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U.S. STEEL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED STATES STEEL CORP.,
CONTESTANT

v.

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

Contest of Orders

Docket No. WEST 81-356-RM
Order No. 0583637 7/6/81

Docket No. WEST 81-357-RM
Order No. 0583638 7/6/81

Docket No. WEST 81-358-RM
Order No. 0583639 7/6/81

Keigley Quarry

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

v.

UNITED STATES STEEL CORP.,
RESPONDENT

Civil Penalty Proceedings

Docket No. WEST 81-395-M
A.O. No. 42-00021-05006

Docket No. WEST 81-394-M
A.O. No. 42-00021-05005V

Keigley Quarry

DECISIONS

Appearances: Louise Q. Symons and Billy Tennant, Attorneys, Pittsburgh, Pennsylvania, for U.S. Steel Corp. Robert A. Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for MSHA

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings were docketed for hearings on the merits in Salt Lake City, Utah, during the term September 21-22, 1982. Dockets WEST 81-394-M and 81-395-M are the civil penalty proposals filed by the Secretary pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for a total of four alleged violations of mandatory safety standard 30 CFR 56.9-2. Dockets WEST 81-356, 81-357, and 81-358 are contests filed by the United States Steel Corporation challenging the legality of the issuance of three of the citations.

~323

The citations and orders which are the subject of these proceedings are as follows:

Docket Nos. WEST 81-395-M and WEST 81-356-RM

Citation No. 0583637, is a combination section 104(a) citation and a section 107(a) "imminent danger" withdrawal order issued by an MSHA inspector on July 6, 1981. The inspector cited a violation of mandatory safety standard 30 CFR 56.9-2, and indicated that the alleged violation was "significant and substantial". The condition or practice cited by the inspector on the face of the citation is as follows:

The service brakes on the company No. 7 Euclid Water truck would not hold the truck in 1st, 2nd, 3rd or 4th or in neutral gears on the ramp by North Truck shop. Also, the other three brakes applied along with service brakes would not hold. This truck works in the plant and pit apron around pool traffic, small vehicle and haul truck traffic.

Docket Nos. WEST 81-394-M and 81-358-RM

Section 104(d)(1) citation No. 0583636 was issued on July 6, 1981, at 2:00 p.m., and cites a violation of mandatory safety standard 30 CFR 56.9-2. The inspector indicated that the violation was "significant and substantial", and the condition or practice is described as follows on the face of the citation:

The emergency brake to the drive line, the torque brake to the converter, and the dump park brake would not hold the company No. 7 Euclid water truck. Would not hold in 1st, 2nd, 3rd or 4th gear in idle. This truck waters the plant area 8 times daily, the haul roads, and the pit area. These areas are used by foot traffic, small vehicle and have truck traffic. These conditions have been reported several times to supervision. This is an unwarrantable failure.

The inspector fixed the abatement time for the citation as 12:00 p.m., July 12, 1981. However, he subsequently terminated the citation on July 8, 1981, and the reason for this action is shown on the face of his termination notice as follows:

The battery for the No. 7 Euclid Water truck was removed. The truck was put on the repair line.

Section 104(d)(1) Order of Withdrawal No. 0583639, was issued at 2:10 p.m., July 6, 1981, and the inspector cited an alleged violation of

~324

mandatory safety standard 30 CFR 56.9-2. He also found that the alleged violation was "significant and substantial", and his order removed the Dart 35 ton haul truck no. 18 from service. The condition or practice cited by the inspector on the face of the order is stated as follows:

The service brakes and dump brakes on the Dart 35 ton company No. 18 haul truck when applied on the level at idle, 550 RPM, wouldn't hold. This truck works in the pit and around other haul trucks, small vehicle and foot traffic. These conditions have been reported to supervision. This is an unwarrantable failure.

The inspector relied on the previous section 104(d)(1) citation number 0583636, July 6, 1981, as the basis for his order (See modification of July 7, 1981). The order was subsequently terminated at 3:30 p.m., on July 8, 1981, and the action taken by the operator is described on the face of the termination notice as follows:

All brakes were restored to adequate operating condition.

Docket Nos. WEST 81-394-M and 81-357-RM

Section 104(d)(1) Order No. 0583638, is a withdrawal order issued at 3:00 p.m., July 6, 1981. The inspector cited an alleged violation of mandatory safety standard 30 CFR 56.9-2, and concluded that the violation was "significant and substantial". The condition or practice cited is described by the inspector on the face of the order as follows:

The service brakes, dump brakes, and park brakes on the haul pack 35 ton company No. 10 haul truck would not hold on the grade at the North truck shop. All three brakes were applied and the truck was placed in 1st, 2nd, 3rd, 4th and neutral gears and the brakes would not hold. This truck works in the pit area around other haul trucks, small vehicle and foot traffic. This is an unwarrantable because this has been turned into supervision.

The inspector cited the previous section 104(d)(1) citation number 0583636, July 6, 1981, as the basis for his order, and the order withdrew the cited No. 10 haul pack truck from service.

The order was subsequently terminated on July 8, 1981, at 3:00 p.m., and the action taken to by the operator is described on the face of the termination notice as follows:

All brakes were put into adequate operating condition.

Issues

Docket WEST 81-356, concerns a combined section 107(a) order and section 104(a) citation. The issues presented are whether the conditions or practices cited by the inspector constituted a violation of the cited mandatory safety standard, and whether those conditions constituted an imminent danger.

Dockets WEST 81-357 and 81-358, concern the legality and propriety of two section 104(d)(1) unwarrantable failure orders, which the inspector believed were "significant and substantial" violations. The remaining civil penalty dockets, WEST 81-394 and 81-395, are the civil penalty proposals filed by MSHA seeking civil penalty assessments for the citations which have been contested.

