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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. KENT 80-92 A/O No. 15-11423-03002
v.		Docket No. KENT 80-158 A/O No. 15-11423-03003
MIDDLE KENTUCKY CONSTRUCTION, INC.,	RESPONDENT	Crapshooter No. 3 Strip Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner Byron W. Terry, Safety Director, Middle Kentucky Construction, Inc., Owensboro, Kentucky, for Respondent

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (Petitioner) filed proposals for penalties in Docket Nos. KENT 80-92 and KENT 80-158 on January 7, 1980, and February 11, 1980, respectively. The proposals were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act), and allege a total of five violations of various provisions of the Code of Federal Regulations as set forth in citations issued pursuant to section 104(a) of the 1977 Mine Act. Answers were filed by Middle Kentucky Construction, Inc. (Respondent), a prehearing order was issued and the cases were scheduled for hearing.

The hearing was held on June 24, 1980, in Owensboro, Kentucky with representatives of both parties present and participating. The cases were consolidated for purposes of hearing and decision. Petitioner made an oral motion for approval of settlement as relates to Citation No. 799605, and an order approving the settlement is included in this decision.

The parties waived the right to file posthearing briefs and proposed findings of fact and conclusions of law.

II. Violations Charged

(A) Docket No. KENT 80-92

Citation No.	Date	30 C.F.R. Standard
799603	09/07/79	77.1605(d)
799604	09/07/79	77.1605(b)
799605	09/10/79	71.500(a)

(B) Docket No. KENT 80-158

Citation No.	Date	30 C.F.R. Standard
799602	09/07/79	77.1605(b)
799618	10/15/79	77.1605(b)

III. Witnesses and Exhibits

(A) Witnesses

Petitioner called Federal mine inspector Earl T. Liesure as a witness.

Respondent called Byron W. Terry, the company's safety director, as a witness.

(B) Exhibits

(1) Petitioner introduced the following exhibits in evidence:

M-1 is a copy of a computer printout compiled by the Directorate of Assessments listing the history of previous violations at the Crapshooter No. 2 Strip Mine for which Respondent had paid assessments beginning November 1, 1976, and ending October 31, 1978.

M-2 is a copy of Citation No. 799603, September 7, 1979, 30 C.F.R. 77.1605(d) and a copy of the termination thereof.

M-3 is a copy of Citation No. 799604, September 7, 1979, 30 C.F.R. 77.1605(b) and a copy of the termination thereof.

M-4 is a copy of Citation No. 799605, September 10, 1979, 30 C.F.R. 71.500(a) and a copy of the termination thereof.

M-5, page 1, is a copy of Citation No. 799602, September 7, 1979, 30 C.F.R. 77.1605(b) and a copy of a subsequent action form extending the time period for abatement.

M-5, page 2, is a copy of the termination of Citation No. 799602, September 7, 1979, 30 C.F.R. 77.1605(b).

M-6 is a copy of Citation No. 799618, October 15, 1979, 30 C.F.R. 77.1605(b) and a copy of the termination thereof

(2) Respondent introduced the following exhibits in evidence:

O-1 contains photocopies of two photographs.

O-2 contains photocopies of four photographs.

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 size of 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) Respondent is subject to the 1977 Mine Act (Tr. 2-3).

(2) The Administrative Law Judge has jurisdiction in the above-captioned cases (Tr. 2-3).

(3) Respondent operates the mine designated as Crapshooter No. 3 (Tr. 2-3).

(4) Respondent is a mine operator with only one mine and currently employs 21 employees or miners (Tr. 2-3).

(5) Respondent's previous history of violations is not excessive and there appear to be no repeated violations within the preceding 24 months (Tr. 2-3).

(6) Respondent's Crapshooter No. 3 Mine was inspected by Inspector Earl T. Liesure on the dates in question (Tr. 3).

(7) The citations were properly issued to Respondent (Tr. 3).

(8) Any penalty assessed will not adversely affect Respondent's ability to continue in business (Tr. 3).

(B) Citation No. 799603, September 7, 1979, 30 C.F.R. 77.1605(d)

Occurrence of Violation

This citation was issued by Federal mine inspector Earl T. Liesure at approximately 9:45 a.m. on September 7, 1979, alleging a violation of mandatory safety standard 30 C.F.R. 77.1605(d), in that "[t]he red Chevrolet Model 10 explosives truck is not provided with an adequate audible warning device (horn) in that the horn will not operate when control button is pushed. This truck is often loaded with explosives and MUST be capable of sounding a warning to other vehicles when necessary to avert collision" (Exh. M-2). The cited mandatory safety standard provides, in pertinent part, as follows: "Mobile equipment shall be provided with audible warning devices."

Inspector Liesure described the vehicle in question as a red Chevrolet, Model 10, half ton pickup truck, and testified that it was parked at the drill site. The drill site was described as an area atop the highwall where a drill rig had been set up for the purpose of boring holes into the earth for the insertion of explosive charges to blast away the overburden covering the coal seam. The inspector asked an employee to test the horn, and thereupon discovered that it would not operate when the horn button was pushed.

Respondent concedes that the truck was not provided with an adequate audible warning device, but claims by way of an affirmative defense that the truck had been removed from service on or around September 5, 1979, because of poor brake pressure on the service brake and was therefore not in use on September 7, 1979.

The testimony of Mr. Byron Terry, Respondent's safety director, reveals that the procedure allegedly used at the Crapshooter No. 3 Strip Mine to remove the vehicle from service was insufficient as a matter of law to constitute removal from service within the meaning of the 1977 Mine Act. In Eastern Associated Coal Corporation, 1 FMSHRC 1473, 1979 OSHD par. 23,980 (1979), a roof fall on the underground track haulage made it impossible to remove a jitney to the maintenance shop to repair an inoperable parking brake. Accordingly, the mine operator placed a danger tag on the machine and permitted the machine to remain in the mine's active workings. The Federal Mine Safety and Health Review Commission (Commission) set forth the following test for determining what constitutes removal from service within the meaning of the 1977 Mine Act:

> It is undisputed that the inoperable parking brake was a violation. For a violation such as this, there are two basic ways to abate - repair or withdrawal from service. Assuming that the jitney could not have been repaired safely in the time set for abatement, the question in this case is whether a danger tag alone constitutes withdrawal from service. We hold that tagging the jitney was not sufficient to withdraw the

jitney from service because the danger tag did not
prevent

> the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. To abate under these circumstances, the jitney should have been made inoperable.

1 FMSHRC at 1474. (footnote omitted)

The alleged removal from service at the Crapshooter No. 3 Strip Mine did not entail rendering the equipment inoperable and, in fact, did not even entail the use of danger tags. Respondent relied upon oral instructions to miners directing them not to use those pieces of equipment classified as unsafe. Nothing prevented actual use of the equipment. A breakdown in those channels of communication upon which Respondent relied could result in a miner remaining unapprised of Respondent's decision to remove a given piece of equipment from service. Additionally, miners actually apprised of the decision could knowingly or inadvertently fail to heed the instructions. In order to affect removal from service within the meaning of Eastern Associated Coal Corporation, the truck should have been rendered inoperable because the truck remained in the mine's active workings. The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. 77.2(a)

Furthermore, Mr. Terry saw the truck on or around August 30, 1979, but did not see it again until on or around September 10, 1979. Therefore, he had no actual, firsthand knowledge as to either its status or location when the citation was issued, and testified on the basis of information provided to him by hearsay declarants. The record does not disclose the requisite information necessary to determine whether the hearsay statements are reliable. For example, it does not disclose the number of hearsay declarants, their identities, or whether they had actual, firsthand knowledge as to the status and location of the truck when the citation was issued. It is particularly significant to note that the testimony adduced by Respondent as to the truck's location is contradictory. At one point, Mr. Terry testified that it was in the pit area (Tr. 68) and at another point appeared to imply that it had been left at the drill site because employees simply had not yet removed it to a suitable location for an out of use vehicle. I am unable to classify the assertion that the truck was in the pit area as accurate because it contradicts the actual observations of the inspector. Furthermore, I am unable to accept the testimony of Mr. Terry insofar as it implies that an out of service vehicle would be kept at the drill site because such placement would impede the drilling operation and also subject the truck to damage when explosive charges were detonated.

In view of the foregoing, it is found that the cited vehicle was in actual use at the drill site on September 7, 1979, and that it was not provided with an adequate audible warning device. A violation fo 30 C.F.R. 77.1605(d) has been established by a preponderance of the evidence.

Negligence of the Operator

The condition should have been detected during the inspection required by 30 C.F.R. 77.1606(a). Therefore, Respondent should have known that the cited condition existed.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

The truck bore markings designating it as an explosives carrier and was located in an area of the mine where explosives carriers are customarily found (Tr. 20-21). Such vehicles are used to transport explosives from the magazine to the job site, but the best available evidence indicates that no explosives were actually on the truck.

Respondent contends that another truck had been assigned to serve as explosives transport after September 5, 1979, and that such truck was in use on the day in question but that it did not bear the warning signs required by 30 C.F.R. 77.1302(c). Accordingly, Mr. Terry speculated that the employees attempted to conceal the truck from the inspector by delaying its departure from the magazine so as to avoid the issuance of another citation. However, no reliable evidence was presented to support this claim.

The fact that a vehicle bearing markings designating it as an explosives carrier was in actual use, in an area of the mine where such vehicles are customarily found when in use, is sufficient circumstantial evidence to establish that the vehicle was in actual use as an explosives carrier. Since Respondent has failed to adduce reliable evidence to the contrary, it is found that the truck in question was in actual use as an explosives carrier.

The lack of a horn would prevent the sounding of an audible warning in the event of an emergency. The two or three individuals normally involved in the operation of the explosives truck, occupants of other vehicles and pedestrians were thus exposed to the possibility of injury (See, Tr. 10-12).

Accordingly, it is found that moderate gravity was present.

Good Faith in Attempting Rapid Abatement

Abatement was due by 12 noon on September 10, 1979 (Exh. M-2). The citation was terminated at 7:30 p.m., on September 10, 1979, when the inspector returned to the mine and determined that the horn had been repaired (Exh. M-2).

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

(C) Citation No. 799604, September 7, 1979, 30 C.F.R. 77.1605(b)

Occurrence of Violation

This citation was issued by Inspector Liesure at approximately 11:15 a.m., on September 7, 1979, citing Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1605(b), in that "[t]he Michigan 275 front-end loader

(SN425C284) is not equipped with an adequate park brake in that they will not hold the equipment on grade when the control is applied." (Exh. M-3). The cited mandatory safety standard provides as follows: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

The inspector's testimony is in accord with the statements contained in the citation, and is sufficient to establish a prima facie showing that the parking brake on the front-end loader was inoperable.

It is clear that the term "parking brakes," as used in the regulation, refers to a braking system separate and independent from the service and emergency brakes on the front-end loader. Respondent presented evidence as to how the emergency brake system functioned. Respondent's arguments are rejected to the extent they imply that the emergency brake system meets the requirement for "parking brakes" as set forth in the regulation.

Accordingly, it is found that a violation of 30 C.F.R. 77.1605(b) has been established by a preponderance of the evidence in that the cited front-end loader was not equipped with an adequate parking brake.

Negligence of the Operator

The condition should have been detected during the inspection required by 30 C.F.R. 77.1606(a) (Tr. 31). Therefore, Respondent should have known of the condition.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

The front-end loader was parked on a slight grade in the general parking area. Employees and other pieces of equipment were in the area. The additional equipment was within a few feet of the front-end loader. The inspector's testimony indicates that the absence of the required parking brake could permit the machine to roll down an incline resulting in injuries to miners.

The front-end loader was equipped with emergency and service brakes, both of which resulted in brake application when air pressure was reduced below 60 pounds per square inch. According to Byron Terry, who possessed actual experience in the operation of front-end loaders, using the emergency brake system to release the air pressure when the machine was parked resulted in an automatic brake application.

In view of the foregoing, it is found that the violation was accompanied by moderate gravity.

Good Faith in Attempting Rapid Abatement

Abatement was due by 8 a.m. on September 14, 1979 (Exh. M-3). The citation was terminated on September 10, 1979, when the inspector returned to the mine and determined that the parking brake had been repaired (Exh. M-3).

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

(D) Citation No. 799602, September 7, 1979, 30 C.F.R. 77.1605(b)

Occurrence of Violation

Inspector Liesure issued this citation at approximately 9:45 a.m. on September 7, 1979, citing Respondent for a violation of 30 C.F.R. 77.1605(b), in that "[t]he red chevrolet Model 10 explosives truck is not equipped with adequate parking brakes in that when control is applied the brakes will not truck on grade." (Exh. M-5, p.1).

The truck in question was the same truck cited by Inspector Liesure in Citation No. 799603 and was located at the drill site when the subject citation was issued. The inspector's testimony as to the condition of the parking brakes is in accord with the statements contained in the citation.

Respondent concedes that the truck was not equipped with an adequate parking brake, but raises the same defense raised in connection with Citation No. 799603. For the reasons set forth previously in this decision, the defense is specifically rejected.

Accordingly, it is found that a violation of 30 C.F.R. 77.1605(b) has been established by a preponderance of the evidence in that the truck in question was not equipped with an adequate parking brake.

Negligence of the Operator

The condition should have been detected during the inspection required by 30 C.F.R. 77.1606(a). Therefore, Respondent should have known of the condition.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

The truck was parked in gear and on a grade at the drill site. It was within 15 to 20 feet of other equipment and approximately four to six people were exposed to physical injury. As noted previously, the best available evidence indicates that no explosives were actually on the truck.

Accordingly, it is found that the violation was accompanied

by moderate gravity.

Good Faith in Attempting Rapid Abatement

The citation set forth 12 noon on September 10, 1979, as the termination due date. The time period for abatement was ultimately extended to 8 a.m. on September 27, 1979, because repair parts were on order, but had not arrived (Exh. M-5, p. 1). When the inspector returned to the mine on October 31, 1979, he examined the truck and determined that the parking brake had been repaired. Accordingly, the citation was terminated (Exh. M-5, p. 2).

In view of the foregoing, it is found that Respondent demonstrated good faith in attempting rapid abatement.

(E) Citation No. 799618, October 15, 1979, 30 C.F.R. 77.1605(b)

Occurrence of Violation

Inspector Liesure issued this citation at approximately 11:15 a.m. on October 15, 1979, citing Respondent for a violation of mandatory safety standard 30 C.F.R. 77.1605(b), in that "[t]he red Chevrolet Model 10 explosives truck is not equipped with adequate service brakes in that when control pedal is activated there is no braking action to wheels." (Exh. M-6). The truck in question is the same truck cited in Citation Nos. 799602 and 799603.

The inspector's testimony as to the condition of the service brakes is in accord with the statements contained in the citation, and reveals that the brake failure was caused by hydraulic fluid leaking from the brake system. The inspector's testimony further reveals that the truck was not in actual use when the citation was issued, but that it was parked in a parking area near the pit.

Respondent concedes that the truck was not provided with adequate service brakes, but raises the same defense asserted with respect to Citation No. 799603, claiming that the vehicle had been removed from service on or around September 5, 1979. It is significant to note that the machine had not been rendered inoperable and, in accordance with the Commission's decision in Eastern Associated Coal Corporation, it is found that the truck in question remained in service as a matter of law on October 15, 1979. Accordingly, Respondent's proffered defense is rejected.

In view of the foregoing, it is found that a violation of 30 C.F.R. 77.1605(b) has been established by a preponderance of the evidence in that the truck in question was not provided with adequate service brakes.

Negligence of the Operator

Respondent reached the conclusion on or around September 5, 1979, that the vehicle was not safe to be operated due to service brake defects. Yet the truck was in actual use on September 7, 1979, and had not been effectively removed from service as of October 15, 1979.

Accordingly, it is found that Respondent demonstrated more than ordinary negligence.

Gravity of the Violation

The absence of operable service brakes exposed the occupants of the vehicle, the occupants of other vehicles, and pedestrians to serious injury. Accordingly, it is found that the violation was serious.

Good Faith in Attempting Rapid Abatement

The inspector was of the opinion that the operator demonstrated good faith based upon the fact that the vehicle was removed from service. The citation was terminated when the inspector returned to the mine on October 31, 1979, and determined that the brakes had been repaired (Exh. M-6).

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

(F) Size of the Operator's Business

The parties stipulated that Respondent operates only one mine and employees 21 miners. Therefore, it can be inferred that Respondent is a small operator.

(G) History of Previous Violations

The parties stipulated that Respondent's history of previous violations is not excessive. Additionally, Exhibit M-1 reveals that Respondent had eight violations at its Crapshooter No. 2 Strip Mine for which assessments had been paid between November 1, 1976, and October 31, 1978. The most recent violations listed thereon occurred on July 14, 1977.

Accordingly, it is found that Respondent has a good history of previous violations.

(H) Effect of a Penalty on the Operator's Ability to Remain in Business

The parties stipulated that any penalty assessed will not affect Respondent's ability to remain in business.

VI. Motion to Approve Settlement

Petitioner made an oral motion on the record to approve settlement which is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
799605	09/10/79	71.500(a)	$48	$48

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have

complied with the intent of the law that settlement be a matter of public record.

The foregoing reasons were advanced in support of the proposed settlement:

[MR. DRUMMING:] With respect to Citation No. 799605, violation of standard 71500A, for lack of toilet, a sanitary toilet and toilet tissue. Mr. Terry has advised that they do not wish to contest this citation and at this point shall I offer it as a motion to settle for this one or --

JUDGE COOK: (COURT INTERPOSES) If you desire to, yes.

MR. DRUMMING: Okay.

JUDGE COOK: It is not necessary to go into any other details other than question of gravity and negligence and good faith and if Mr. Terry wants to propose or agree to some settlement, you can proceed with that now.

MR. DRUMMING: Okay. Standard 71500A and it was assessed by assessment officer at $48. The degree of negligence such as ordinary negligence. The seriousness listed as not serious. The lack of toilet paper and sanitary toilet will not lead to any immediate injury or harm to the employees, but over the long run or long term effects of inadequate health facilities for the elimination of waste materials, that would adversely effect [sic] the health and welfare of the mine employees. The good faith abatement of this citation was assessed as being normal good faith and that it was assessed in the time stipulated.

JUDGE COOK: Alright. Now, Mr. Terry, what's your position?

MR. TERRY: Sir, on that one as I indicated to Mr. Drumming, we did state that we would like to go ahead and settle this. It was a case of oversight on the company's part. We had the facilities at a previous mine that had neglected to be moved over and due to the high frequency of use, actually these portable toilets when they moved it, rather than bring the old one over they acquired two new ones and had them placed on the mine site. This inspection was on the tenth of September and as of this date they have been cleaned periodically, but they have not been used from the time that they were installed. So, this is the reason of the negligence on our part. They are not a heavy demand use. And we goofed, I mean, that's, but, we don't feel that it was an extremely serious situation, but we didn't stay in compliance with what we should have.

JUDGE COOK: Alright. Then, are you agreeing with the settlement?

MR. TERRY: Yes, sir.

JUDGE COOK: Alright. Mr. Drumming and I take it that you are moving at this time for approval of that?

MR. DRUMMING: Yes, Your Honor. We are moving for approval of the settlement of 100 percent payment of the $48 penalty.

(Tr. 46-48).

The reasons given above in support of the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest. Accordingly, an order will be entered approving the settlement.

VII. Conclusions of Law

(1) Middle Kentucky Construction, Inc., and its Crapshooter No. 3 Strip Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

(2) Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

(3) Federal mine inspector Earl T. Liesure was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations involved in these proceedings.

(4) The violations charged in Citation Nos. 799602, 799603, 799604, and 799618 are found to have occurred as alleged.

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

VIII. Penalties Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

(A) Docket No. KENT 80-92

Citation No.	Date	30 C.F.R. Standard	Penalty
799603	09/07/79	77.1605(d)	$ 75
799604	09/07/79	77.1605(b)	100
799605	09/10/79	71.500(a)	48 (settlement)

Citation No.	Date	30 C.F.R. Standard	Penalty
799602	09/07/79	77.1605(b)	$100
799618	10/15/79	77.1605(b)	100

ORDER

IT IS ORDERED that the proposed settlement outlined in Part VI, supra, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent pay civil penalties in the amount of $423 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge