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SOL (MSHA) v. W. B. COAL
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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 Proceeding Docket No. LAKE 79-218 A.O. No. 33-03300-03005 I
v.	
W. B. COAL COMPANY, RESPONDENT	Ann Strip No. 1 Mine

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Edwin S. Bernstein

On November 20, 1980, I conducted a hearing in Pittsburgh, Pennsylvania, to determine whether Respondent violated mandatory safety standards as alleged in two citations issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 (the Act), and a withdrawal order issued pursuant to Section 107(a) of the Act.

The parties stipulated, and I find:

1. At the time that the citations and order were issued, Respondent operated, and continues to operate, the Ann Strip No. 1 Mine. This is a surface coal mine, the products of which enter and affect interstate commerce.

2. Respondent and the Ann Strip No. 1 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. I have jurisdiction over this proceeding.

4. During calendar year 1978, the mine produced 56,952 tons of coal and Respondent produced 118,476 tons of coal in all of its operations. Respondent has approximately 50 employees and is a small coal operator.

5. At all times pertinent to the issuance of the citations and order, Inspectors D. Ray Marker and Willard F. Poe were, and still are, authorized representatives of the Secretary of Labor.

6. Copies of the citations and order are authentic and were properly served upon Respondent. However, Respondent did not stipulate as to the truthfulness or relevancy of any statements in these documents.

7. The alleged violations were abated in a timely fashion. The operator demonstrated good faith in achieving abatement.

8. Respondent has a good history of prior violations.

9. The assessment of civil penalties will not adversely affect Respondent's ability to remain in business.

Richard J. Neal, Willard F. Poe, Lester R. Ohler, and D. Ray Marker testified for Petitioner. Melvin Anderson, Joseph Zalesky, Richard Lynch, George Pincola, and Max Sovell testified for Respondent. Alfred Haverfield testified for both parties.

Richard Neal testified that as of February 16, 1979, he had been employed by Respondent for about ten months. He was hired as a blaster, but he also operated drills, bulldozers, and pan vehicles. A pan vehicle is a track vehicle with blades which is used to spread and collect topsoil.

On the morning of February 16, 1979, Mr. Neal began work at 7 a.m. He had been operating a bulldozer for about 45 minutes when he broke a steering clutch and decided to switch vehicles. He did this without obtaining permission or informing anyone at W. B. He began operating a Model 631B pan vehicle, also known as a scraper. A scraper is equipped with a bowl, or pan, which collects dirt. The weather was cold that day, and it was drizzling freezing rain. Mr. Neal testified that he moved four or five loads of dirt along a particular road. In order to get to this road, Mr. Neal had to drive down a hill into a valley, and then up another hill. He did not recall whether there were berms (FN.1) on the side of the road at the time. On his last trip down the road, he turned the wheel to the right in order to make a turn. The road was icy and the machine started sliding to the left. Mr. Neal stated that he gave the machine a little more throttle, and when it regained its traction, it "shot across the other side of the road," hit an embankment, and flipped over.

When asked about the adequacy of the machine's brakes, Mr. Neal stated that when he started operating the scraper that day, the brakes felt inadequate to him. He also stated that by dropping the scraper bowl in the back of the machine, it was possible to stop the scraper without the brakes. He

added, however, that he was unable to do this at the time of the accident because he was carrying the bowl in a high position in order to clear a bump in the road. This made it impossible to drop the bowl quickly.

Mr. Neal admitted that he was not wearing a seatbelt at the time of the accident, but that the scraper was equipped with rollover protection.

He also said that he was generally assigned work by his foreman, Alfred Haverfield. He stated that Mr. Haverfield conducted safety meetings but Mr. Neal did not recall being instructed to wear a seatbelt. He did receive a safety booklet discussing the machine's operation, but he never read it.

On cross-examination, Mr. Neal testified that before February 16, 1979, he had operated the pan scraper for a couple of hours in November or December, 1978. He also operated it the previous July on a reclamation project. He said he had between 120 and 130 hours of experience operating a scraper for Respondent. Prior to coming to W. B., he had no scraper experience. At W. B., he spent most of his time operating a drill. When asked what he did with the safety manual he received, he said he probably threw it in a drawer at home.

Mr. Neal explained that he did not ask permission to use the scraper on February 16 because he did not see a supervisor nearby. He indicated, however, that there are radios on the site, including one in a nearby dragline. The radios could have been used to contact his supervisor or foreman. He stated that his foreman drove past him but he was not certain that the foreman saw him.

During cross-examination, Mr. Neal repeated that he knew about the bad brakes when he began work with the scraper. He also repeated that the machine could be stopped by dropping the bowl. He was asked about the bump which caused him to carry the bowl high, and indicated that he did not attempt to scrape it or smooth it out by dropping dirt.

Mr. Neal admitted to several inconsistencies between his testimony in this case and his testimony in a prior matter. He admitted that in previous testimony he had stated that he was instructed to keep the bowl where it could be used to stop the machine. He also had previously testified that he did not know if his wheels had locked up during the accident, while at this proceeding he testified that the wheels had to be spinning, although he did not see them spin. He said a vehicle such as this can be stopped on ice by lowering the bowl, but he added that the ice had been removed from this road early on the day of the accident, and he could have removed it himself with the scraper.

Alfred Haverfield was the mine foreman at the Ann Strip No. 1 Mine on February 16, 1979. He stated that he arrived at the mine around 6:15 or 6:30 a.m. After inspecting the road

conditions, he ordered all road areas to be cleaned with dozers. He told Mr. Neal and George Pincola to do this.

They were instructed to cut the ice and muck and remove it from the area. He stated that he was not aware that Mr. Neal was operating a scraper, and that he did not see Mr. Neal that day until immediately after the accident. He did not recall how high the berms on the road were that day, but he disagreed with the suggestion that they were only six inches high. He could not recall whether the berm heights changed between February 16 and February 20, 1979. He testified that before February 16, 1979, W. B. tried to maintain berms approximately three feet high because the company had been advised by MSHA inspectors that a three-foot height would be adequate. Mr. Haverfield also stated that it is difficult to maintain berm heights because dirt constantly falls on a road. This causes the height of the road to increase relative to the height of the berms. An operator has to continually remove dirt from the road to maintain berms. If there is much dirt spillage, the operator may have to scrape the roads four or five times a day.

Mr. Haverfield testified that before each shift, mechanics inspect equipment visually and check the water and oil. He did not believe that they checked the brakes on this machine or that they usually check brakes before shifts because the machines are usually parked when they are checked.

He stated that the firm held weekly safety meetings, and that all employees were told to wear seatbelts. Before February 16, 1979, four or five employees had been fired for misuse and improper maintenance of equipment, mainly draglines. On cross-examination, he added that if an employee finds a defect in a machine, he is instructed to shut down the equipment and contact his foreman by radio. There are several radios in the area, including one in a dragline about 100 to 150 yards away from the accident site.

Mr. Haverfield reiterated that he did not give Mr. Neal permission to operate the pan scraper. W. B.'s policy is to forbid operators from changing machines without first notifying a foreman. Mr. Haverfield was in the process of bringing another man to the site to operate the scraper in question when he learned of the accident.

After the accident, Mr. Haverfield said he took Mr. Neal to the hospital. The men discussed the accident at that time. Mr. Neal told Mr. Haverfield that he had not been wearing a seatbelt, and that he had been carrying the bowl high. Normal procedure is to carry the bowl low. Mr. Haverfield stated that if Mr. Neal had carried the bowl low, he could have prevented the accident. Mr. Neal did not mention lack of brakes to Mr. Haverfield on the way to the hospital.

Mr. Haverfield also discussed Mr. Neal's prior experience with a pan scraper. Mr. Neal had previously spread topsoil in a reclamation area using this equipment, but that area had been relatively flat. On the morning of the accident, Mr. Neal was assigned to a dozer called a "push cat." Mr. Haverfield said he did not consider Mr. Neal to be an experienced scraper operator

in the area he was working. He said the weather that morning was freezing rain, but no drying material had been dropped on the road.

Willard F. Poe, an MSHA coal mining inspector, inspected the W. B. site on February 20, 1979, along with Inspector D. Ray Marker. Mr. Poe found that the berms along the road where Mr. Neal had his accident were inadequate. He stated that a berm can be made of a mound of any material. The berm he observed was made either of soil or shale. The height of the berm ranged from six inches to 24 inches, and it ran for 50 to 60 feet along the road. MSHA's policy is that berms should be the height of the axle on the largest machine which travels the roadway. That would have been 42 inches for the berms in this area. He also stated that in this case both sides of the roadway were "outer banks," as that term is used in 30 C.F.R. 77.1605(k). One side was the outer bank going in one direction, and the other was the outer bank going in the other direction. He therefore felt that both sides of the the road required berms.

On cross-examination, Mr. Poe stated that Mr. Neal's scraper was fully loaded at the time of the accident, and thus weighed about 50 to 60 tons. He did not know whether or not a berm of axle height would have restrained the scraper under the circumstances of this accident. He issued Citation No. 784603 for inadequate berms at 9 a.m. that day.

Leslie R. Ohler, another MSHA coal mine inspector, stated that he accompanied Inspector Marker on a visit to the hospital to see Mr. Neal on February 21, 1979. Mr. Marker conducted most of the interview with Mr. Neal. Upon leaving the hospital, the men determined that an imminent danger order would have to be issued for inadequate brakes on the scraper. They proceeded to the mine and inspected the scraper. They noted that some hydraulic hoses and air hoses were broken, and Mr. Marker told Mr. Ohler that an air valve leading to the scraper trailer had been turned off. This indicated to Mr. Ohler that no air was being pumped to the trailer. Mr. Marker also told Mr. Ohler that the push rods of the trailer's braking mechanism were inoperable. They were packed with ice and frozen dirt, and there was no indication that they had been moving. In Mr. Ohler's words, "There was no shiny place on it. It was rusted and sealed over." Mr. Ohler told Mr. Marker that he would have to issue the order, and Order No. 784405 was issued late that morning.

Inspector D. Ray Marker was MSHA's next witness. He stated that he visited the mine on February 21, 1979, with Inspector Ohler. They inspected the scraper which had been in the accident. Mr. Marker noted that the valve which supplied air to the rear brakes was "across line," or in the "off" position. He also noticed that several brake lines were severed, and that the gooseneck of the vehicle was cracked. He found frozen brown dirt around the push rods, and saw no shiny marks on the rods. This indicated to him that rods were not operating. He concluded that the rear brake system had been inoperative for "quite a while."

On cross-examination, he stated that during a preshift inspection, a qualified person should check equipment to see if it is safe. He stated that he did not know when the air valve was turned off on the vehicle, when the hoses were broken, or

when the gooseneck was damaged. He could not state

whether or not these things happened during the accident. He also could not say whether the dirt that he found around the push rods accumulated during the accident or prior to it. He stated that it could have gotten there during the accident.

He stated that a pan scraper can be stopped by dropping the bowl, and on reasonably level ground, the brakes should be able to stop it. On a slope, however, it is more difficult for brakes to stop a scraper. This is especially true when the scraper is loaded. Speed can also affect the brakes' ability to stop the scraper. He said the grade on this road was about 14 percent, and that proper brakes could stop a scraper on such a road. He added that the bowl would be less useful on icy roads.

Mr. Marker stated that the violation was abated on June 11, 1979. This was the first time Respondent informed MSHA that the machine had been repaired.

On cross-examination, Mr. Marker stated that he and his wife own the land which W. B. mines and receive monthly payments from W. B. Mr. Marker first stated that he had no discussions with, or complaints about, W. B. concerning royalty amounts. However, he subsequently admitted that, in a previous proceeding, he had testified that he made such complaints. He explained that he had problems with the dates that he received the royalty checks. The checks sometimes came a day late, he said. He also had problems with W. B.'s watering the road in front of the property. He stated he once had an excellent relationship with W. B. Now, he described it as "better than poor," but not good. He stated, "It's not my fault." He denied that he had ever asked W. B. for a job.

Melvin Anderson, another scraper operator, was Respondent's first witness. He testified that he was sick on February 16, 1979, but on February 15, the day before the accident, he used the scraper in question. Asked about the condition of the vehicle's brakes, he stated, "They were, I guess, what you would call adequate brakes." He did not list the brakes as being bad on his timesheet, but he added that it is not his habit to use the brakes. Instead, he usually uses a hand lever to lower the bowl for stopping. He stated that the bowl can be raised as much as two feet when empty, but that when the bowl is full, he normally operates with the bowl six to eight inches off the ground.

Joseph Zalesky testified that at the time of the accident, he serviced and repaired heavy equipment, including the vehicle in question. He has had about 22 years of extensive experience in repairing this type of machinery. He stated that he now works for, and is part owner of, a company known as Rebuild, Inc. He was working at W. B.'s facility on the day of the accident.

Mr. Zalesky first saw the scraper shortly after the accident, when it was lying at the bottom of a pit. He uprighted the scraper with the help of dozers and a loader. He steered the vehicle as it was being pulled from the pit. Upon examining the

brake gauge, he noticed that it had about 110 pounds

of pressure. The indicator was in the green, or satisfactory, area. He also noted that it had adequate braking power at the time to steer it. However, he noted that the gooseneck area of the vehicle had been damaged, and that several brake lines had been broken. He could not state whether or not the brakes were in good condition at the time of the accident. He was not able to test the brakes and determine whether some of these lines broke during the accident or had broken previously.

Mr. Zalesky also stated that he had repaired the vehicle in early February, and had found the brakes to be adequate at that time.

Richard Lynch, W. B.'s superintendent since it began operations 7-1/2 years ago, testified that he has 32 years of experience operating heavy equipment, including pan scrapers similar to the one at issue. He stated that he and Mr. Haverfield assign employees to their jobs, and that Mr. Neal was assigned to a Caterpillar bulldozer on February 16, 1979. Before the accident, he did not see Mr. Neal operating the scraper in question. He stated that the road was "generally smooth and frozen," and that freezing rain was falling at the time of the accident. In his opinion, the accident was caused because Mr. Neal was driving too fast and locked all four wheels when he applied the brakes and skidded. Mr. Lynch noticed some skid marks, and the scraper bowl was in a high position. He concluded that the wheels had locked as a result of braking because if they had not locked, he would have seen tread marks.

He also stated that a bowl should be carried no higher than necessary. By carrying the bowl low, the operator can stop quickly, as well as maintain a smooth road. He stated that the normal method of stopping such a vehicle is to drop the bowl slightly. Mr. Neal's big mistake was in carrying the bowl high. This created a high center of gravity and made the machine tip more easily. It also prevented him from lowering the bowl quickly to stop the vehicle. With respect to the bump that Mr. Neal testified prevented him from keeping his bowl low, Mr. Lynch stated that the bump could have been removed very easily, or else the operator could have filled up the area by dropping dirt. In Mr. Lynch's opinion, if Mr. Neal had dropped his bowl, he would have been able to stop the scraper.

Mr. Lynch testified that W. B. stressed maintaining berms, but he added that berms could change very quickly depending on the type of work which was being done. He stated that the company has tried to maintain berms at axle height since the accident. Before the accident, they were never told of a specific height. He stated that even if the berm in question had been axle height, the vehicle would have rolled over, and might have rolled over more than it did.

Mr. Lynch asserted that W. B. instructs its operators to wear seatbelts. This is because the company does not want MSHA to penalize it, and does not want its employees to be hurt.

He also stated that it is against W. B.'s policy for an operator to switch vehicles without permission. He would not have given Mr. Neal permission to use the scraper on the day in question. Caterpillar Tractor, the manufacturer of this vehicle, says it generally takes about a year for an individual to become proficient in the operation of a pan scraper. This is only an average, however. Some men take more time, and some take less.

He also stated that under the company's policies, if an operator finds his brakes to be inadequate, he is supposed to tell either his supervisor or a mechanic. Mr. Neal was within 200 feet of a dragline where there was a radio, and he could have informed someone before using the scraper.

Mr. Lynch also took issue with a statement made by Inspector Marker. He said Mr. Marker had asked him for a job, but was turned down.

On cross-examination, Mr. Lynch stated that on February 16, 1979, he arrived at work around 6:15 a.m. and inspected the work areas. He did not notice the bump on the road which Mr. Neal mentioned. He stated that the berms on the righthand side were about three feet high where the accident occurred.

He also said that he believes Mr. Neal had a total of four to five days of pan scraping experience. He explained that Mr. Neal worked the pan scraper one to two hours a day after his normal duties, which usually involved operating a drill. W. B.'s employees are paid based on the total number of hours worked, and the hourly rate on the highest paid machine worked. Since operating a scraper pays more than operating a drill, Mr. Neal would put in for a full day operating a scraper, even though he may have actually operated one for only one or two hours. Thus, although on the accident report Mr. Neal said he had about three weeks of experience operating a pan scraper, Mr. Lynch said that in terms of total hours he had no more than four to five full days.

Finally, Mr. Lynch testified that prior to February 16, 1979, he asked an MSHA inspector what was adequate height for berms. The inspector did not tell him, and Mr. Lynch concluded that "adequate" meant adequate to restrain a vehicle. He felt that three feet was an adequate height for a berm.

George Pincola, a bulldozer operator for W. B. and a union secretary, has worked for the company for over three years. When Mr. Neal was using the pan scraper, Mr. Pincola used a bulldozer to help load the scraper. He stated that he never switched machines without notifying a mechanic or foreman because this is against company policy and could be dangerous. He also stated that he never carries a bowl over six to eight inches off the ground because that way if he wants to stop suddenly he can easily drop the bowl. He stated that in operating this type of scraper, he never trusts the brakes. In his opinion, if Mr. Neal had dropped the bowl, he would definitely have been able to stop the vehicle.

Max Sovell, W. B.'s general manager, testified that his duties include both operating and safety responsibilities. He stated that W. B.'s relationship with Mr. Marker is not good. Mr. Marker has not been satisfied with W. B.'s method of mining, and he does not feel W. B. pays him large enough royalties. W. B. apparently pays Mr. Marker less than it pays two adjoining land owners, and Mr. Marker complained. Mr. Sovell said Mr. Marker once filed a complaint with the Office of Surface Mining which resulted in a citation being issued against W. B. Mr. Marker also complained about the timeliness of his monthly royalty checks, which are due on the 25th of each month. On one occasion, a check arrived on the 26th, and Mr. Marker told W. B. it had violated its lease and had to get off his property.

Mr. Sovell stated that it is the company's policy that employees are not supposed to switch machines without authorization. If an employee discovers a safety problem, such as inadequate brakes, he is supposed to immediately notify his supervisor or a mechanic. Furthermore, it is company policy to have all employees wear seatbelts and the company has a 10- to 20-minute safety meeting each week. Seatbelts and the unauthorized use of vehicles have been discussed at these safety meetings. Mr. Sovell testified that due to his violations of company rules, Mr. Neal's employment was terminated around March 19, 1979. He added that the damage to the scraper cost the company approximately $30,000, and that the company has fired other employees for damaging equipment.

He said he had never seen MSHA's inspection manual, in which the agency specified a height for berms, until about 30 days before the hearing, when his lawyers showed it to him. He also stated that between the accident and the inspection, nothing was done to reconstruct the berms.

Inspector Poe was recalled, and testified that on February 20, 1979, he saw W. B. stripping and working on the road in question. The height of the berms at that time varied between six and 24 inches.

Citation No. 784603

MSHA alleged that Respondent violated the mandatory safety standard at 30 C.F.R. 77.1605(k). That standard reads: "Berms or guards shall be provided on the outer bank of elevated roadways." The citation read:

> The berms provided for the elevated haulage roadway were inadequate in that the berms ranged from 6 to 24 inches in height for a distance of approximately 50 feet in length. The axles for the Caterpillar 631B scrapers traveling this roadway measured approximately 42 inches in height. A serious non-fatal accident occurred on this roadway when a Caterpillar 631B scraper (Serial No. 13G3145) traveled off this elevated roadway and overturned.

I find that on February 20, 1979, Respondent was in violation of this standard. The road in question was an elevated roadway. Both banks could be

considered "the outer bank" because there were drops on both sides of the roadway. (FN.2) Although on February 20, 1979, when Inspector Poe issued the citation, there were berms along the road, I find that the berms were between six and 24 inches in height. I find Inspector Poe's testimony in this regard more reliable than contradictory testimony that the berms were 36 inches high. There was a lack of consistency among Respondent's witnesses with respect to the 36-inch height, and I was quite impressed by Inspector Poe's testimony. I thought he was much more knowledgeable about the height of the berms at the time. I also credit his testimony that there was work going on on February 20, when he was at the site.

I agree with Respondent that MSHA's requirement that berms be axle height, or 42 inches in this case, was not binding on W. B. because the company had no knowledge of the requirement. However, implicit in the standard is a requirement that the berms be of reasonable height to offer protection. This is clear from the definition at 30 C.F.R. 77.2(d). Mr. Lynch testified that a satisfactory height, in his opinion, would have been three feet. Even if I accept this figure, I find that the height of the berms at the time the citation was issued was less than three feet. At points it was as low as six inches. Therefore, the berms were not of sufficient height. I note that Mr. Lynch testified that at the time of the accident, the berms were about three feet high, but I do not believe he testified that the berms were that height on February 20. Therefore, I find that the berms were not adequate on February 20.

The operator was negligent since it was aware that berms of six to 24 inches were unsatisfactory. However, I recognize that the height of such berms changes constantly, and I therefore find W. B.'s negligence was not great. As to gravity, inadequate berms can lead to an accident. I do not believe Mr. Neal's accident would have been prevented by berms 36 inches or even 42 inches high. I credit the testimony of Respondent's witnesses that Mr. Neal improperly operated his scraper, and probably would have been thrown off the road even if the berms were of satisfactory height. Nevertheless, the gravity here is reasonably serious.

I also note that the operator is a small operator, that it has a good history of prior violations and that it achieved rapid abatement of this violation. Therefore, I assess a penalty of $500 for this violation.

Citation No. 784404

This citation was issued for an alleged violation of the mandatory safety standard at 30 C.F.R. 77.403a(g). That standard reads: "Seatbelts

required by 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped with ROPS by 77.403(a)." 30 C.F.R. 77.1710(i) requires "[s]eatbelts in a vehicle where there is a danger of overturning and where roll protection is provided." The citation read: "Seatbelts were not being worn by the operator of the Caterpillar 631B scraper, Serial No. 13G3145. This condition was determined during a serious nonfatal accident investigation. The Caterpillar 631B scraper was equipped with a roll over protective structure referred to as ROPS."

The testimony of Mr. Neal and of Respondent's witnesses indicated that Mr. Neal was not authorized to operate the scraper, and he chose to operate the vehicle entirely on his own. This finding does not, of course, eliminate Respondent's liability. The actions of employees are attributable to their employers. Therefore, I hold that Respondent violated the standard. However, under these circumstances, I find that the operator's negligence was minimal. Therefore, I assess a penalty of $10 for this violation.

Order No. 784405

On February 21, 1979, Inspector Marker issued this order pursuant to Section 107(a) of the Act based upon a finding of imminent danger. The order read: "The Caterpillar 631B scraper, Serial No. 13G3145, was not equipped with adequate brakes (section 77.1605(b)). It was determined during a serious nonfatal accident investigation that at the time of the accident the scraper was being operated with inoperative brakes."

I find that this order was proper at the time it was issued. The evidence is clear and undisputed that when Inspector Marker examined the vehicle after the accident the brake lines were severed and the brakes were in a defective condition. Whether this occurred during the accident or previously does not matter. The fact is that unless this vehicle was repaired, it could not be used without placing the operator in imminent danger. Therefore, the order was appropriate.

The order also alleged a violation of 30 C.F.R. 77.1605(b), which provides in part: "Mobile equipment shall be equipped with adequate brakes * * *." The additional question, therefore, is whether before the accident the operator was in violation of this mandatory safety standard, and if so, what civil penalty should be assessed.

The witnesses who testified about the brakes were Mr. Neal, Mr. Anderson, and Mr. Zalesky. Mr. Neal stated that in the course of his operation of the scraper, in which he made approximately four runs before the accident, he found the brakes to be poor. Mr. Anderson stated that on the day before the accident, the brakes were adequate. Mr. Zalesky stated that after the accident he found the brake pressure to be sufficient although the brake lines were broken in spots. The net effect of Mr. Zalesky's testimony is that he is in no position to state whether or not on February 16 the brakes were satisfactory. The

only evidence that the brakes were not satisfactory was Mr. Neal's testimony. In contrast, Mr. Anderson said that on the previous

day, the brakes were in good condition. I find that Mr. Neal's testimony is rather weak. Mr. Neal has been shown to be inexperienced in the operation of this scraper and I am not certain that in the confusion surrounding the accident, his ability to observe and recall was sufficiently accurate. There were also inconsistencies between Mr. Neal's testimony at this hearing and his testimony at an earlier hearing. I do not find Mr. Anderson's testimony that the brakes were in good condition on the previous day, and Mr. Zalesky's testimony that the brakes had been checked out earlier that month, to be outweighed by Mr. Neal's testimony that the brakes were not working. Mr. Neal's testimony is also somewhat suspect because he stated that he found the brakes to be unsatisfactory when he started the machine and yet continued to use it. His actions seriously undermine his testimony. Therefore, Petitioner has not proven that on February 16, 1979, the brakes were unsatisfactory as alleged. This citation is vacated.

ORDER

Respondent is ORDERED to pay $500 in penalties within 30 days of the date of this Decision in satisfaction of Citation No. 784603, and $10 in penalties within 30 days of the date of this Decision in satisfaction of Citation No. 784404. Order No. 784405 is AFFIRMED, but the citation alleging a violation of 30 C.F.R. 77.1605(b) is VACATED.

Edwin S. Bernstein
Administrative Law Judge

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(FOOTNOTES START HERE.)

~FOOTNOTE_ONE

1 As defined in 30 C.F.R. 77.2(d), a "berm" is "a pile or mound of material capable of restraining a vehicle."

~FOOTNOTE_TWO

2 The Commission recently voted in an open meeting to affirm a decision by Chief Judge Broderick holding that both sides of roadway could be considered the "outer banks." See 4 Mine Reg. & Productivity Rept. No. 42 at 1 (1980). As of this writing, the Commission has not issued a written decision in the case, MSHA v. Cleveland Cliffs Iron Co., Docket No. VINC 79-68-PM.