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SOL (MSHA) v. COLUMBIA CEMENT
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Federal Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

COLUMBIA CEMENT CORPORATION,
RESPONDENT

Civil Penalty Proceeding

Docket No. LAKE 80-245-M
A.O. No. 33-00047-05014 I

Jonathan Mine and Mill

DECISION

Appearances: F. Benjamin Riek III, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner;
Robert A. Minor, Esq., and Michael G. Long, Esq.,
Vorys, Sater, Seymour & Pease, Columbus, Ohio, for
Respondent.

Before: Judge Edwin S. Bernstein

On July 8, 1979, Mr. James Levering was seriously injured while operating a Waldon 5000 front-end loader at Columbia Cement Corporation's Jonathan Mine and Mill. Respondent was cited for a violation of 30 C.F.R. 57.9-2. The Secretary of Labor alleged that the Waldon 5000 loader had defective service brakes, that Respondent was grossly negligent, and the Secretary of Labor requested assessment of a penalty of \$10,000. Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), I conducted a hearing on December 9 and 10, 1980, in Columbus, Ohio. Following the hearing, the parties submitted briefs. Upon the entire record and the parties' briefs, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The parties stipulated and I find:

1. Jonathan Mine and Mill is a mine. Its products enter and affect interstate commerce.
2. Respondent operates, and at all times pertinent to the citation at issue, operated Jonathan Mine and Mill.

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3. Respondent and every miner employed at the mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 and jurisdiction over the subject matter of this proceeding vests with the Federal Mine Safety and Health Review Commission.

4. During the year of 1978, this mine accumulated 561,645 production man-hours. Respondent's firm accumulated 795,115 production man-hours for 1978. For 1979, this mine's production was 503,120 man-hours. This constitutes medium-sized production for both years.

5. The assessment of penalties as requested will not affect Respondent's ability to continue in business.

6. Inspectors Dennis Haeuber and Daryl Beauchamp are authorized representatives of the Secretary of Labor.

7. As indicated by a computer printout submitted as an exhibit by Petitioner, Respondent paid fines in connection with 140 violations covering the period from July 10, 1977, through July 9, 1979.

8. Citation and Order No. 361463 involved in this proceeding was served upon Respondent on July 9, 1979. Notice of this proposed penalty was served on Respondent on February 18, 1980. Notice of contest of the proposed penalty was filed on March 21, 1980 and a special assessment was filed on May 5, 1980.

9. The alleged violation was abated in good faith.

Ten witnesses testified for Petitioner while three witnesses testified for Respondent.

James Levering testified that he worked in the mine during the second shift on Sunday, July 8, 1979. He operated a Waldon 5000 front-end loader in order to clean up dirt and mud that was built up in the crusher area in the underground mine portion of Respondent's facility. Craig Brannon had operated the same machine during the prior shift and Ernie Curtis was shoveling dirt in the area to help Levering.

Mr. Levering stated that the Waldon loader was without brakes and the gear shift kept popping out of gear. It had been this way for about two months. Levering had operated that Waldon loader about six or 12 times previously and never recalled that the loader had brakes. When the gear shift popped out of gear, the machine would float freely and the machine would be in neutral. In order to make the machine go forward, one would push the front of the foot pedal on the righthand side of the machine. To make it go backwards, one would push that same pedal down with his heel. Because the machine had no brakes, you would stop the machine by reversing your foot on flat surfaces or dropping your bucket to drag the machine.

Before the accident, Levering told Ernie Curtis about the brakes from the beginning of the shift onward. Levering also

told his foreman, Harold

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Roberts, that the machine had no brakes and that the gear knob was popping out. He told them this at about 5 p.m. that day. Roberts said that he realized this but so many things needed to be fixed in the mine that he doubted that anyone could work on the Waldon loader. He stated, "As you know, bigger pieces get fixed first; small ones are the last to be worked on."

As he made one roundtrip and was beginning his second trip going up a ramp, the machine slipped out of gear, he was unable to stop the machine, and the machine rolled backwards. The machine rolled against a catwalk behind him. This caused Levering to be pinned between the catwalk which was pressing against his back and the steering wheel of the Waldon loader. As a result of the accident, his ribs were broken and his left femur was broken in five places. He was out of work for 14 months as a result of the accident.

On cross-examination, Levering stated that before July 8, 1979, he never complained about the brakes to anyone representing management although he talked to other employees about it. He stated that the top speed of the machine in low gear was about five miles per hour. He did not tell Roberts that he was using the ramp and Roberts may not have known this. Roberts had told him not to take the dirt in that area. However, there was no other place to put dirt and Roberts never told him to avoid the ramp.

Dennis Haeber stated that he is an MSHA mine safety specialist who visited the mine on October 30 and 31 and November 1, 1979, in order to make a special investigation of the accident. He saw the Waldon 5000 loader parked at the bottom of the ramp near the accident site. He took photographs which were submitted as exhibits in this hearing.

Haeber stated that on October 31, 1979, he pushed the brake pedal with his hand and he felt no resistance. The pedal went down to the floor. Based on his experience, the brake should have stopped before going down to the floor.

He interviewed Ray Walker, a mobile maintenance superintendent, whose job was to order parts and supervise repairs. Walker said that the brakes on the Waldon loader never were good. Walker stated that two master cylinders were ordered before the accident and that he thought that the master cylinder had been put in this Waldon. However, Walker stated that when he looked after the accident he was surprised to find that a master cylinder had not been installed in this loader.

Haeber also found a work order issued by George Hill, one of Respondent's foremen, on July 4, 1979, to Walker which stated about the 5000 Waldon loader, "Needs brakes and light." Haeber also found a purchase order for two master cylinders dated February 23, 1979. Haeber concluded that the brakes were inadequate. He also found the gear shift stick wired in a forward or low gear position.

Craig Brannon testified that he operated the Waldon 5000 on the earlier shift on July 8, 1979. He stated that the machine did not have brakes. He did not recall pushing the pedal that day because the brake pedal had not worked on previous days. In order to stop the machine, he needed to reverse gears by reversing his foot on the foot pedal. He stated that sometimes if he reversed the gear shift would pop out and into neutral. He testified that he complained about these mechanical problems to his supervisor, Don Hammer. He stated that he was never instructed not to use the Waldon 5000 loader on either July 5, 6, or 7, 1979. He testified that it was general knowledge that the brakes on the machine did not work. Most of the workers complained to each other about the brakes.

Lawrence Reed testified that he has been a mobile equipment repairman for Respondent for the past 25 years. He stated that the maintenance supervisor, Ray Walker, instructed Reed to remove the master cylinder from the Waldon 5000 loader in question in February of 1979. Reed removed the master cylinder from that machine. He was told that a new master cylinder would be ordered the next day. Reed never installed another master cylinder in that Waldon and does not know whether or not a master cylinder was ordered or received. He stated that he did not work on that machine after February 1979, and he did not know whether or not the machine had a master cylinder at the time of the accident. He testified that if a master cylinder is removed or empty there is little pressure on the brake.

Robert Jones stated that he worked at Respondent's mine and is a member of the union safety committee. He testified that a few days before the accident he looked at the Waldon 5000 loader in question with George Hill and Clarence Simmons. Simmons had refused to run the machine because of safety. Jones pushed the brake pedal and the pedal went to the floor with little resistance. He stated that if the brakes were good the pedal would have gone no more than halfway to the floor. Therefore, he concluded that the machine had no brakes. A work order was written requesting repair of the brakes. That work order was admitted into evidence as Petitioner's Exhibit G-27. The date on the work order is July 4, 1979, a Wednesday.

Jones testified that Hill told the oncoming shift foreman, Donald Hammer that the machine had no brakes. Hammer said that he told "Baldy" (Roberts) about this. Jones acknowledged that driving through mud and water such as that found in the area causes brake problems.

Ernie Curtis was working as a mine utility man and clearing the belt at the time that Levering was injured. Curtis used the machine on the day before the accident, Saturday, July 7, 1979. He stated that on that date the machine had no brakes and popped out of gear. The brake pedal went to the floor. The gear stick lever was wired into a forward position. It had been that way for at least six months. When the wires would come out of place it would be rewired.

Curtis stated that he spoke to Harold Roberts, a shift foreman, about the brake on Saturday, July 7, 1979. Roberts told Curtis to park the

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machine and that Roberts would try to get a maintenance man to repair the brakes. The machine was not marked as being defective or "tagged out." Roberts did not request that it be tagged out.

The following day as Curtis was shoveling he found Levering pinned between the Waldon and the catwalk. He called Roberts for help and together they removed Levering.

Before the accident that day, Levering told Curtis that he had told "Baldy" about the defective brakes on the Waldon. Roberts did not tell Levering to go up the ramp, however, Levering went up the ramp in order to do the required job. He stated that the ramp was approximately 30 feet long and that the Waldon moved in low gear at a maximum speed of two to two and a half miles an hour.

Dwight Kelley testified that on the day after the accident he walked by the Waldon 5000 loader in question and he pushed the brake pedal to the floor. He found no resistance in the pedal. He found the linkage to the pedal was loose and not connected with anything. He saw no master cylinder where it should have been and saw no piston. He was told that the master cylinder had been removed previously. He reported this to Robert Stouton, the mine superintendent.

