

CCASE:
CAMBRIA COAL V. SOL (MSHA)
DDATE:
19821208
TTEXT:

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

CAMBRIA COAL COMPANY,
CONTESTANT-RESPONDENT

Contest of Citation

v.

Docket No. PENN 81-145-R
Citation/Order No. 1043746 4/9/81

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

Civil Penalty Proceeding

Docket No. PENN 81-204
A.O. No. 36-02738-03008H

Cambria Coal Strips and Tipple

DECISION

Appearances: Robert A. Cohen, Attorney, U.S. Department of Labor,
Arlington, Virginia, for MSHA Bruno A. Muscatello, Esquire,
Butler, Pennsylvania, for Cambria Coal Company

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation and order issued by an MSHA inspector pursuant to sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, charging Cambria Coal Company with alleged violations of mandatory safety standards 30 CFR 77.404(a) and 77.405(b). The inspector also made a finding that the conditions or practices cited on the face of the citation constituted an imminent danger and that the alleged violations were significant and substantial. Docket No. PENN 81-145-R is the Contest filed by Cambria challenging the legality of the imminent danger and significant and substantial findings made by the inspector, and Docket PENN 81-204 is the civil penalty proposals filed by MSHA seeking penalty assessments for the alleged violations. The cases were consolidated for trial in Pittsburgh, Pennsylvania, on June 29, 1982, and the parties appeared and participated fully therein. Although given an opportunity to file post-hearings proposed findings and conclusions, the parties declined to do so. However, I have considered all of the arguments made by counsel on the record during the trial in the course of these decisions.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., particularly sections 104 and 107.

~2174

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

The issues presented in these proceedings includes the following: (1) whether the conditions or practices cited by the inspector on the face of the citation constituted a violation of the cited mandatory safety standards, (2) whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other safety or health hazard, and if such violations were caused by the unwarrantable failure of the operator to comply with the mandatory health or safety standard, (3) the appropriate civil penalty which should be assessed against the operator for the alleged violations based upon the criteria set forth in section 110 of the Act. Additional issues include the findings of "imminent danger" and "significant and substantial" made by the inspector.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. Cambria Coal Company and the mine in question are subject to the Act.
2. At the time the citation issued, the mine employed approximately 180 miners, mined approximately 3,000 tons of coal a day, and the mine constitutes "a fairly large strip mining operation."
3. The citation in question was issued by a duly authorized representative of the Secretary of Labor.
4. The imposition of a reasonable civil penalty will not adversely affect the respondent's ability to continue in business.
5. The respondent's history of prior violations at the mine in question was small, and during the preceding 24-months from the date of the issuance of the citation in question the mine was assessed for five violations, none of which involved the specific mandatory safety standard cited in this case (Tr. 19).

~2175

The parties also stipulated as to the admissibility of their respective exhibits, and on motion by MSHA's counsel, the witnesses were sequestered.

Discussion

The citation issued by the inspector in this case, No. 1043746, April 9, 1981 (exhibit R-1), describes the condition or practice cited as follows:

Terry Hamilton and Lewis Wagner, employees of this company, were doing maintenance work on a Drilltech drilling truck Ser. No. 1147303. This truck was suspended in air and not blocked in position (77.405(b)). This truck was being suspended by (3) hydraulic jacks mounted on this truck. The front hydraulic jack hose was partially removed to test this safety jack. This jack bled off when this hose was cracked indicating that it was not maintained in safe condition (77.404(a)).

MSHA's testimony and evidence

MSHA Inspector Leroy R. Neihenke, testified as to his mining experience and background, which included work as an electrician and mechanic, and he confirmed that he conducted an inspection at the mine on April 9, 1981, and that he observed a Drill Tech truck suspended in the air by hydraulic jacks near the train loadout building in the vicinity of the preparation plant (Tr. 23-27; exhibits C-1 and C-2). The truck was a model D40K heavy duty type consisting of three axles and ten tires, and it was equipped with one hydraulic jack on the front end and two jacks on the rear. The jacks are normally used to level the truck during drilling operations, and the jacks are operated by levers located inside the cab of the vehicle (Tr. 30).

Mr. Neihenke stated that when he observed the vehicle suspended in the air by means of the three hydraulic jacks no one was working on or in it. The front end of the truck was suspended approximately 12 inches off the ground, and the rear end was suspended approximately four inches and six inches off the ground at each jack location. He determined these distances by visual observation while standing approximately ten feet from the vehicle. He observed no blocking materials under the truck, and he indicated that solid wood crib blocks would normally be used to block the truck to keep it suspended in the air and to keep it absolutely stationary to prevent any movement (Tr. 30-31).

The inspector testified that a service vehicle was parked next to the drill truck in question and two employees were in it. The employees confirmed that they had performed work under the suspended truck previous to his arrival on the scene changing an oil filter and working on the hydraulic lines, but told him that they did not intend to continue

~2176

the work. He estimated that the work already performed would have taken a half an hour, and he also confirmed that the employees were mechanics and that he observed oil on the ground near the front jack as well as under the truck. The inspector stated that the mechanics told him that they had been under the truck changing the oil filter, but that they did not have to be under the truck to change the oil. The inspector also indicated that even though the mechanics told him they were under the truck to change the filter, he did not believe they had to be under it since the filter can be changed from the top of the truck (Tr. 35-37).

The inspector stated that he issued the order because he believed the mechanics had been under the truck while it was suspended in the air, and that while they informed him they did not intend to go under it again he believed they would if he were "to walk away". He asked Terry Hamilton, one of the mechanics to check one of the hydraulic jacks to ascertain whether it would collapse if the fitting were cracked. Normally, the jack should remain extended after the fitting was cracked. When the fitting was cracked during the test, he observed oil coming out of it and the jack started to collapse. This indicated to him that the fitting pilot check valve was not functioning the way it was designed to (Tr. 40-42). The tested jack cylinder dropped for an approximate distance of two inches over a five minute period, and if it were functioning properly it would not collapse at all (Tr. 43). He believed that the malfunctioning pilot check valve could present a hazard to the men under the truck in that in the event a hydraulic hose or a fitting were to burst the jack could have collapsed, thereby causing serious or fatal injuries to the men under the vehicle (Tr. 44).

The inspector stated that company safety rules which were posted in the scale house required that equipment not be worked on until it was securely blocked, and in this case the safety rule was not followed (Tr. 44). He confirmed that the order he issued was the first imminent danger order he has issued in the five years he has been employed as an MSHA inspector (Tr. 48). He also indicated that the hydraulic jacks on the truck did not replace the requirement that the vehicle be blocked and that the purpose of the jacks was to level the truck during drilling (Tr. 52).

The inspector stated that after issuing the order, he returned to the mine on April 13, 1981, and the truck was in the same position as it was on April 9. The rear jacks were still suspended, but the front jack had collapsed and the front tires were on the ground. The jack was tested again and when it collapsed 1/8th of an inch he determined that it was still inoperative and he did not terminate the order. He returned to the mine again on April 16, but was told the truck would be repaired on April 21. He terminated the order on that day after testing the jack again (Tr. 59).

The inspector confirmed that he cited two standards in his order; one for failure to block the equipment, and the other for

failing to properly maintain the mobile equipment (Tr. 59). He considered the condition he cited to be very serious, that an injury could have

~2177

occurred immediately had the men crawled back under the truck, and he believed the respondent was negligent in that it is responsible for training its personnel as to the proper equipment blocking procedures. He also did not believe the respondent acted in good faith in abating the condition because of the time period which elapsed between April 9 until April 21, when repairs were actually made. He also considered the violation to be significant or substantial because it was reasonable to believe that any injury would be fatal, and that this was a reasonable likelihood (Tr. 59-62).

On cross-examination, Inspector Niehenke confirmed that he is familiar with jacks or similar equipment used on surface mining drilling trucks. He confirmed that he was familiar with a pilot operated check valve of the type used on the truck which he cited and indicated that it was a load locking device. He also indicated that the purpose of the jacks on the drill truck in question is to keep the truck level so that an accurate vertical hole can be drilled, and they are also used to keep the truck from overturning in the event the hole is not drilled correctly. If properly maintained, he believed the jacks would keep the truck in a stable position for a long period of time (Tr. 68-72).

The inspector testified that when he first observed the truck, the motor was not running and the two mechanics were sitting in their service truck parked ten feet away taking their lunch break. He confirmed that the truck has three leveling jacks, but others which are used to raise and lower the boom. He did not know whether the jacks were fully extended when he observed it, nor did he know how high the truck could be raised by fully extending the jacks (Tr. 74). He confirmed that the two mechanics admitted that they were working under the truck prior to his arrival on the scene changing the oil filter and a hose. He assumed they were working on a hydraulic oil hose because he observed a puddle of oil under the truck, but he could not determine whether the oil in fact came from the truck in question. Since the oil was directly under the truck pod, he assumed it came from the truck. He confirmed that the men told him that they did not intend to go back under the truck, and when asked why he found it necessary to issue an imminent danger order, he replied as follows (Tr. 78-79):

Q. If the men did not intend to go back under the truck, what was the purpose of issuing the imminent danger order?

A. I had the rest of my inspection to complete. I could not in fairness and good inspection procedure walk away from this condition, knowing that there was a real possibility that these men would crawl back under this vehicle.

Q. Even after you told them not to, or did you not tell them not to go back under?

A. At that time, no, I did not tell them.

Q. Isn't it true that the whole problem could have been resolved just by having them lower the truck to the ground?

A. It is not my -- I am not to direct the work force. That is the operator's responsibility.

Q. Was there not a supervisor there?

A. At that time, no.

Q. I believe you indicated that whenever you first went to the area, that you had talked with a supervisor when you got there?

A. No, sir, that was in a different area.

Q. How far away was it?

A. A hundred yards.

Q. You could not walk 100 yards or send somebody over to get a supervisor to tell somebody to lower the jacks?

A. No.

Q. You are telling me that in your opinion, this was so dangerous that you would not tell a person to lower the jacks because it created a significant imminent immediate peril to the health, safety and welfare of these miners?

A. We did not direct the work force.

Q. I believe also in your testimony, you indicated that you assumed that they were going to crawl back under there. On what did you base that assumption?

A. That fact that they had been under the equipment to begin with. They stated they were under there. There was no blocking. It was reasonable for me to assume if I was to leave that area, it was reasonable for me to assume that these men, because they had done it in the past, they would do it again.

The inspector indicated that he had one of the mechanics "crack" one of the front hydraulic jack fittings, but not the back ones. He did so because he was only concerned with the front jack at that time,

~2179

and his concern stemmed from the oil which he observed on the ground, and he assumed that something was wrong with the jack because of the presence of the oil on the ground and the fact that the jack itself was covered with oil (Tr. 81-82). His recollection was that it was the left hydraulic hose fitting going into the top of the jack (Tr. 83). He observed oil coming from the fitting under some pressure for about four or five minutes. He did not mark the extension of the jack prior to having the fitting cracked, nor did he measure how high the jack was positioned prior to the cracking of the fitting. However, he indicated that the truck dropped approximately two inches in a period of five minutes after the fitting was cracked, and that this drop was slow. He determined the drop distance by observing the distance between the truck tire and the ground as the truck was slowly dropping (Tr. 85). The rear jacks were not affected since they act independently from the front one. He did not observe the truck for more than five minutes because "it was reasonable to expect that if it fell this distance in five minutes, that if a man was under the vehicle, he could be crushed in that distance" (Tr. 86).

The inspector indicated that his concern was the pinch point from the axle to the carriage of the truck or from the ground to the truck axle. If someone were to be caught at either point, serious or fatal injuries could result. He indicated that the distance between the truck axle and ground was "fairly high" and that a man should be able to crawl under the truck without elevating it. He conceded that while he never observed the distance between the truck axle and carriage, he nonetheless felt that this was a possible pinch point where someone could get stuck in but that he did not know for sure. He also believed that the area between the axle, carriage or ground could be another pinch point and that if someone were to slide under the axle sideways "maybe the axle could come down and crush him that way" (Tr. 88). He also stated that his concern was over the slow gradual drop of the truck rather than a complete or sudden drop (Tr. 89).

The inspector stated that he did not consider the use of the truck jacks as adequate blocking of the vehicle, regardless of the safety features on the truck, and that his opinion in this regard is based on his training and experience. With regard to the citation concerning the failure to maintain the truck in a safe operating condition, he stated that he cited this standard because of his concern for the condition of the front jack, and that he did not inspect the truck itself to determine actual internal working conditions and only concentrated on the jack (Tr. 91). He conceded that the pilot check valve spring operates under pressure generated hydraulically by the truck motor and with the motor off there would be no such pressure (Tr. 96).

The inspector denied that he ever stated to anyone that he would not have issued the imminent danger had Mine Superintendent Morrison come to the scene when he called for him, but he admitted that he was upset because Mr. Morrison could not get there right away and he was

~2180

upset because Mr. Morrison "had something more important to do than to worry about his personnel" (Tr. 97). The inspector also indicated that safety regulations prohibiting work on elevated vehicles unless they were securely posted were in fact posted on the bulleting board (Tr. 99).

The inspector did not believe that the respondent exercised good faith in the abatement of the violations because of the amount of time it took to take corrective action. He indicated that he had no way of knowing that the truck was needed, and the failure to timely repair it constituted a hazard as far as he was concerned (Tr. 100). He also indicated that he was concerned over the fact that he had to go back to the mine two or three times to abate the violation (Tr. 102).

In response to questions from the bench concerning his rationale in issuing an imminent danger order, the inspector states as follows (Tr. 103-105):

Q. Am I to assume that had you observed this truck out by the pit drilling area rather than in a raised position stationary with two fellows by it, that we probably wouldn't have this case, would we, if you were driving by this truck and you saw it drilling out there, nothing would have come to your attention, would it?

A. No. It would have been a normal situation for me to see this vehicle suspended in the air with these jacks while they were drilling. There wouldn't have been anything abnormal to it unless I would have happened to check this valve, which I more than likely would have done.

Q. So what called this particular situation to your attention was the fact that you saw it raised and you saw some indication of oil and you thought that some fellows had been working on it?

A. They stated that they had been working on it, yes.

Q. Let me ask you this question. At the time that you observed the vehicle, the time that you talked to the two employees, and then you spoke to one of the foremen there, you spoke to someone, you talked to Mr. Morrison on the phone. What if someone in management, mine management, had made the decision to lower the truck, in other words, put it down full flush to the ground, would that have abated the condition?

~2181

A. To me, it would have relieved the imminency of the condition, but I would have still issued a citation.

Q. Some kind of citation with a reasonable time to take care of the hydraulic problem, is that the idea?

A. Yes.

Q. Let's assume that the one hydraulic jack was not leaking and that it had tested and that the condition was okay. You still would have come to the conclusion that this being suspended on the jack was still an imminent danger?

A. Yes, I would.

Q. Even though all three jacks were in proper working conditions?

A. Yes.

Donald L. Liberatori, employed as a journeyman mechanic with the Beckwith machinery company, Clearfield, Pennsylvania, testified that his duties include the making of field repairs on caterpillar and Drill Tech equipment, and he stated that his experience also includes work on the Drill Tech Truck hydraulic jacking system over a period of five or six years. He also indicated that on several occasions he worked on various hydraulic problems on the trucks similar to the one cited in this case, and he checked the front jack on the very truck itself (Tr. 117-120).

Mr. Liberatori stated that the jack in question has a safety pilot check valve and he explained how it operates. In order to make the jack go up or down the engine must be running and hydraulic pressure between 1200 and 1500 pounds must be present to overcome the check valves. When the engine is not running, there is only 100 pounds of air pressure and the jack mechanism will not operate, and this would be true even if someone inadvertently activated the controls. Further, each jack cylinder has two pilot operated check valves and they must be unseated by hydraulic pressure (Tr. 121-123). He identified a sketch of one of the leveling jacks and explained the operation of the jack cylinder and how the jack is extended (Exhibits C-5, C-3, Tr. 123-128).

Mr. Liberatori testified that if the hose to the jack in question were "cracked" or disconnected oil under pressure would be released from the inside of the jack cylinder, but this would not indicate that the machine was malfunctioning because oil was coming out (Tr. 130). He stated that he was called to the mine on April 9, 1981, to inspect the truck jack in question and that he made certain tests and filled out a service report. He measured the position of the jack with and without hoses. He marked the jack and measured the drop or "drift" distances

~2182

with a ruler. At 3:14 p.m. the jack cylinder was extended out to a distance of 39 and 5/8 inches. At 3:18 p.m. it had dropped to 39 1/4 inches, and it dropped or "drifted" less than one inch in twelve minutes. At 3:31 p.m. both hoses were removed from the jack, and 38 inches of the cylinder was exposed, which indicated a drop of 1 5/8 inches with both hoses off over a period of 30 minutes. In his opinion, it was not unusual for such a machine to drift this distance, and after a further drift of another fraction of an inch it would stop (Tr. 129-134).

Mr. Liberatori stated that the truck jacks are designed so that they not drift or drop more than the distances which he has indicated because the drill holes have to be perfect or the machine "will teeter and it could upset" (Tr. 134). When asked whether the jacks are designed to hold a piece of elevated equipment stationary, he replied "it's the same thing, it's all part of the design of it" (Tr. 135). He also expressed an opinion that the jack in question was in proper working condition, and he explained the presence of any oil as normal and that it was not coming from the leveling jack (Tr. 137).

Mr. Liberatori stated that he has been under Drill Tech trucks "a lot of times", and has worked under the truck with the jacks as the sole support because "there is a lot of jobs that that's the only way I can get at it." He explained that depending on the terrain, there is 12 to 14 inches of clearance under the axle, and there is room to crawl through. He also indicated that the truck has huge springs, weighs over 79,000 pounds, and has big steel blocks which limits its travel (Tr. 138). He also indicated that there is 8 to 10 inches of clearance between the truck axle and carriage and that the area would not compress more than an inch because it would hit the steel blocks. In order for the truck to drop completely there would have to be complete pilot valve failure, but that this drop would probably take 10 to 12 seconds, which he believes would be reasonable time for anyone to get out from under the machine (Tr. 140).

Mr. Liberatori stated that with the jacks on the truck fully extended, the truck would be securely blocked because that is the way the system is designed. He could not say the same for loaders or bulldozers because they do not have safety jacks designed to support them (Tr. 142).

On cross-examination, Mr. Liberatori stated that his tests on the cited cylinder was made over a couple of hours duration, that the cylinder hoses were taken completely off, and that the jacks protrude far enough from the truck so that there was no need to crawl under the truck to check the jack (Tr. 146-147). He indicated that he was familiar with the truck operations manual and indicated that it says nothing about blocking out the vehicle before it is repaired (Tr. 151). He indicated that he would not block the truck in question to work on it if it were parked where it was on the day the citation issued, but if it were on an incline he would put it in gear and block it (Tr. 152). Blocking would give one an extra margin of safety to prevent it from

falling or rolling (Tr. 153).

~2183

Mr. Liberatori confirmed that the truck cylinder in question was not leaking oil and that if it were it would drop faster than it did during his test, and it would eventually jam itself (Tr. 157). He explained the presence of oil on the outside of the jack as a possible leaky seal or "o" ring, which could possibly cause a drop of a distance of 1 1/2 inches (Tr. 159-160). He also indicated that there is almost no possibility of the jacks in question completely failing, but he conceded that he did not perform routine maintenance on the jack in question (Tr. 161). He also conceded that if the jacks failed completely and the truck dropped two inches there is a danger of the truck rolling, upsetting or toppling over if it were in the process of drilling and this would present a hazard since the jacks are not fail-safe (Tr. 164, 166).

Mr. Liberatori stated that performing maintenance on the truck, such as greasing the universals or changing the tires would require it to be elevated, and he would feel completely confident doing this work with the truck elevated by means of the three jacks and with no blocking (Tr. 168).

Ralph E. Morrison, respondent's General Mine Superintendent testified that on April 9, 1981, he was at the mine with the safety crew conducting a monthly inspection of the machines at every job site, and he was approximately 8 miles from the site of the drill truck which was cited. The mechanic and the inspector called him over the radio. The inspector informed him that the truck had no blocking and was unsafe and wanted him to come to the scene right away. Mr. Morrison advised the inspector that he would come as soon as possible, and he eventually arrived at the scene some 20 minutes or a half hour later (Tr. 170-173).

Mr. Morrison testified that he discussed the situation with the inspector, and pointed out to him that the jack rod which he believed was leaking was actually inside the jack tube or sheathing and that what he observed was the outside of the tube. The inspector told him that if he had gotten there sooner he would not have issued the order. The inspector advised him that the jack was unsafe because it was leaking, and the mechanic took a jack hose off to see whether the jack would drop. It dropped about an inch or so and the hose was then reattached. The inspector advised him that he wanted the jack removed and repaired, and Mr. Morrison advised him that he probably fix it but wanted to check it first and that the truck would not be moved from the site (Tr. 175).

Mr. Morrison stated that after the inspector left the site, one of his mechanics removed the hoses and oil came out of the hoses but the drill "sat there". There was no internal leak of any oil coming down the jack rod. The Beckwith Company was then called to in to check the jack and he observed Mr. Liberatori conduct his tests and he concurred with his testimony concerning the test results (Tr. 176-177).

Mr. Morrison stated that the inspector was called back to the mine on Monday, April 13, 1981, and was told that there were

leaks from the

~2184

jack rod. The inspector believed it was scored, and before spending \$2000 to repair the jack Mr. Morrison wanted to make sure it was defective (Tr. 177). Mr. Morrison also indicated that the jack moved no more on Monday than it did the day the citation issued on the previously Friday. The inspector insisted that the jack leaked and indicated that he wouldn't remove the order until it was fixed (Tr. 179).

Mr. Morrison stated that the drill truck in question had not been used since it was cited, and that contract drillers have been used since that time (Tr. 181). He also indicated that on May 14, 1982, the Inspector came to the mine and asked to see the truck so that he could look at the checkpoints and valves (Tr. 179). Mr. Morrison believed that the inspector issued his order because he (Morrison) did not go to the scene promptly (Tr. 182-183).

On cross-examination, Mr. Morrison confirmed that subsequent to the issuance of the citation the jack in question was broken down and taken apart by Stockdale Mine and they found nothing wrong with it. He identified photographic exhibit C-6 as the jack after it was returned by Stockdale. Mr. Morrison could not recall telling the inspector that the jack has a defective o-ring (Tr. 185).

Mr. Morrison stated that the work performed on the truck when it was cited entailed the replacement of hoses from the truck engine to an oil lubrifiner located near the front tire. The mechanics were there only to put a hose on the enginer, and this work took "probably 20 minutes" (Tr. 187). He also confirmed that company policy required that vehicles be blocked out when work is performed under them, but that the Drill Tech trucks have never been blocked. He also confirmed that the imminent danger order on the truck was the first such order issued at the mine and that it caused him some concern (Tr. 187-188).

Mr. Morrison confirmed that when the inspector returned to the site on Monday, April 13, the two back wheels were still suspended and the tires were off the ground. However, the front jack had collapsed and the tire was on the ground. This would indicate that someone either let the front jack down or it collapsed by leaking down. Assuming it leaked down 12 inches, then he conceded that there would be something wrong with it in that it had a leak (Tr. 192-193).

Terry Hamilton, mechanic, testified that he operated the drill truck in question for four years, and for the past three years has performed maintenance on it in his capacity as a mechanic. He confirmed that at the time the inspector arrived at the scene he and Mr. Lewis Wagner had just completed changing an engine oil hose. The inspector asked him whether or not the front jack would drop if the hose broke loose, and when he disconnected the hose at the inspector's request, oil came out of the hose and the jack dropped approximately 1/2 inch. Mr. Morrison was summoned to the scene and when he arrived the hoses were taken

completely off and little oil came off and the jack did not move.

~2185

Mr. Hamilton denied that the inspector asked him whether he had worked under the truck. However, he admitted that he had worked under the truck and had his tools there, but that he did not believe it was dangerous. He also conceded that when he performs maintenance on the truck in question he never blocked it because he believed the truck jacks are adequate for this purpose.

On cross-examination, Mr. Hamilton confirmed that when he repaired the engine oil hose he was under the truck, but that it was not jacked up at that time. He jacked it up so that the hose could be passed over the front wheel fender area. He also confirmed that when he cracked the jack hose to test the hydraulic system he was standing on the front fender and was in no position to observe any movement of the truck. He indicated that he had heard that an "o" ring on one of the jack valves was defective (Tr. 194-212).

Louis Wagner, testified that at the time the order issued he was working as a driller on the truck which was cited. At the time, he was helping Terry Hamilton repair an oil line which had been damaged the day before. The truck was on the ground at one time during the repairs, but was subsequently jacked up to facilitate the installation of some clamps.

Mr. Wagner stated that the hydraulic jacks on the truck have several safety features which prevent the truck from falling. The inspector asked him to "break the hose" on the front hydraulic to ascertain whether the truck would fall, and when he disconnected the jack hose, the jack dropped approximately 1/4 to 1/2 inch. He did not measure the distance, but simply relied on his experience to estimate the distance.

Mr. Wagner stated that he had worked with the truck on many occasions drilling holes, and he estimated that he drilled approximately 30 holes on any given shift and had no problems with the jacks functioning properly. He believed the front jack on the truck which was cited was in a good and safe operating condition at the time the order was issued.

Mr. Wagner stated that at the time the order issued, he could recall no oil or hydraulic fluid present on the front jack, and if it were there, it must have come from the "mast" and not from the hydraulic jack cylinder. He denied that he told the inspector that he had been working under the truck.

On cross-examination, Mr. Wagner confirmed that he never worked under the truck, but that Mr. Hamilton was under it at the time he was repairing the engine oil hose. All repairs were completed at the time the inspector arrived at the scene, and in view of the fact that he and Mr. Hamilton were on a "break" the truck was left in a raised position. He confirmed that the inspector asked him why the truck had not been blocked and that he (Wagner) told the inspector that it had been "on the jacks".

~2186

Mr. Wagner stated that he believed the front truck jack was in good condition. He also confirmed that he had heard that an "o" ring on the jack had been found to be defective when it was dismantled by a maintenance contractor (Tr. 227-242).

John McElheny, truck mechanic, testified that on April 9, 1981, he was asked to disconnect the hydraulic hose line to the front hydraulic jack on the Drill Tech truck in question. Present were Mr. Morrison, Mr. Wagner, and the inspector. When he disconnected the line, the pressure was bled off, oil came out of the hose, but he could not detect any movement in the truck. He had never previously performed any maintenance on the truck except for working on the directional turn signals, but this did not require his crawling under the truck.

Mr. McElheny stated that he was at the truck area approximately 15 to 20 minutes while testing it and he saw nothing wrong with the jack in question.

On cross-examination, Mr. McElheny stated that because of his position on top of the truck at the time the testing was conducted, he was in no position to observe any movement of the truck when the jack hose line was disconnected. He could not recall observing any hydraulic oil on the ground under the truck, and while he may have observed some oil on the hydraulic cylinder, he did recall whether it was present on the hose (Tr. 247-262).

Gary L. Maney, General Manager, testified that on May 14, 1982, he spoke with the inspector concerning the order and citation in question. The inspector had come to the mine for the purpose of gathering additional evidence in preparation for the hearing, and wanted to test the drill truck in question. However, the machine was not operable at the time. Mr. Maney stated that during his conversation with the inspector he stated to Mr. Maney that had Mr. Morrison shown up when he called him he probably would not have issued the imminent danger order. Mr. Maney also indicated that he had no personal knowledge concerning the condition of the truck in question (Tr. 270-275).

Mr. Morrison was recalled, and he testified that the jack in question was taken off the truck and replaced, and he indicated that the company did this because the inspector thought it was defective. An exchange cylinder was placed on the truck and inspector Niehenke was called back to the mine to abate the citation. Mr. Morrison indicated that the company still has the parts from the jack that was taken off, and to his knowledge the jack was not defective. However, in response to a question as to whether the jack cylinder may have had a defective "O" ring, as referred to in the inspector's notes, Mr. Morrison stated that he could not recall telling the inspector that the jack may have had a cracked "O" ring after it was dismantled by the repair company which gave them a replacement (Tr. 278-285).

Mr. Liberatori was recalled and he confirmed that repair companies often replace jacks by simply giving the company a replacement and taking

~2187

the old one for repairs (Tr. 289). When asked an opinion as to whether the jack dropping an inch and five-eighths within 30 minutes was unusual, Mr. Liberatori stated "it's workable" and "you could live with it" (Tr. 290). He also indicated that "it was very near normal" (Tr. 291).

Inspector Niehenke was recalled, and was questioned about his citation concerning the allegation that the front jack of the truck was not being maintained in a safe condition. He stated that he based his conclusion that this was so on the oil or hydraulic fluid that he observed on the outside of the jack and on the ground. He indicated that there was "a continual path of oil from the side of the jack to the pad on the ground" (Tr. 294). He confirmed that oil came out when the jack hose was partially removed to test it, but he conceded that he did not know where the oil was coming from and assumed that it was from the jack (Tr. 295).

The inspector identified exhibit 4-B as the jack hose in question and confirmed that the hose was on the outside of the jack housing. He also indicated that a drop of two inches when the hose was cracked is not normal, and that if the safety valve were operative it should not have dropped at all (Tr. 296). Since it did drop, he concluded that it was not maintained in a safe condition (Tr. 297).

Findings and Conclusions

As indicated earlier, the inspector issued one citation in this case citing conditions or practices which he believed violated mandatory safety standards 30 CFR 77.405(b) and 77.404(a). He concluded that the failure to block the truck which was suspended in the air by means of three hydraulic jacks which were an integral part of the truck constituted a violation of section 77.405(b). After testing the front jack and finding that it "bled off", he also concluded that the truck was not being maintained in a safe condition, and that the failure to remove it from service constituted a violation of section 77.404(a).

In addition to his charges of violations of the aforementioned cited mandatory safety standards, the inspector also found that the conditions and practices cited on the face of the citation also constituted an imminent danger pursuant to section 107(a) of the Act, and that the violations were "significant and substantial" ones.

Mandatory safety standard 30 CFR 77.404(a), provides as follows:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Mandatory safety standard 30 CFR 77.405(b), provides as

follows:

No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

Fact of Violation - 30 CFR 77.404(a)

Section 77.404(a) requires that equipment be maintained in a safe operating condition and that any such equipment which is unsafe is required to be removed from service immediately. On the facts of this case, I conclude and find that MSHA has failed to establish through any credible evidence that the drill truck was not in safe operating condition because of the purported defective front hydraulic jack. At the time the inspector looked at the truck, it was not in operation, the engine was not running, and at the time the mechanic performed the so called test by cracking the hydraulic hose valve, the engine was not started and there was no power to the truck hydraulic system. Further, the inspector conceded that he had no way of telling precisely what the problem was since he "could not see into the internal parts to that hydraulic jack" (Tr. 47). He also conceded that he assumed that the oil he observed running down the outside of the jack came from the jack itself and not from any other source (Tr. 296). He insisted that a properly operating pilot safety valve would not have caused the jack to drop at all even if it were cracked or bled off as it was during the test. When it did, he concluded that the jack was not being maintained in a safe operating condition (Tr. 297).

There is nothing in the record to suggest that the inspector had any reason to suspect that the front hydraulic jack in question was defective prior to the time the mechanic loosened the pilot check valve fitting. The truck caught the inspector's attention because it was elevated and not blocked, and that was his principle concern. His concern was that with the truck wheels on the ground, a two-inch drop in the front hydraulic jack would result in crushing injuries in the event a man were under it and had his head between the truck frame and the axle (Tr. 55). However, in this case the inspector stated that after the test was conducted on the front hydraulic jack, he decided to immediately issue his imminent danger withdrawal order. Under these circumstances, the effect of that action immediately caused the truck to be taken out of service. Although this was not done by the operator, the result is the same.

Inspector Niehenke believed that the truck was not being maintained in a safe operating condition because the front hydraulic jack dropped approximately two inches in five minutes when the hydraulic hose fitting was "cracked" or "bled off" when loosened with a wrench. Mr. Niehenke asked a mechanic to crack the fitting in order to determine whether a pilot check valve was functioning properly. When the fitting was cracked, the inspector observed hydraulic oil coming from the fitting, and he concluded that pilot valve was defective. In his opinion, a properly operating valve would not permit any oil to come out of the fitting, even when cracked or tested. He also believed that a properly operating pilot valve would not have permitted the front jack to drop two inches when cracked or tested, and stated that the purpose of the check valve was to keep the hydraulic cylinder extended even if there was a loss in hydraulic pressure due to a broken hose or fitting.

The drill truck in question is a large, three axle machine with ten tires, and the purpose of the hydraulic jacks is to keep the truck level during the drilling of vertical holes. The truck is normally used to drill holes while blasting overburden, and as indicated earlier, the function of the three hydraulic jacks is to stabilize the drill rig during the drilling process. During the drilling process the jacks and drill are operated by levers by the drill truck operator, and there is nothing to suggest that anyone has to crawl under the machine while it is in its normal drilling position. Therefore, it seems clear to me that at the time the inspector observed the truck in its elevated position it was not located where it would normally be while drilling. As a matter of fact, the truck was near the preparation plant and some maintenance was being performed on it by two mechanics who had their equipment in a pick-up truck parked nearby. Further, there is no evidence that the two rear hydraulic jacks were defective or unsafe. As a matter of fact the inspector stated that he did not ask the mechanic to crack the valves on the rear jacks since he was only concerned with the front one since he observed oil on the outside of the jack. Although he also alluded to some oil on the ground, he could not tell whether it came from the truck hydraulic jack, and since the mechanics had just completed changing oil filters on the truck it is possible that this was the source of that ground oil.

Respondent's witness Liberatori, a journeyman mechanic whose experience included maintenance work in Drill Tech Truck hydraulic systems, testified that each hydraulic jack cylinder has two safety pilot check valves, and he stated that in order to make the jacks go up or down the truck engine must be running so that the hydraulic pressure is built up to a point to overcome the check valves. With the engine off, he indicated that there is only 100 pounds of air pressure and that the jack mechanism will not work. He also indicated that the jack pilot valves can only be unseated by hydraulic pressure, and that if one of the jacks is "cracked" or disconnected oil pressure would be released from inside the jack cylinder, but that simply because this oil is released in these circumstances does not indicate that the jack is defective. He explained the presence of any oil on the outside of the jack as a possible leaky seal or ring, and he conceded that a total failure of the jack during the drilling process could present a hazard.

On the basis of all of the evidence and testimony adduced in this case, I cannot conclude that MSHA has established by a preponderance of any credible evidence that the alleged defective pilot check valve on the front hydraulic jack in question was defective or unsafe. On the facts presented in this case, it seems clear to me that the inspector conducted a rather cursory and superficial examination of the jack in question. I believe that he decided to issue his withdrawal order when he found that the two mechanics had been under the suspended truck without blocking it, and that the "testing" of the jack in question was done in an attempt to justify his order. I venture a guess that had the truck not been suspended in the air, neither the inspector nor the operator

~2190

would have any reason to crack or test the front jack pilot valve, thereby releasing the oil and causing the jack to slowly drop for a distance of two inches. In short, I cannot conclude that this drop of two inches, which I believe was the result of the cracking or loosening of the valve, was in fact a safety defect affecting the safe operation of that truck while in use during the drilling of overburden.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish a violation of section 77.405(a), and that portion of the citation which alleges such a violation IS VACATED.

Fact of violation - 30 CFR 77.405(b)

Section 77.405(b) requires that raised machinery or equipment be securely blocked in position before any work is performed under it. It seems clear to me from the arguments made on the record in this case that Cambria's position is that the drill truck in question was securely blocked in position by means of the three hydraulic jacks which are an integral part of the machine (Tr. 18). On the other hand, it seems equally clear to me that MSHA's position is that the three hydraulic jacks in question are not a suitable substitute for the requirements that the machine be independently blocked by means other than the truck jacks.

Apart from the testimony presented by Cambria's witnesses with respect to the use of the truck jacks to stabilize the truck while it was being worked on by the two mechanics, Cambria relies on a "policy guideline" found in MSHA's "Inspector's Manual", Exhibit R-5, which states as follows:

Mechanical means that are manufactured as an integral part of the machine for the purpose of securing a portion of the machine in a raised position is acceptable as meeting the requirements of this section.

MSHA's position with regard to the so-called "policy guideline" is that it is inapplicable to the facts presented in this case, and that other "information bulletins" and "interpretative memorandums" make it clear that raised equipment such as the truck which was been cited, must be blocked by independent means and blocking materials other than the jacks in question. After careful consideration of the arguments presented, I conclude and find that MSHA has the better part of the argument and that the three jacks which are an integral part of the drill truck in question may not be used as a "suitable substitute" for the blocking requirements of section 77.404(b), and my reasons for this finding follow below.

It seems clear to me from the photographs of the truck in question, exhibits C-1 through C-4, C-8, and R-4 (a) through R-4 (d), as well as the testimony adduced in this case, that the purpose of the three truck jacks is to stabilize the truck and maintain it in a level position while

~2191

actually drilling holes during the blasting of overburden. Keeping the truck level and secure insures an accurate drill hole and prevents a drill from deviating from its intended course and possibly tipping the truck over. However, once the truck is removed from the drilling site for the purpose of performing maintenance, as was the case here, I cannot conclude that the hydraulic jacks, even if they were functioning properly, could ever insure against a forward or backward movement of the truck while in an elevated position. The language of the standard is specific on this point. It requires blocking, and as I understand that term the intent and meaning of the standard is that some independent means of blocking be used to insure against movement of the equipment while maintenance is performed on it. As correctly stated by MSHA's counsel during the course of oral arguments during the hearing, "blocking means blocking."

It is clear from the evidence and testimony adduced in this case that the truck in question was raised and that it was not blocked against movement by blocking materials independent of the hydraulic jacks. Respondent's own witness, mechanic Liberatori, conceded that blocking would provide an extra margin of safety to prevent the machine from falling or rolling, and I reject his suggestion that this would not be the case if the truck were elevated on level ground as it apparently was in this case. Under the circumstances, that portion of the citation charging a violation of section 77.405(b), IS AFFIRMED.

The alleged imminent danger

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. 820(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Section 107(a) of the Act provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the condition or practice which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 44 (March 1970), states in pertinent part as follows:

The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added]

And, at page 89 of the report:

The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al.*, 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. *Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973)*, aff'd., *Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al.*, 504 F.2d 741 (9th Cir. 1974). The foregoing principles were reaffirmed in *Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al.*, 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

[E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate

an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7 (d) of the Administrative Procedure Act (5 U.S.C. 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucas Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322, 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the facts presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspector's education and experience would conclude that the condition of the front jack on the truck which was cited constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Likewise, MSHA must also show that the lack of suitable blocking at the time the order issued also presented such an imminently dangerous situation.

After careful consideration of all of the testimony and evidence adduced in this case, I cannot conclude that the conditions described by the inspector in his citation constituted an imminent danger on April 9, 1981. At the time the inspector observed the elevated truck no one was working under it and the two mechanics who were present were at a safe distance eating their lunch in a service truck parked nearby. After observing the elevated truck, interviewing the two mechanics and learning that they had been under the truck performing some maintenance work shortly before his arrival on the scene, the inspector proceeded to examine the front jack and he instructed one of the mechanics to loosen or bleed off the front pilot check valve with a wrench. It seems to me that if the inspector was really concerned about the imminency of the situation, he should have instructed the mechanic to lower the jacks so that all of the wheels were safely on the ground before approaching the truck to conduct the so-called test. His statement that he could not do so because he "does not direct the work force" is inconsistent since he specifically instructed and directed the mechanic to loosen the pilot valve to perform the test. Since the inspector obviously believed that instructing the mechanic to perform this chore was within his authority, I fail to understand why he may have believed that instructing him to lower the jacks somehow exceeded that authority. In my view, the lowering of the jacks would have eliminated any perceived hazard, and permitting the mechanic to go ahead and approach the truck and perform the test adds to the doubts which I have concerning the presence of any imminent danger at the time the order issued.

Although he denied telling anyone that he would not have issued an imminent danger order had mine superintendent Morrison come to the scene immediately when he called him over the mine telephone, the inspector did concede that he was upset over Mr. Morrison's failure to come immediately. Having viewed the inspector during his testimony that Mr. Morrison "had something more important to do than to worry about his personnel", I believe that the inspector was somewhat chagrined by Mr. Morrison's failure to come to the scene immediately, and that this did influence the inspector's judgment somewhat in deciding to issue the order.

The inspector's asserted justification for issuing an imminent danger order was his belief that once he left the scene the two mechanics would have gone back under the truck. On the facts presented here, I find nothing to substantiate the inspector's speculative conclusion that the two men would defy his instructions. One of the two "mechanics" who purportedly were under the truck prior to the inspector's arrival at the scene was in fact a driller (Louis Wagner) who was helping the mechanic. Mr. Wagner testified that he was not under the truck, and he denied telling the inspector that he had been under the truck. He also testified that at the time of the inspector's arrival all of the work on the truck had been completed. The inspector conceded that an oil filter could be changed from the top of the truck without the necessity of anyone going under it. Further, the facts here also show that the two rear jacks were in

proper working order. Coupled with my finding that the two inch
drop in the

~2195

front jack was caused by the deliberate loosening of the fitting during the so-called "test", I cannot conclude that the condition of the front jack was such as to constitute an imminent danger. In addition, I cannot conclude that the absence of blocking presented any imminent danger on the facts here presented. Under the circumstances, that portion of the citation which alleges an imminent danger IS VACATED, but my findings concerning the existence of a violation of section 77.405(b) stand as affirmed.

Significant and Substantial

In *Secretary of Labor v. Cement Division, National Gypsum Company 3 FMSHRC 822*, issued on April 7, 1981, the Commission interpreted section 104(d) and set forth the test for determining whether a condition created by a particular violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine hazard. The National Gypsum case was a civil penalty proceeding concerning eleven section 104(a) citations in which the inspectors marked the "S & S" block on the face of each citation. In that case the Commission held that a violation is "significant and substantial" if --

based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

On the facts presented in this case, the inspector marked the "S and S" block on the face of the citation form, and at the same time he made a finding that an imminent danger existed. However, I find nothing in section 104(a) or 107(a) that specifically authorizes an inspector to also make an "S & S" finding when he issues such citations or orders. The only specific mention of any "significant or substantial" violation is found in section 104(d)(1) and section 104(e)(1). The former section deals with "unwarrantable failure" citations, and the latter deals with "patterns of violations" which are considered to be significant and substantial. Under section 104(d)(1), a condition precedent to a finding of "significant and substantial" is that no imminent danger exists. Therefore, on the facts of this case, the inspector's findings that the conditions or practices cited constituted an imminent danger as well as significant and substantial violations is somewhat inconsistent.

In the instant case, it seems obvious to me that the inspector believed that the failure to independently block the truck while performing maintenance on it while in an elevated position constituted a significant and substantial violation of section 77.405(b). Although it may be true that the hydraulic truck jacks provide some measure of support for the truck while it is the actual drilling mode, I am convinced that the primary purpose of those jacks is to stabilize and level the truck during the drilling process so as to insure an accurate drill hole. In this case, the truck was not engaged in any drilling, but was parked away from the drill site while maintenance was being performed on it. The practice of

~2196

not using any independent means of blocking under the truck to preclude any forward or backward movement while someone may be under it is a serious practice which, under the proper set of circumstances, could result in serious injuries to those individuals. The question here is whether those circumstances were present. While it can be argued that at the time the citation issued, the work on the truck had been completed and no one was under it, the respondent's candid admission in this case that the Drill-Tech Trucks were never blocked is a practice which I consider to be a significant and substantial violation. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Remain in Business

The parties stipulated that the mine is a fairly large operation and that the assessment of reasonable penalties will not adversely affect the respondent's ability to remain in business. I adopt these stipulations as my findings on these issues.

History of Prior Violations

The parties stipulated that the respondent has a small history of prior violations. In fact, they also stipulated that for the 24-month period prior to the issuance of the instant citations, the respondent had five paid assessments, none of which were for violations of the same safety standards at issue in these proceedings. Taking into account the size of the mining operation here, I conclude and find that for the purpose of this proceeding Cambria Coal has a good safety record and that any additional increase of the civil penalty assessment made in this case is not warranted.

Negligence

The evidence here establishes that the notice of mine policy against working under elevated equipment without adequate blocking was posted on the mine bulletin board, and one of the mechanics admitted he had been under the truck in question without any independent means of blocking. Under the circumstances, I conclude that the respondent here failed to take reasonable care to prevent the cited conditions and that this constitutes ordinary negligence.

Gravity

I conclude and find that the failure to provide an independent means of blocking for the elevated truck in question constituted a serious violation. The respondent conceded that it did not use independent blocking under such drill trucks because of its belief that the hydraulic jacks which are an integral part of the equipment provided adequate support. Although respondent may have acted out of a mistaken belief that MSHA's policy

~2197

guidelines provided an exception for the requirement for independent blocking, I find that the practice of relying on the truck hydraulic jacks alone while performing maintenance on the truck is serious.

Good Faith Compliance

The inspector believed that the respondent exhibited bad faith in correcting the cited conditions and his conclusions in this regard stem from the fact that he had to make several trips back to the mine before he finally abated the order. On one occasion when he went back and found that the front jack still dropped an eighth of an inch when tested, he refused to abate the order and was compelled to return again. However, the facts show that the jack was dismantled and completely replaced with a new one. This was apparently done after the operator opted to leave the truck where the inspector found it, and there is no evidence that the operator used it after it was cited. Simply because the inspector was required to make several trips back to the mine to abate the citation is no reason to conclude that there was bad faith. Here, the effect of the withdrawal order was to remove the truck from service and no abatement time was fixed by the inspector. The abatement time was therefore up to the operator's discretion, and the fact that the inspector may have been inconvenienced is not sufficient grounds for me to conclude that the operator here exhibited a lack of good faith in finally correcting the cited conditions. Accordingly, I cannot conclude that there was a lack of good faith compliance in this case.

Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account all of the statutory criteria found in section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of \$400 is reasonable and appropriate for the violation which has been affirmed, namely 30 CFR 77.405(b).

Order

Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$400 within thirty (30) days of the date of this decision for the violation in question, and upon receipt of payment by MSHA, the civil penalty matter should be DISMISSED.

George A. Koutras
Administrative Law Judge