

CCASE:
SOL (MSHA) V. MEDUSA CEMENT
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on January 18, 1980. The Petitioner did not file a formal brief, but filed a letter on January 25, 1980, containing representations in the nature of proposed findings of fact and conclusions of law. On February 4, 1980, the Respondent filed a letter in response to the Petitioner's representations.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
96893	11/7/78	56.9-3

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called as its witness Thomas W. Hubbard, an MSHA inspector.

The Respondent called as its witnesses Billy R. Berrett, an administrative assistant; John Fowler, the general quarry supervisor; and Richard P. Kistler, the plant manager.

B. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

M-1 is a copy of the first page of the proposed assessment compiled by the Office of Assessments.

M-2 is a copy of the second page of the proposed assessment compiled by the Office of Assessments.

M-3 is a copy of Citation No. 96893, November 7, 1978, 30 C.F.R. 56.9-3.

M-4 is a copy of a portion of a miner's complaint.

M-5 is a copy of a document styled "Inspection of Off the Highway Haulage Trucks."

2. The Respondent introduced the following exhibits into evidence:

O-1 is a copy of a letter.

O-2 is a copy of "Minimum Performance Criteria for Brake Systems for Off-Highway Trucks and Wagons - SAE J166."

O-3 is a three-page document containing copies of three daily operator's reports for the Euclid No. 2 haul truck.

O-4 is a three-page document containing copies of three daily operator's reports for various other vehicles.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding (Tr. 4, 5, 11).

2. The Respondent operates a mine, the products of which enter commerce or the operations of which affect commerce within the meaning of the 1977 Mine Act (Tr. 4, 5, 11).

3. The Respondent's size is set forth in the notification of proposed penalty in that the mine operates 200,000 to 300,000 annual hours of work and the controlling company operates 3 to 6 million annual hours of work (Tr. 4, 5, 11).

4. The Respondent had no history of previous violations prior to the subject citation (Tr. 4, 5, 11).

5. Assessment of the \$345 civil penalty proposed by the Office of Assessments will not affect the Respondent's ability to remain in business (Tr. 4, 5, 11).

B. Occurrence of Violation

On November 7, 1978, MSHA inspector Thomas W. Hubbard conducted a complaint investigation at the Respondent's Clinchfield Mine & Mill. He arrived at the mine at approximately mid-morning, accompanied by Mr. Bruce Dial, a training inspector (Tr. 19-21).

The complaint had been filed with the Occupational Safety and Health Administration and subsequently turned over to Inspector Hubbard (Tr. 23). The complaint (Exh. M-4) states, in pertinent part, as follows: "There is a large dump truck used to carry limestone from the pit to the crusher. The truck has no brakes. This is an off-road truck, used only on plant property."

While on the property, the inspector determined that the R-50 Euclid haul truck No. 2 was the truck referred to in the complaint. He made this determination on the basis of a telephone call to the complainant and a conversation with the union people involved (Tr. 62).

Billy R. Berrett, the Respondent's administrative assistant; Peter Shipes, the representative of the local union; and Mr. Dial were present when the inspector observed the truck (Tr. 25). The inspector testified that while walking toward the truck, he observed it running into both an earthen berm, described as a mound of dirt located approximately 40-50 feet in front of the primary crusher dump, and the bumper block at the primary crusher in order to stop (Tr. 25-26). Not only had the inspector noticed this, but it was also pointed out by the union official (Tr. 25). According to the inspector, the truck was loaded and coming from the pit at the time of this observation, but was not traveling very fast (Tr. 26-27).

Upon reaching the truck, the inspector asked the driver (FOOTNOTE 2) how he was "fixed for brakes" (Tr. 27). The inspector testified that the driver replied "not very well" or "not very good" or words to that effect (Tr. 27).

A test of the vehicle's braking system was thereupon conducted at the inspector's request. The test was conducted with the truck stationary, and the testing method employed was specified by the inspector. The driver placed the vehicle in third gear, placed his foot on the brake and depressed it to the lower limit of travel, and applied acceleration. The inspector testified that he noted the truck starting to "creep" when the driver started to accelerate. The inspector testified that "[i]mmediately when [the driver] started to accelerate, I asked [the driver] to try fourth gear; and the same thing happened. I asked him to apply his hand service brake and try it again. In all tests, the machine began to creep at the beginning of acceleration" (Tr. 27-28). The inspector initially requested the driver to "rev" the engine to 1,000 rpms during the test, but when the truck began to "creep" determined that such was unnecessary (Tr. 27, 37).

The subject citation (Exh. M-3) was thereupon issued alleging a violation of mandatory safety standard 30 C.F.R. 56.9-3 as follows: "Neither of the service brakes would hold in 3rd or 4th gear on the R-50 Euclid haul truck Co. No. 2 being used to haul." The cited mandatory safety standard states as follows: "Powered mobile equipment shall be provided with adequate brakes."

The sole question presented in this case is whether the brakes were adequate within the meaning of the regulation. According to the inspector, MSHA defines "adequate" as "capable of stopping and holding a loaded haul unit on any grade on the mine property" (Tr. 33-34). This interpretation

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reflects a concise and accurate interpretation of 30 C.F.R. 56.9-3. The inspector testified as an expert that the brakes on R-50 Euclid haul trucks will satisfy the requirements of the standard if they will hold the truck at 1,000 rpms while in third gear (Tr. 53). The test conducted by the inspector and his interpretation of the results obtained during the test are thus sufficient to establish a prima facie case for inadequate brakes.

Once this prima facie showing had been made, it was incumbent on the Respondent to produce probative evidence establishing the adequacy of the brakes in order to rebut the Petitioner's case. The Respondent failed to do this. None of the Respondent's witnesses had firsthand knowledge as relates to the condition of the brakes.

The Respondent attacks the testing method employed for two reasons: First, the Respondent notes that the inspector did not test the truck in a loaded position for stopping and holding on a grade, and argues that the Petitioner failed to establish a valid correlation between the test actually performed and the requirement that a loaded truck should stop and hold on any grade over which it had to travel at the mine (Respondent's Posthearing Brief, pp. 3-5). I disagree. The inspector's expert testimony is sufficient to establish a valid correlation between the test actually performed and the requirements of the standard.

Second, the Respondent argues that both the test taught to the inspector by MSHA (Exh. M-5)(FOOTNOTE 3) and the test actually performed are not true tests of the braking system in that they test merely the "weakest link in the chain," and, additionally, that the tests could result in damage to the equipment. According to the Respondent, Exhibit O-2 sets forth the proper method for testing brakes (Respondent's Posthearing Brief, pp. 5-7).

The evidence to which the Respondent points in support of its argument fails to establish that the test actually performed by the inspector yielded an inaccurate result. At most, it establishes a disagreement amongst experts as relates to the proper method of testing brakes.(FOOTNOTE 4)

Accordingly, I conclude that a violation of 30 C.F.R. 56.9-3 has been established by a preponderance of the evidence.

C. Negligence of the Operator

It cannot be determined precisely how long the condition had existed based on the information contained in the record. The inspector testified that the complainant had alleged that the Euclid haul truck No. 2 had been involved in an accident some days or weeks prior to November 7, 1978 (Tr. 31). However, Mr. John Fowler, the general quarry supervisor, successfully rebutted this testimony by establishing that the subject truck had not been involved in an accident (Tr. 81). However, the fact that the condition had existed long enough to process a miner's complaint indicates that the Respondent should have known of the condition.

The fact that the defective brakes were not mentioned on the daily operator's reports for the 3 days preceding the inspection (Exh. O-3) is not controlling. The absence of entries in these reports cannot be deemed probative evidence of the condition of the brakes. In this regard it is significant to note that the truck's inoperative tachometer was not noted in the reports (Tr. 88-89) even though a space was provided for reporting defective instruments, an omission fatal to acceptance of the reports as accurate.

Accordingly, it is found that the Respondent demonstrated ordinary negligence.

D. Gravity of the Violation

The truck was in use and contained one occupant (Tr. 32) when it was first observed by the inspector. Other haul vehicles, service trucks, and graders used the roadway (Tr. 31). The driver of the cited truck and the drivers of the other vehicles were exposed to serious injury.

Accordingly, it is found that the violation was serious.

E. Good Faith in Attempting Rapid Abatement

The truck was immediately taken to the repair shop for a brake adjustment (Tr. 69-70). The citation was terminated 3 hours and 5 minutes after issuance (Exh. M-3).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The parties stipulated that the Respondent has no history of previous violations (Tr. 4, 5, 11).

G. Size of the Operator's Business

The size of the Medusa Cement Company is rated at 3,728,274 manhours per year. The size of the Clinchfield Mine & Mill is rated at 222,120 manhours per year (Exh. M-1).

H. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

The parties stipulated that assessment of the \$345 civil penalty proposed by the Office of Assessments will not affect the Respondent's ability to remain in business (Tr. 4, 5, 11). Therefore, I find that a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Medusa Cement Company and its Clinchfield Mine & Mill have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspector Thomas W. Hubbard was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citation which is the subject matter of this proceeding.

4. The violation charged in Citation No. 96893, November 7, 1978, 30 C.F.R. 56.9-3, is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The parties filed posthearing submissions as set forth in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

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Citation No.	Date	30 C.F.R. Standard	Penalty
96893	11/7/78	56.9-3	\$300

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of \$300 assessed in this proceeding within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

The alleged violation is set forth in a combined citation and withdrawal order issued under sections 104(a) and 107(a) of the 1977 Mine Act. This document will be referred to as a citation throughout this decision.

~FOOTNOTE 2

According to Mr. Fowler, Mr. Richard Thorpe was the operator of the truck on the day in question (Tr. 84).

~FOOTNOTE 3

The inspector was instructed at the Mine Safety and Health Academy in Beckley, West Virginia, to employ the following technique for inspecting brakes on off-the-highway haulage trucks:

"With engine at low idle ask the operator to make three (3) full foot brake applications. Observe the brake pressure gauge, note if pressure drops to -0- or in the caution area. (Air is straight air - air over hydraulic). This will indicate to the inspector (if) need for further check. Ask the operator to make and hold full foot brake application, release park and or dump brakes, engage the transmission in 1st. gear, accelerate slowly. If machine creeps, note at what speed, low idle, 1/2 - 3/4 or full throttle. This will indicate additional check is needed" (Exh. M-5).

~FOOTNOTE 4

If the Respondent questions the propriety of MSHA approved testing methods or alleges unauthorized testing methods used by MSHA inspectors, then the Respondent should bring its concerns to the attention of responsible MSHA officials. Neither MSHA nor its inspectors are authorized to inflict damage on a mine operator's equipment.