He stated that removal of a master cylinder renders the braking system useless. He stated that Respondent's firm had consistent brake problems on most equipment due to mud and water. Usually if brakes were defective, the machine would be deadlined or taken to the shop. He testified that sometimes, but generally not all the time, machines that were defective would be tagged out. On cross-examination, Kelley stated that he could not see the master cylinder from where he looked. To view the master cylinder, he would have to remove the plate on the floor. However, looking from the pedal side he saw no piston going through the floor. Thus, even if the master cylinder was in place it would be inoperative unless it was connected to the piston which it was not.

Harold Roberts testified for Petitioner as an adverse witness. He stated that at the time of the accident he was Levering's foreman. Roberts denied being told by Hill on July 4, 1979, or before the accident that the Waldon loader had inadequate brakes. Roberts also denied being told by Curtis that the machine had inadequate brakes and an inadequate gear shift. Roberts admitted that after Levering had started work, Levering had asked Roberts if he knew that the shift lever was wired. However, he denied that Levering told him about the defective brakes.

Roberts stated that he "assumed the brakes were adequate a few days and before the accident." He stated that he ran the Waldon himself in June and that the brakes were adequate. The pedal did not go all the way to the floor.

In his report, Roberts had said "Loader may not have had any

brakes." He stated at the hearing that he never checked on this.
At first, he denied

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this as a possible cause. He stated that if the brakes were bad enough the machine would have been tagged out. He did not personally push the brake pedal after the accident.

George Hill, a mine foreman for Respondent, testified that Jones refused to run that Waldon loader on July 3, 1979. He stated that he then checked the brakes for pedal pressure with his hand and found the brakes to be weak. The brakes went to the floor showing little or no brakes. Hill told the maintenance superintendent, Ray Walker, that this was a problem and the brakes needed correction. Walker said that he would have the brakes fixed either that shift or the next shift. On July 4, 1979, Hill wrote a work order for repair of the brakes. He also told another supervisor, Don Hammer, about the defective brakes. He did not recall whether or not he told Roberts about the defective brakes.

Hill stated that he did not tag out the loader as being unsafe. He acknowledged that he should have tagged out the machine. The reason was that at the time he did not have any tags. He did not check to see if the machine was repaired, however, he did not assign anyone else to run the Waldon after he requested repair of the brakes. Hill stated that the slope of the ramp is 10 percent and any grade is sufficient to enable the Waldon to coast down the ramp.

Daryl Beauchamp investigated the Waldon the day after the accident, July 9, 1979. He pushed the pedal with his hand and the pedal with just a little resistance pushed all the way to the floor. He concluded that the accident was caused when the machine popped out of gear and the operator lost control of it as a result of having no brakes.

Beauchamp testified that adequate emergency brakes are no substitute for inadequate service brakes. He stated that the company cooperated fully during his investigation and during his regular inspections. He stated that Brannon said that he knew the brakes were bad before the accident but had not told anyone about this. Beauchamp testified the withdrawal order is still in effect in that the machine is still on the site unrepaired.

James Hammer testified for Respondent. He stated that a week after the accident he looked at the Waldon 5000 on his own. He had heard there was no master cylinder but when he looked at the machine he saw a master cylinder in place. He does not know if there was a master cylinder before or during the accident. He does not recall working on the machine before the accident. He noted that hydraulic lines were not connected to the master cylinder. Without hydraulic lines being connected to the master cylinder, the brakes would not work. He noted that the master cylinder was held in place by three mounting bolts and could have been installed in 10 to 15 minutes. He stated that he could not tell how the hydraulic lines became disconnected. He indicated that the master cylinder that he saw was not a new one, it was rusting. He could not tell if there was a rod going between the master cylinder through the firewall to the pedal.

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Howard Miller testified that he was Respondent's mine maintenance superintendent between 1974 and 1978 and since March 1, 1980, but not at the time of the accident. He has operated the Waldon 5000 and is familiar with the machine, including its repair. He stated that the machine's top speed and range is 2.5 miles per hour. He testified that the machine had brake problems from 1974 to 1978. He reported concerning tests that were made with a similar but larger Waldon Model 6000 loader at the mine. These tests indicated that on level ground by shifting gears between forward and reverse the machine could be stopped at between two and a half and approximately nine feet.

Miller stated that Respondent no longer has any Waldon 5000 in use. These have been replaced by Bobcat machines which do not use hydraulic brakes and therefore have more effective braking systems.

Miller testified that he examined the work slips for 1979 and found no slip complaining about the gear shift popping out of range, however, these slips were not complete and many were not available.

On cross-examination, Miller stated that if the Waldon popped out of gear on that ramp and had no brakes it would coast at about 10 miles per hour until it stopped or hit something.

David McVicker has been Respondent's safety director or industrial relations manager since May 1979. He stated that he accompanied Beauchamp and Haeber during their investigations. He had submitted a report which said "No brakes" but this was based on hearsay of others. He was told by a mechanic that the master cylinder was in the Waldon but the lines were disengaged. He stated that if the hydraulic lines were not connected, the brakes could not work. He did not check to see if the brake pedal was connected to the piston.

With regard to repair orders, he stated that if work is done a yellow copy is received. With regard to the July 4, 1979, work order for brakes, he found no yellow copy. Thus, he had no information to indicate that the brakes had been repaired after July 4, 1979. He also had no information that would indicate that a master cylinder had been installed on that Waldon 5000 after it had been removed by Reed in February 1979.

CONCLUSIONS OF LAW AND CONCLUDING FINDINGS

I find that Respondent violated the mandatory safety standard at 30 C.F.R. 57.9-2 as alleged. That standard reads: " 57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

The evidence is overwhelming that on July 8, 1979, when Mr. Levering used the Waldon 5000 loader at Respondent's facility the machine had defective brakes and had a defective gear shift. In its posthearing brief, Respondent argued that the problem with the loader's brakes was not one which affected safety because

"the machine's use was to be restricted to

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traveling only on level ground at a speed of two and one-half miles per hour." Although the machine moved slowly, it was extremely dangerous because of its heavy weight. Even on a slight incline the machine was capable of rolling and injuring either a pedestrian or its operator. In fact because of the defective brakes, Mr. Levering suffered injuries which incapacitated him for 14 months.

Upon consideration of the criteria in section 110(i) of the Act, I assess a penalty of \$10,000, the maximum amount authorized by section 110(a), against Respondent. I find that Respondent (1) is a medium sized operator; (2) has a history of 140 violations of the Act in the 2-year period prior to this violation; (3) abated the violation in good faith; and (4) assessment of this penalty will not affect Respondent's ability to continue in business. Further, I find that this violation (5) constituted gross negligence and (6) was of severe gravity.

30 C.F.R. 100.3(d)(3) defines gross negligence as follows:

"Gross negligence" means an operator either caused the condition or practice which occasioned the violation by exercising reckless disregard of mandatory health and safety standards or recklessly or deliberately failed to correct an unsafe condition or practice which was known to exist.

I find that in failing to correct the loader's defective brakes before the July 8, 1979 accident, Respondent recklessly and deliberately failed to correct an unsafe practice which was known to exist.

First, Mr. Ray Walker, Respondent's former mobile maintenance foreman ordered its mechanic, Laurence Reed to remove the master cylinder for the loader in February, 1979. There is no evidence that this master cylinder was replaced before the accident. The loader was continued in use after the cylinder was removed.

Second, on July 4, 1979, Mr. George Hill, one of Respondent's foremen in the company of Mr. Randy Jones inspected the loader and found that it had little or no brakes. Hill then gave a work order to Walker who promised to repair the brakes on that shift or the next shift. The work order stated: "Needs brakes and lights." Hill also told another supervisor, Don Hammer about the defective brakes. Hill did not tag the machine out although he admitted that he should have and the machine continued in use.

Finally, another of Respondent's foremen, Harold Roberts, was told of the defective brakes both by Ernie Curtis on July 7, 1979 and by Levering on July 8, 1979. Although Roberts was told that the brakes was defective by Curtis, he told Levering to use the loader the next day. I credit Levering's testimony that when Levering complained about the brakes shortly before the accident, Roberts told him to continue to use the loader because other

equipment had to be repaired first.

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These actions and inactions by Respondent's foremen and supervisors constituted a deliberate decision to continue to use a machine that they knew was unsafe over an extended period of time despite numerous warnings and opportunities to repair or discontinue use of the machine. The defective brakes were further aggravated by the defective gearshift which would pop out of place throwing the machine out of a running gear and into neutral. Instead of repairing the gearshift, Respondent's wired it into place in a defective, makeshift manner. This entire course of conduct constituted a deliberate and reckless regard for safety and a reckless and deliberate failure to correct an unsafe condition.

My finding of severe gravity is first based upon the fact that this was an extremely heavy machine capable of killing or seriously injuring either its operator or a pedestrian as a result of its deficient brakes. In fact, Mr. Levering was disabled for over a year because of this violation. Additionally, the fact that the deficient brakes continued over a substantial period of time increased the probability that someone would be injured.

ORDER

Respondent is ORDERED to pay \$10,000 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge