent's Exhibit 3B, regarding *Oil Dry Production Co.*, 40 FMSHRC 876 (June 2018) (Administrative Law Judge Gill), Rolfe stated that it involved a citation for nearly the same type of Ford L 9000 truck. Referring to page 32 of that exhibit, Rolfe noted that the inspector informed

from his experience, he expected a system tick in this manner to have initiated a pressure drop off from between 10 and 15 PSI from the normal operating value of a 110 PSI to 120 PSI. He's just noting the normal drop off during the testing. Inspector LaRue waited for the initial drop off to start his measurements. LaRue testified that to his knowledge the drop off in pressure of 6 PSI within a 60-second period would qualify as a failure.

Tr. 150.

Rolfe then explained to the Court that his point was the use of the threshold pressure test, contending that was the test that the inspector was employing. *Id.* Continuing, Rolfe stated that the test gives the inspector

an air loss rate calculation to determine whether or not the air brake system is truly functioning or if it's outside of what the North American standard out of service

criteria provides or manufacturer's suggested pressure drop rate. [Rolfe agreed] with [the] inspector [] that in a 60-second period that, that drop off rate would have -- the drop off rate of nearly 30 PSI would be a failure in the system. And [on that basis, Rolfe] would agree with a citation. But he used the common practices under FMCSA to determine whether or not he had a functioning air brake system or not.

Tr. 150-151.

The CLR objected, noting that by the testimony of the issuing inspector in this matter, MSHA doesn't do these tests. The objection was overruled. Tr. 151.

Rolfe then turned to R's Ex. 3C. This exhibit is an MSHA fatality report dated March 17, 2015, CAI-2015-07, involving Rogers Petroleum Services and Republican Energy. Rolfe maintained this was another example of

MSHA's use of Federal Motor Carrier Safety Administration rules and regulations, and out of service criteria. This is actually a tanker truck that overturned on haul road. During the investigation that MSHA conducted, the service brake chamber strokes were measured and evaluated in accordance with Kenworth operating manual for this truck and the Commercial Vehicle Safety Alliances; CVSA out of service criteria handbook. So, again, these regulations under 49 CFR and the CVSA promulgated out of service criteria are being used. So, the Kenworth manual defines proper maintenance of the vehicle and CVSA handbook has determined and when the vehicle is to be immediately taken out of service. So, again, they relied upon these regulations and out of service criteria to make a decision on whether or not the brakes were in functioning condition or not.

Tr. 152.

The CLR's objection was that the exhibit related to an accident investigation and that the government was not contending that Inspector Wright was an engineer or an investigator. Tr. 153. The exhibit was admitted, with the Court explaining that the weight afforded to an admitted exhibit is a separate issue.

Next up was Respondent's Ex. 3D. It pertains to MSHA and an administrative law judge's decision in *Bresee Trucking*, 35 FMSHRC 2124 (July 2013) (Administrative Law Judge Bulluck). Involved was a Mack Truck, a commercial motor vehicle. Focusing on page 2 of 6, Rolfe stated that

“[t]he inspector in th[at] case, also completed a threshold pressure test to determine the functionality of the brake system on this truck. [In the second paragraph of that page] it notes that the brake pressure gauge indicated that the brake system lost 20 pounds of air in 27 seconds. *That's your air loss calculation, [] [and] [t]hat can only [be] calculate[d] through a threshold pressure test which was not done in our case. So, that's how you determine the functionality and the integrity of the air brake system. And this inspector [i.e. regarding R's Ex, 3D] did that ...*”

Tr. 154 (emphasis added). Rolfe next noted that at page 3 of 6 of the same exhibit, the inspector for that case

opined that the truck brakes may not work properly without full amount of air pressure available and that the normal use the leak could expand or rupture chambers which would render the left brake completely inoperative and incapable of stopping the truck. He surmised that the air leak was coming from the service brake chamber rather than the parking brake chamber. Since the parking brakes were not activated during the inspection, and the gauge in the cab indicated that the air was being lost from the service brake system. That's what you find out through a threshold pressure test. But the more important statement made here is [this was done] according to the North American standard vehicle out of service criteria used by MSHA. Tr. 155.

Respondent then referred to Respondent's Ex. 3 E, at page 5, which exhibit involved an "underground coal mine fatal power haulage accident, [at] Savage Industries at Pinnacle Mine." Tr. 156; *see also*, Jerry O.D. Lemon, et al., *Report of Investigation: Fatal Powered Haulage Accident, Savage Industries Inc.*, Mine Safety and Health Administration (June 10, 2002), <https://arlweb.msha.gov/fatals/2002/ftl02c08.htm> ("*Report of Investigation: Savage Industries*"). In that matter, Rolfe stated,

three defects were found. One brake chamber had an audible air leak when the service brake was applied, and the brakes at two wheels were out of adjustment. Audible brake chamber air leak was on axle number two on the right side. And out of adjustment brakes are on the axle number seven. The air compressor maintained 120 PSI of reservoir pressure despite the audible air leak. When the service brake was fully applied and the engine was at a low (inaudible), the type 30 brake chamber on the seven left position had a push rod travel of 2 and 1/8 inch. It was therefore 1/8 inch beyond the brake adjustment limit. The Type 24 long stroke brake chambers on the seventh position had a push rod travel of 2 and 1/2 inches and was therefore, 1/2 inch beyond the brake adjustment limit. Based on the criteria established by the Commercial Vehicle Safety Alliance, the percentage of defective brakes on the vehicle did not exceed the allowed 20 percent limit. So, the vehicle was still suitable for use. The above defects did not affect the parking brake performance. The CVSA, North America uniform out of service criteria are nationally recognized by the trucking industry for highway trucks and [are] used by MSHA to determine brake adequacy.

Tr. 156-157. Rolfe highlighted the last sentence which notes that the "CVSA North American uniform out of service criteria are nationally recognized by the trucking industry for highway trucks and are used by MSHA to determine brake adequacy." Tr. 157; *Report of Investigation: Savage Industries*. The report's conclusion also notes that "[t]he service and parking brake systems were inspected and met the criteria established by the Commercial Vehicle Safety Alliance (CVSA) for trucks in service on public highways." *Id.* at page 7.

Respondent's Ex. 3F was next. This exhibit pertained to a fatal power haulage accident on June 10, 2004. Sherman L. Slaughter, *Report of Investigation: Fatal Powered Haulage Accident, Tug Valley Coal Processing Company*, Mine Safety and Health Administration, <https://arlweb.msha.gov/fatals/2004/ftl04c11.asp>. Rolfe noted from page 9 of that exhibit that involved was a commercial motor vehicle three-axle dump. When the vehicle was tested it was found that:

the right front tandem drive axle brake chamber had an audible air leak with a foot pedal and parking brake released. The leak rate was 60 times the maximum acceptable level of leakage as specified by the manufacturer of Mack. The chamber would also leak if the foot pedal or treadle valve that we discussed earlier was applied when the parking brake was engaged due to the anti-compounding feature within the parking brake system.

Tr. 158-159. Rolfe explained that this involved the “threshold pressure test. [Rolfe expressed his view that] it was appropriate for the inspector to do that [test] to get [the] air loss rate calculation, which he [did in that case].” *Id.* Rolfe added that this was “just another example of why it's important to do a threshold pressure test which was absent from [the citation in issue in this case] [as] ... [i]t goes to the functionality and adequacy of the air brake system.” *Id.*

The Respondent continued with its next exhibit, Respondent’s Ex. 3 G, pointing to pages 14 through 16 of that exhibit. It involved a surface coal mine, the *Colony Bay Surface Mine* and the MSHA investigation associated with that case. Rolfe’s purpose for this exhibit was as another example showing that the functionality and adequacy of an air brake system should be assessed through a threshold pressure test. Tr. 160-161. As he stated,

the service br[akes] were functionally tested using the foot valve or the service brake pedal. All six service brakes cycled when the foot valve was cycled. Service brake pressure at each of the three axles was consistent with a primary and secondary take system pressures. This is a threshold pressure test. It's important to determine the functionality of an air brake system. This was done by this inspector as well.

Id. Rolfe then highlighted page 16 and table number five, where it notes that “the secondary air tank system pressurized experience approximately 2 PSI per minute; air loss of air pressure with its brake chamber removed from the system at its initial pressure of 110 PSI. *Again, that's an air loss rate calculation determined by a threshold pressure test.*” Tr. 160 (emphasis added).

Following that, Respondent’s Exhibit 4A was admitted, with the Court noting that it could have taken official notice of the exhibit in any event, as it reflects a June 23, 2009 decision issued by Administrative Law Judge Feldman. This decision has already been discussed, *supra*.¹⁴ Rolfe noted that the decision by Judge Feldman involved

an MSHA inspection of a RD 600SX Mack [] truck. The point again, what I'd like to bring [to the Court’s] attention is an MSHA Inspector, ... testif[ying] ... that he relies on the North American out of service criteria guidelines for commercial vehicles. ... But the most important part of that statement is that the MSHA inspector testified that he relies on the North American Standard out of service criteria.

¹⁴ Respondent’s Ex. 5A, a Commission decision involving *Daanen & Janssen, Inc.*, 20 FMSHRC 189 (Mar. 1998) is discussed in this decision.

Tr. 163.

In response to the Court's inquiry about the purpose and value of considering these exhibits offered by the Respondent, Rolfe responded that

the point we're trying to make, Your Honor, is that 30 CFR has absolutely no guidelines, no promulgated standards or anything concerning air brake systems. MSHA sister agency FMCSA, however does. They've got an out of service criteria that sets forth when an air brake system is functioning and when it is to be considered non-functioning or out of service.¹⁵ It provides plenty of guidelines on how to conduct threshold pressure tests, which was absent in this case here. [By contrast, in this case] [w]e have an MSHA inspector who felt that he heard an air exhausting from a component that's designed to exhaust air while the brake pedal is engaged, fully charging the system; which by the citation, that's exactly the configuration that Inspector Wright had the vehicle in. So, [one] would expect some sort of exhausting of air through specific components while the vehicle is in that configuration.

Tr. 164.

Following that was Respondent's Exhibit 7A, a one page drawing of a typical relay valve, was admitted. Tr. 170-171. While admitted, and included as a footnote for the reader's convenience,¹⁶ the Court considers the exhibit and the testimony related to it of minimal value,

¹⁵ Frankly, the Court did not initially grasp the applicability of using an "out of service guideline" but Rolfe dispelled the Court's misapprehension explaining that

[t]he out of service guideline ... is when you place a vehicle out of service, what violations -- you determine what violation or defect that you're finding. And then you go to the out of service criteria and see if the CVSA says that that condition is not a service. All right, if you'll look, subsection K under the break -- under out of service, it talks about air loss, right. We need to calculate air loss, right? Just because you do find an exhausting of air from a brake system does not put an air brake system out of service. And as a qualified inspector, if you are searching down some sort of air leak, you need to be qualified enough to determine whether that is a defect or if it's an exhausting of air.

Tr. 165. Thus, Rolfe cleared up the Court's too literal use of the term "out of service guideline" as it is meant to determine *when* a vehicle is to be removed from service. As Rolfe put it, the "criteria provides [] guidance on *when* an air brake system would be considered non-functioning [and therefore marked to be put] out of service." *Id.* Consequently, the Court's misunderstanding of the term used – out of service guideline – was cleared up and therefore there is no *in service* guideline.

¹⁶ Referencing that exhibit, Rolfe addressed the purpose, the design, the functionality of this relay valve and why it's important on these vehicles. In that regard, he stated

as it does not add to the issue to be resolved here, again namely, did MSHA establish by a preponderance of the evidence that the brakes on the cited truck were not functional? However,

[t]he service relay valve is a very integral safety function within an air brake system. Your relay valve, that you'll usually find on your rear drive axles has different functions. One of the functions is it provides air pressure balance between the right side and the left side of your vehicle. And these functions are in no particular order of importance. Another function of the service relay valves is it reduces or eliminates the air travel lag from your air reservoir tanks to the rear axles or rear brake systems of an air brake system. Think of it like this, commercial, I mean, a tractor trailer, the air tank reservoirs are up underneath the driver side and passenger side door. And you've got 18 feet of tractor trailer, then you've got 53 feet of trailer behind you. So, that's a long way for air to travel all the way back to a rear tandem set in order to actuate brakes. We don't need brakes taking a long time to actuate because as we know from everyone driving, there are times where you may have to brake rather suddenly. So, a service relay valve moved to the rear sets of tandems will actually allow the air to be already brought back to the rear tandems. So, when you actuate your brake pedal, the air is already back there and it eliminates the air travel lag. So, your brakes actuate a lot faster. That's what we want. Now, the service relay valve provides another function too. It provides exhausting of the air brake system in several instances. Again, if you sat next to a commercial motor vehicle, it'll light when the driver releases pressure on the panel or whatever you'll hear air exhausting. Now, the air comes from numerous different places whether it be the brake chamber. But it also exhausts as you can see on the bottom of the exhibit. These all start at the bottom of the service relay valve. Now, what that does is when you're letting up on the brake pedal, it allows the air to exhaust from the air brake system and it disengages your brakes. An air brake system doesn't run in reverse. And so we have to have a way to release the air from it when we're ready to move. ... Also, that exhaust port, if you look towards the top under the control ports, you can have certain instances where you can over pressurize the brake system. If a driver is driving down the road and a child runs out in front of him and he stands on the brake pedal, he's over pressurizing that system, while instead of the air rushing to the diaphragms of the brake chamber and bursting them like a balloon, the service relay valves allow the air to exhaust; keeping the air system from essentially busting like a balloon. So, you'll have exhausting effects. In this case that we're talking about, Inspector Wright had our operator up in the driver seat, and he had the pedal engaged. So, again, any differentiation of pressure on that panel is going to put that service relay valve into operation and part of this operation is to exhaust air out of the system. Now, not being a qualified air brake Inspector, you can very quickly make a determination that you've located a defect rather than proper exhausting from the component as designed.

Tr. 171-174. Similarly, Respondent's Exhibits 7 B, 7 C, and 7 D, while also admitted into the record, are not of particular value to the issue to be resolved.

as the footnote demonstrates, by displaying Rolfe's testimony, it is useful in further establishing his considerable expertise and knowledge about braking systems and service relay valves.

Rolfe was then asked if it "correct that any fluctuation in the brake pedal would allow the system to exhaust air with this relay valve of what we're discussing?" Rolfe responded, "Yes, sir. Just like I said, if you're sitting next to a truck (inaudible), any fluctuation of pressure, you're going to have air exhausting from an air brake system." Tr. 175.

Then directed to Respondent's Exhibit 7B, at the second paragraph, the Respondent noted that there is a reference there that the "brake force is adjustable and when released, the relay valve exhausts air into the atmosphere. That is straight from the Bendix of this component." *Id.* Rolfe was asked if he agreed with that statement and he responded that he did agree with it. Tr. 176.

Exhibit 7C, the receipt for the service relay valve, was then introduced. Rolfe stated that was not the component that he examined. Instead, he explained that is a quick release valve, which was included as an exhibit for the purpose of providing contrast. Instead, he informed that the actual component was depicted on 7B on the Bendix page. He noted that they are all service relays, but all have the same function. *Id.* The Court then inquired of Rolfe why should it care about the second page of 7C, asking why it is of importance in this case. Rolfe answered it was included for contrast as one who is not technically sophisticated on service relay valves can "very easily mistake the two," and therefore he commented that one has to be "very careful what you're looking at." ¹⁷ Tr. 177.

Cross-examination of Rolfe began with his admitting that he is not an MSHA inspector. Tr. 182. He also agreed that he was not present at the time the citation was issued. Tr. 185. The Court notes that he had already acknowledged these points during his direct testimony. Although the government remarked that the Respondent could have offered testimony from its mechanic at the quarry, this displays confusion about the parties' respective roles. Tr. 186. It is the government's burden to establish a violation by a preponderance of the evidence. It is not the Respondent's duty to disprove the violation. Tr. 186-188.

For its own understanding of Rolfe's testimony, the Court inquired:

[a]nd the service relay valve, and in my understanding of the testimony [] you will looked at that [valve] from every possible angle, other than perhaps X-raying it or taking it apart. And as you did that, my understanding of the testimony is that you

¹⁷ Although considered of negligible value, Ex. 7 D was admitted. Rolfe referred to a highlighted portion at that exhibit, at page 43, which notes

depending on the level of service brake pressure, compressed air from the spring compressed chambers will be evacuated into the atmosphere through the outlet, E and vent 3 until the pressure in the chamber B is greater once again and the piston closes on the outlet, a neutral position has been reached.

Tr. 178. Rolfe added that he believed that section is referring to the function of a service relay as an air pressure balance, which protects the system. Tr. 179.

observed nothing, zero, wrong or defective that alerted you to the possible problem with that piece that was replaced. Is that fair or not accurate? Tr. 190.

Rolfe responded “[t]hat’s completely accurate, Your Honor. I examined the component for any evidence of any defect or any cracks, broken off pieces, missing anything, and I found absolutely zero defects with this component.” *Id.* And, further, Rolfe confirmed that short of an x-ray or completely taking the component, there was nothing else he could do regarding examination of it. Tr. 191. Thus, in terms of any outward signs of a problem, Rolfe noted that he saw no issues. These outward manifestations could include: narrowed threads, creating the potential for air to slip past, or a crack in the body of the component and he observed neither issue. Tr. 191-192.

In a further effort to make sure that it understood certain aspects of Mr. Rolfe’s testimony, the Court presented the following hypothetical: “if [one] come[s] come upon a truck, such as the one involved here of that class, and [one] hear[s] a air hissing noise, does that per force indicate to you that there could be a problem with the braking system?” Tr. 194.

Rolfe responded,

It doesn't immediately say there's a problem because [there] could be other explanations for that air exhausting. It could just simply be that the driver or operator failed to walk around and close (inaudible) on his air service reservoir. And he needs to do that so the air reservoir can capture air. It could be something as simple as that. It could be the airbags filling up on the suspension system. It could be the suspension filling up on the operator's seat. There [are] numerous reasons that you will hear air. But again, that goes back to being a qualified inspector to be able to recognize and determine [] whether it's a defect, or if it's by design.

Tr. 194-195.

Following up on that response, the Court then asked if it was Rolfe’s “position that if one suspects that there's a problem with the braking system that the only legitimate way to determine that is by conducting a threshold pressure test?” Agreeing that was true, Rolfe added only one qualifier – namely, apart from some impact to the system, such as a truck hitting an object and ripping off a brake chamber, Rolfe agreed that

if the air brake system is intact, and the air brake system -- and there's no significant damage like that, yes, you want to do a threshold pressure test, to generate your air loss calculation. And that will tell you whether or not if you have a sound, adequate air brake system.

Tr. 195-196.

The Court then asked, characterizing its question as a “tough one” for Rolfe, if one assumes hypothetically that the part is replaced “and the inspector then goes to the truck and no

longer hears the noise, doesn't the fact that that noise is no longer present under this hypothetical tend to indicate that there was a defect with the valve ... [and there is] [a] new part with no hissing” Tr. 196. Rolfe answered,

Well, no, sir. And let me let me explain. ... If you have no hissing, there's several explanations for that. Number one, you may have an operator in the seat at that moment that might have pushed the pedal to the floor and hold it there and is not releasing pressure. In this case, here, I will refer you back to the inspector's notes that during his post brake test, he did it with the engine running. If you're going to have an engine running on an old model Ford L8000, you're going to have a whole lot of noise levels to overcome to hear [an]air leak.

Tr. 196.

In rebuttal testimony, the Secretary recalled the issuing inspector, Mr. Wright. The inspector was then asked “[t]he day that you issued the violation to Vulcan on the truck; when you were actually checking it, did you have the driver turn the engine off on the truck while you were checking for air leaks?” The inspector responded yes, he did that. Tr. 201. The inspector then was asked if he could tell exactly where the leak came from, to which he answered, “[i]t came from a[n] air valve located on the frame at the front tandem.” *Id.* Wright also stated that the truck was running¹⁸ and that he felt the air leak. Tr. 202. The inspector also acknowledged that he did not remove the truck from service when he issued the citation. However, the mine operator did remove it. The Court then asked why the inspector did not remove it from service, to which he responded that he “gave them a termination time [for] that next morning to have the truck fixed.” Tr. 202. On re-cross-examination, the Respondent asked if the inspector held his hand under the component, to which the inspector responded yes. Tr. 205.

As noted earlier, on re-direct, the CLR asked the inspector what he had the mine operator perform in order to check the brake. The inspector answered “[w]hen I first heard the air leak, it was a continuous leak. I afforded them the opportunity to pump the brakes at least three times to see if there was any contaminant inside the brake valve or inside that valve, that it would blow it out and seal. It never did. They pumped it three times and it was still had a continuous leak. When he held the foot brake down, it was always a continuous air leak.” Tr. 206.

On further re-cross-examination, the inspector was asked if he could “say 100 percent for certain that the operator was holding steady pressure to that brake pedal the whole time during [his] inspection.” Tr. 206-207. Wright answered that the driver was asked to do that, but he could not confirm that was done. Thus, he could only assume that the driver did so. Tr. 207.

Given the inspector’s testimony, that he put his hand under the engine and felt the air, the Court inquired if the Respondent wished to recall Mr. Rolfe to respond whether that in fact that did indicate that there was a problem. The Respondent accepted the invitation for additional testimony on this issue from its witness, Rolfe. Upon being recalled, Rolfe was asked if one is

¹⁸ Syntactically, the question and answer were opaque, with the question posed “And the truck was not running when you heard that?” To which the inspector answered “[n]o sir.” Tr. 202. The Court interpreted the question and answer as reflected above.

doing a walk around on the vehicle, doing a doing an inspection, and you heard an exhaust or a wisp of air and you got under the truck. And in this component, you stuck your hand under and you felt an exhaust of air. What does that mean, and what does that verify?

Tr. 210. Rolfe answered that it

means [] that there's an exhaust air. What we'd have to verify is does the location that it's coming from, is it [from the]brake ... [is] it [from] a[n] [im]proper connection [o]r is it a component that is designed to exhaust air? We have to determine what we're looking at.

Tr. 210-211.

The Court then inquired further about this, asking:

hypothetically that I'm at a truck, such as the one that's cited in this case, and I put my hand under the service relay valve, and I feel air, does that not tell me that there's a problem with the service relay valve based solely on my feeling air coming from that relay valve?

Tr. 211.

Rolfe responded,

not in this case, Your Honor, because if you'll recall, [Inspector] Tommy Wright's citation, he had a person up in the cab with the brake actuated. So, he's actually sending pressure back to the service relay valve. So, now you'll need to determine if that exhausting is caused by the pressure and is properly exhausting into the atmosphere, as you saw in the WABCO and Bendix examples, or if you truly have an exhausting of air coming from a different part of the component, where you have a defect. So, it's not black and white. *That's why we [] harp on being qualified to do these air brake inspections. That's why FMCSA has promulgated the standard to be qualified, because there's so many variables that can be placed than even trying to, hypothetically create a situation, there's a lot of variables that you'll have to consider.*

Tr. 211-212 (emphasis added).

The Court then inquired, if it is Rolfe's position that "merely placing your hand under the valve is insufficient to determine if the service relay valve is malfunctioning ... [or] what one has to do instead is to do a bubble test?" Tr. 212. Rolfe answered that was the case, as

[j]ust by trying to identify an exhaustion of a service relay valve [which is] *designed to do that*; you need to do a threshold pressure test, and generate your air loss calculation and see if it is in excess of the manufacturer's recommendation, or the out of service criteria. ... [the] [t]hreshold pressure test is your functionality and integrity test.

DISCUSSION

The safety standard at issue here, 30 C.F.R. §56.14101(a)(3), titled “Brakes,” provides at the cited subsection that “All braking systems installed on the equipment shall be maintained in functional condition.”

In *Daanen & Janssen, Inc.*, 20 FMSHRC 189 (Mar. 1998), the Commission construed the same standard in issue in this matter and that decision is instructive. The language of the standard has remained the same. In that decision, the Secretary contended that the plain language of the standard mandates a finding of violation “*when a component of the braking system is not maintained in functional condition, regardless of whether the braking system is capable of stopping and holding the vehicle.*” *Id.* at 192 (emphasis added). The Commission, upon determining that the language of the standard was vague, held that the Secretary’s interpretation was reasonable. In that case, the administrative law judge found that the cited front-end loader’s “rear adjusting bolts, [which were] ‘integral component[s]’ of the loader’s service braking system, were frozen and inoperative.” *Id.* at 191. The Commission observed that the

common usage of the term “system” contemplates “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose,” and “an aggregation or assemblage of objects joined in regular interaction or interdependence.” *Webster’s Third International Dictionary (Unabridged)* 2322 (1986). Because the definition of the term “system” entails an interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional.¹⁹

¹⁹ In reaching its conclusion that each component must be functional, the Commission also noted that:

the Secretary has consistently applied the interpretation embodied in the citation. The *PPM* [*Program Policy Manual*], which the Commission long has recognized as evidence of MSHA’s policies and practices (*Dolese Bros.*, 16 FMSHRC at 693 n.4), succinctly states the interpretation of the braking standard advanced here by the Secretary. The *PPM* provides: “Standard [56].14101(a)(3) should be cited if a component or portion of any braking system on the equipment is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above.” IV *PPM*, Parts 56/57, at 55-55a (1991).

Id. at 194.

Id. at 193.

Thus, the Commission's decision in *Daanen & Janssen* makes it clear that a defective air valve, as an undisputed component of the cited truck's braking system, must be functional.

However, that does not end the inquiry, as the Secretary must still establish by a preponderance of the evidence that the cited valve was in fact defective. The preponderance of evidence is the appropriate standard of proof in proceedings before Commission administrative law judges. To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). "Preponderance of the evidence means the greater weight of the evidence, such that the Secretary has demonstrated that the violation is more probable than not." *Marion County Coal Co.*, 40 FMSHRC 39, 46 (Feb. 2018) (Acting Chairman Althen & Commissioner Young, concurring).

Other Commission cases are in accord with this expression of the preponderance standard.

The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). The preponderance standard, in general, means proof that something is more likely so than not so. *See* 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 72.01 (1987); 2 Kenneth S. Brown et al., *McCormick On Evidence* § 339, 439 (4th ed. 1992); *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). The Supreme Court, in *Concrete Pipe*, 124 L.Ed.2d at 563, relied on by the judge, 16 FMSHRC at 895, explained that "[t]he burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *See also* 2 McCormick § 339, at 439 n.12, citing Model Code of Evidence, Rules 1(3) & (5).

In re: Contests of Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1838 (Nov. 1995).²⁰

²⁰ In discussing the burden of proof, the Commission has taken note of use of that term under the common law, remarking that:

At common law, preponderance of the evidence 'means that amount of credible evidence which is most persuasive on a particular point.' *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). The preponderance of the evidence standard has also been defined at common law as '[t]he greater weight of evidence, evidence which is more convincing than the evidence which is proffered in opposition to it.' *St. Paul Fire & Marine Insurance Company v. U.S.*, 6 F.3d 763, 769 (Fed. Cir. 1993), *reh. denied*. In general, preponderance of the evidence is such evidence as, when weighed against that opposed to it, has the more convincing force that

something is more likely so than not so. *Merzon v. County of Suffolk*, 767 F. Supp. 432, 444 - 445 (E.D. N.Y. 1991); see Standard Civil Jury Instruction for the District of Columbia § 2-8 (revised ed. 1985); see also, *Bazemore v. Friday* 478 U.S. 385, 400 (1986); *Smith v. U.S.*, 726 F.2d 428, 430 (8th Cir. 1984); *Nissho-Iwai Co., Ltd. v. M/T Stolt Lion*, 719 F.2d 34, 38 (2nd Cir. 1983); and *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 n. 3 (D. D.C. 1990). The preponderance standard is satisfied when the party bearing the burden has shown that “the existence of a fact is more probable than its non-existence....” *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 at ___, 113 S. Ct. 2264, 2279 (1993) (citations omitted).

In re: Contests of Respirable Dust Sample Alteration Citations Keystone Coal Mining Corp. 17 FMSHRC 1883, 1897 (Dec. 1995) (Commissioner Marks, dissenting).

Plateau Mining, 28 FMSHRC 501 (Aug. 2006) also speaks to the preponderance standard and the substantial evidence test.

The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). “The preponderance standard, in general, means proof that something is more likely so than not so.” *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838. Further, the occurrence of an ignition is not, in and of itself, evidentiary proof of an inadequate bleeder system. *Consolidation Coal Co.*, 20 FMSHRC 227, 240 (Mar. 1998) (Comm’rs Riley and Verheggen) (citing *Mar-Land Indus. Contractor, Inc.*, 14 FMSHRC 754, 758 (May 1992); *Old Ben Coal Co.*, 4 FMSHRC 1800, 1804 n.4 (Oct. 1982)). When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2) (A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). Further, the Commission has held that “the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence.” *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are “permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.

Plateau Mining, 28 FMSHRC 501, 524 (Aug. 2006) (separate opinion of Chairman Duffy and Commissioner Suboleski)

Underlying the determination of the preponderance standard is application of the substantial evidence test, a subject also addressed by the Commission in *Daanen & Janssen*. There, the Commission remarked:

[w]hen reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

20 FMSHRC at 195.

The basis for the Secretary's alleged violation of 30 C.F.R. §56.14101(a)(3) is that, "when tested the airbrake valve had an audible air leak while the pedal was being engaged." Tr. 18-19. To establish this, the Secretary relied upon two witnesses – the inspector who issued the citation, Mr. Tommy Wright, and a brake expert from MSHA's Technical Support Center, in Triadelphia, West Virginia, Mr. Fred T. Marshall. While Mr. Marshall was undoubtedly qualified to testify about braking systems, including how airbrake valves work, none of the testimony he offered was of value to resolving the issue before the Court, to wit:

Did the Secretary establish, by a preponderance of the evidence, that the airbrake valve, as an acknowledged component of the cited truck's braking system, was in fact defective?

Mr. Marshall's testimony, while informative as a matter of general interest about braking systems on trucks, did not advance the resolution of the issue. The reasons for this are plain and not in dispute: Marshall *never saw* the cited Ford Truck, either before the citation was issued nor after. Consequently, he could offer nothing about the noise the inspector testified to hearing. Further, *he never saw the valve*, alleged by the Secretary to have been the source of the noise, even after the suspect valve had been removed, though there was nothing preventing the Secretary from access to the valve through discovery.

This means that the Secretary's ability to establish the alleged violation rested entirely upon the testimony of Inspector Wright. For the reasons which follow, deficiencies in the testimony of the MSHA inspector, when considered in comparison with the testimony of the Respondent's brake expert, Mr. Marty Rolfe, who *did examine* the cited valve and otherwise raised significant issues detracting significantly from Wright's testimony, leads the Court to

conclude that the Secretary of Labor did not establish, by a preponderance of the credible evidence, that the cited brakes were nonfunctional.

Wright testified that he issued the subject citation *upon testing* the brakes because he heard an audible present with the brake pedal engaged. His citation asserted that the audible emanated from a brake air valve at center of the front tandem. However, the inspector acknowledged that the truck passed a brake test, making an accident unlikely.

No one has challenged that the inspector heard an audible air noise. Nor does anyone contend that the valve, defective or not, was a component of the truck's braking system. However, establishing that an air noise was heard, does not spell that the violation was established. It is also not in dispute that when the suspected to be defective valve was replaced the air noise was not then detected.

It may be tempting to believe that, by virtue of the replacement of the valve and the air noise not then being detected, that clinches the Secretary's case. But that conclusion relies upon a finding that the source of the air noise came, in fact, from the valve that was replaced.²¹ *If the air noise was attributable to another source or reason, replacing a non-defective valve with a new non-defective valve would not be surprising.* The issue of the source of the air noise is an evidentiary matter for the Court to resolve. That resolution in turn relies upon the Court's analysis of the testimony from Wright and Rolfe.

Wright testified that, in using the word "audible," he meant an air leak and he attributed that to a brake air valve at center of the front tandem. He asserted that the whole time during the brake test the driver had his foot on the brake pedal²² with it engaged and that under those conditions there was a constant, audible, air leak. He added that when the driver released his foot off the brake, the air noise stopped. Wright also testified that he crawled up under the truck and could feel the air leak, although he subsequently said he could *hear* where the air was coming from and he put his hand at the bottom of the valve and could also *feel* it. Tr. 51.

Upon cross-examination, it is fair to state that Wright has no specialized training regarding air brakes, vaguely answering that it involved "[l]eaks, stroke, canisters, the type, the know what and how the stroke would be. Listen for air leaks, valves, how things should set up." Tr. 55. His method for determining if there were any leaks on the brake system was similarly brief, advising that the driver would put his foot on the brake pedal and Wright would then walk around and check for the air leaks. The equipment would be off during the test. Tr. 56.

Asked if he did a "threshold pressure test" during the inspection, Wright did not know of such a test. After employing different terms to describe that test, sometimes referred to as a stone or pump test, Wright answered that such test was not done. Next, asked if he verified an air calculation rate during his inspection, the inspector answered that he is not required to, that answer meaning no. When asked how he verified that there was an air leak, the inspector repeated his earlier testimony on that subject. Asked if he, Inspector Wright, was in the truck

²¹ As discussed *infra*, a second issue is whether it was established that constant pressure was in fact being applied to the brake pedal during the whole time of the test.

²² Wright insisted, several times, that the truck driver had his foot on the brake pedal the whole time and that the driver kept the brakes engaged. Tr. 40, 42-43, 52.

cab at the time of the inspection, the inspector answered that he was not, offering that he crawled up under the truck and heard the air leak and put his hand under the valve and felt the air. When he had crawled under the truck, the motor was not running; the truck was off at that time.

Upon further questioning, Wright stated that the valve was at the center of the truck at the front tandem and that the truck had two axles. He denied that the component he examined was a service relay. When asked if he was familiar with how the brake components operate, the inspector informed that one applies the brake and if continuous pressure is applied to it, the valve is not supposed to leak air. He conceded that air would be exhausted if the driver failed to keep continuous pressure on the brake.

Regarding the Respondent's contention that other supporting agency guides are used by MSHA, Wright informed they were not. As a follow up, he was asked if, during his MSHA training, there were references to a North American Standard CVSA, or any commercial motor vehicle inspections, Wright avoided a direct answer, responding that inspectors "are not required to have those and that it was just a reference. In a follow-up to that question, the inspector was then asked if there was reference material for inspections and again he avoided answering the question, responding that he cannot enforce those other sources. The Court, dismayed by the non-responsive answers, asked of Wright if there was such reference material that he came into contact with during his training, to which the inspector acknowledged that he had.

Addressing his termination of the citation, Wright advised that after the new valve was installed and the brake was then applied without the engine running and held down, there was no longer any audible air leak present at that valve, where the old valve was. However, he did not, as had done before, crawl back up under the truck and stick his hand to the bottom of the valve, answering that he did not need to do that after the valve was replaced. Finally, regarding the subject valve, after describing what is depicted on Gov. Ex. P 10, Wright informed that the exhaust port on the valve is on the very bottom and that the location of his hand at the time he felt air exhausting from it was at the bottom.

In its defense of the alleged violation, the Respondent called Mr. Marty Rolfe, who was established as an expert in the field of braking systems and as an inspector for commercial motor vehicles. It is worth noting again that Rolfe has a certificate from the Federal Motor Carrier Safety Administration granting him the authority to conduct and enforce laws on any commercial motor vehicle in the United States. His qualification includes "level one" inspections, which level is the ultimate level under such inspections. In significant contrast to MSHA's expert witness, Marshall, Rolfe *did view* the cited Ford truck and he examined the suspect valve that was replaced. He performed a level one inspection on the cited truck, though this was done after the valve had been replaced.

In reviewing the citation, Rolfe noted that no air loss calculation was reflected on it. Rolfe then stated that the valve in issue was a service relay valve, but he also had to determine the valve's location because the inspector wrote that it was *in the center of the front tandem*.²³ Rolfe contended was not an accurate configuration of this truck. Rolfe asserted that the inspector's use of "center of the front tandems" would indicate that the cited truck had five axles

²³ Rolfe was correct. The citation does state "there is a brake air valve *at center of front tandem* that has an audible present." Citation No. 9428093 (emphasis added).

or greater, but in fact the cited truck had *three* axles and had *one* set of tandems. As the component was newly installed, he easily located it on the number two axle.

In detailed testimony, Rolfe then described his examination of the valve that was removed from the truck, and it is fair to state that he found nothing wrong with it. As he put it, the valve “didn't appear to be defective at all.” Tr. 135-136. His exam was an external review of the valve; no x-rays or disassembly of the valve's internal parts were conducted. The Court does not believe that the Respondent was under an obligation for its defense to conduct such an extraordinary exam of the valve, as by x-ray or disassembly, of it.

Beyond his thorough examination of the valve, Rolfe took exception to the test itself conducted by the MSHA inspector. Rolfe asserted that a proper check of the functionality and integrity of an airbrake system requires one to perform a threshold pressure test. This is because that test provides an air loss calculation that allows one “to determine the air pressure balance, and whether or not the air brake system has a faulty component somewhere in it that is leaking air.” Tr. 139. Importantly, Rolfe stated that it is a “simple test that an inspector can perform.” *Id.* As he expressed it, the test will “reveal whether or not the air brake system has an air leak within the system somewhere. Tr. 139-140

Finding fault with the method employed by the inspector in concluding that the valve was defective, Rolfe maintained it is important that the inspector does the test on his own, because if someone sits in the driver's seat while the inspector walks around the truck, any fluctuation of pressure on the treadle valve will cause exhausting of air. Merely hearing air exhaust from such a truck does not, by itself, indicate that the brake is dysfunctional, as air will exhaust if a driver lets up on the brake pedal even a little.

Thus, Rolfe summed up that, in his view, if one wants “to verify if an air brake system has a leak of any kind, you must do a threshold pressure test and generate that air loss calculation.” *Id.* In support of his view of the need for the threshold pressure test to accurately determine brake functionality, Rolfe identified several exhibits which were admitted into the record in support of his contention. These have all been described, *supra*, and will not be repeated here. However, collectively, the Respondent's exhibits indicate that MSHA has at least referred to the sources that Rolfe maintained are essential to validly determine brake functionality.

It must be said that the inspector's training for air brakes pales in comparison to Respondent's witness, Mr. Rolfe. As noted above, when asked about his training for air brakes, Wright vaguely responded that it involved “[l]eaks, stroke, canisters, the type, the know what and how the stroke would be. Listen for air leaks, valves, how things should set up.” Tr. 55.

The inspector contended that the method he used was a common way to detect a leak on a brake and that the leak was constant “the whole time the driver had his foot on the brake with the pedal engaged; there was a constant air leak.” Tr. 52. Thus, he asserted that “[t]he whole time the driver had his foot on the brake pedal with it engaged. There was a constant air leak, an audible air leak that I could hear and I could feel when I crawled up under the truck.” Tr. 40. It is noted that the Secretary did not call the driver, nor produce a statement from the driver attesting to the testing procedure he employed.

The inspector conceded that he never did an air calculation rate during his inspection, adding that he is not required to do that. Tr. 58. When asked how he verified that there was an air leak, he responded that “[t]he operator pushed the brake [] [a]nd the valve that I cited had an audible air leak present the whole time he had the brake pedal engaged. He held at constant pressure on it.” Tr. 59. Asked if he, Inspector Wright, was in the truck cab at the time of the inspection, the inspector answered, “[n]o, sir. I crawled up under the truck and heard the air leak and put my hand under the valve and felt it.” Thus, the inspector could only surmise that the driver pushed the brake pedal down the whole time.

The Court acknowledges that MSHA does not require that an air calculation rate for enforcement of this standard. The Court also acknowledges that it cannot require MSHA to conduct such a test in order to enforce a violation of 30 C.F.R. §56.14101(a)(3). However, that is a distinct issue from the need for MSHA to establish by a preponderance of the evidence that the brake valve was defective.

Applying the preponderance of evidence standard, the Court concludes that Rolfe’s testimony was more persuasive, that is to say, more convincing, on the issue of whether the suspect valve was in fact defective. Restated, the Court concludes that the Secretary did not show that it was more probable than not that the braking system was defective.

Based on the recounting of the testimony, as set forth above, the Court finds the following: As detailed above, Wright’s understanding of the truck and braking systems generally was far less detailed than Rolfe’s. Being more knowledgeable about the truck’s braking system, the Court places more credence in Rolfe’s analysis of whether the suspect valve was truly defective. Part of this conclusion is based on the fact that Wright could not be sure, under the testing system he employed, that the driver kept continuous pressure on the brake pedal the entire time. Wright admitted that it was essential that the driver not let up on the brake pedal during testing. Though the Secretary could have deposed and/or called the driver as a witness on this issue, it did not take either of those steps.

The Court’s conclusion is also based on the concession from the Secretary’s brake expert that there can be other sources for the sound of air on the truck. Tr. 110-112. In meeting its required burden of proof, the Secretary also could have, through discovery, obtained the suspect valve, for x-ray analysis or possible disassembly, but did not avail itself of this either.

Last, there is the matter of Rolfe’s examination of the alleged defective valve, an examination for which he could not find any outward manifestation of a defect. The Court finds that Rolfe’s testimony as to the condition of the alleged defective valve was credible.

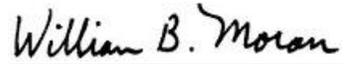
CONCLUSION

Based upon the above, the Court concludes that the Secretary failed to establish by a preponderance of the reliable evidence that the cited truck’s braking system was not functional. In particular this finding means that for the one component cited by the Secretary as the culprit for the allegation that the braking system was not functional, namely the service relay valve, the Secretary failed to establish under the same preponderance standard that the valve was defective.

Accordingly, it is found that the alleged violation described in Citation No. 9428093 was not established.

ORDER

It is hereby ordered that Citation No. 9428093 is **VACATED** and this proceeding is **DISMISSED**.



William B. Moran
Administrative Law Judge

Distribution:

Winfield W. Murray, Esq. U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street,
S.W., Suite 3M25, Atlanta, GA 30303
murray.winfield.w@dol.gov

Roy T. Cornelius, CLR, U.S. Department of Labor, MSHA, 3837 S U.S. Hwy 25E, Barbourville,
KY 40906
cornelius.roy@dol.gov

Christopher C. Sorrows, Vulcan Construction Materials LLC, 800 Mt. Vernon Hwy NE, Suite
200, Atlanta, GA 30328
sorrowsc@vmcmail.com