In determining the amount of a civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (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.

Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated that the Keigley Quarry is subject to MSHA's jurisdiction, that the operator U.S. Steel Company is a large operator and that any reasonable penalties assessed will not affect its ability to continue in business. The parties also agreed that all of the citations issued in these proceedings were abated in good faith, that the inspectors who issued them were duly authorized representatives of the Secretary, and that for the purposes of these proceedings U.S. Steel's history of prior violations at the quarry in question consists of six citations issued during the 24-months prior to the issuance of the citations in question in these cases (Tr. 4, Exh. G.-1).

MSHA's Testimony and Evidence

Bernard A. Oberg, Maintenance Foreman, Keigley Quarry, testified that he was working at the mine on July 6, 1981, during the day shift, and

~326

he indicated that he is responsible for maintaining the trucks in good repair after he receives notification from the drivers or foremen that repairs are needed. His procedure is to schedule maintenance work from any notes turned in by the truck drivers on their daily reports which may reflect that some work is required on a particular vehicle. Generally, the decision as to whether any particular truck may be kept in service and driven is left to the driver, but trucks with bad brakes are not permitted out of the shop (Tr. 9-13).

Mr. Oberg testified that in July 1981, he was in charge of the maintenance program at the quarry, and he confirmed that there were some problems because of the age of some of the trucks, lack of manpower, and the lack of money to purchase new ones. He described the trucks as being in "fair to good condition", and indicated that in general "most of the vehicles have pretty good brakes". He also confirmed that because of equipment breakdowns, all of his manpower was used to repair other equipment and less attention was paid to the trucks (Tr. 15).

Mr. Oberg confirmed that MSHA Inspector Goodspeed cited several trucks on July 6, 1981, because of inadequate brakes, and he confirmed that the No. 7 water truck was ordered removed from service by the inspector because he believed the brakes were inadequate. The inspector gave him permission to take the batteries out of the truck, but he (Oberg) did not speak with truck driver Charles Gonzales about the condition of the truck, but he did confirm that he received a written report from Mr. Gonzalez about the inadequate brakes on the truck and it was dated that same day. However, he had no idea when Mr. Gonzales made his report, but indicated that they are usually turned in at the end of the shift at 4:00 p.m. Mr. Oberg conceded that the No. 7 water truck brakes "needed some minor attention", and he did not dispute Mr. Gonzales' report which indicated that the brakes "were bad". Mr. Oberg conceded that the brakes "were poor" (Tr. 20).

Mr. Oberg described the braking systems on the No. 7 water truck, and he confirmed that repair work on the truck was made in his maintenance shop, and he indicated that new brake shoes were installed on all four wheels and that a chipped bearing on the front wheel was replaced. The drive line to the parking brake had to be replaced because it had been left on. He confirmed that the parking brake was not working, and that if the truck were parked on a hill "it may run away depending on where it was at" (Tr. 22). He also confirmed that the retarder braker was working, but that the dump brake "would not hold the truck on the level that he wanted us to hold it on" (Tr. 24). He indicated that after the truck was repaired, it was road tested and that all of the brakes worked much better after they were repaired. He conceded that the brakes on the truck in question were in need of repair (Tr. 25).

Mr. Oberg stated that the No. 7 water truck was converted from an old haulage truck, but that nothing was done to the

brakes at the time of the conversion. He confirmed that the truck travels the same roads as the haulage trucks, but that drivers "did not care to use the truck on the hill, hauling loads, because of the fact that it did have poor brakes. They were poor when the truck was new", and he explained the situation further as follows (Tr. 44):

A. Every time you would ask the people who delivered the truck there, they said, "Hey, these brakes are only meant to stop the truck on a final stop. They are not to bring the truck off the hill. That is done by the converter brake."

Q. So the reason it was changed from a haulage truck to a water truck was because you had complaints on the vehicle?

A. We had drivers that didn't want to drive the truck.

Mr. Oberg confirmed that the No. 10 K-W haul truck was also taken out of service by the inspector on July 6, 1981, because the inspector believed that it had "bad brakes". Mr. Oberg stated that the truck "hauls off the hill every day of the week, on every shift that we work it" (Tr. 26). He confirmed that after the truck was cited the driver and a mechanic drove it and they found that the brakes were "not working properly". Although the truck had brakes, the mechanic found that they "were not working the way that he felt they should". The truck was taken to the shop and the brake linings on all four wheels were replaced. He also had a local brake contractor, Southwest-Kenworth, check out the truck hydraulic master cylinders, and they found two that were not working properly. However, all four of the master cylinders were repaired. The faulty master cylinders would affect the brake pressures, but the brake linings which were on the truck before they were replaced had about "three quarters of linings left". In addition, the truck parking brake needed to be adjusted, and the linings were replaced, but the torque brake was functioning fine and was not repaired. Mr. Oberg identified exhibit G-5 as a copy of the field service report prepared by the contractor for the No. 10 truck (Tr. 26-31).

Mr. Oberg testified as to the condition of the brakes on the No. 18 haulage truck, and he confirmed that it was an old secondhand truck. He confirmed that when the truck was checked there were "a few minor problems with the brakes, mainly on the left side" (Tr. 32). He indicated that the brake cam shafts that rotate the brake shoes and lock the wheels were worn, had not received enough grease, and were starting to freeze up. He confirmed that these conditions would possibly affect the ability of the vehicle to stop within a certain distance and that the brake shoes "would have to travel farther and wouldn't come on quite as quick" (Tr. 32). He also confirmed that he did not personally road test the truck, but that the mechanics stated that "there were brakes on there, but they needed adjusting." Once the mechanic began to adjust them he found the shaft that was not operating, and all of the wheels were pulled and the repairs were made (Tr. 33). The front brakes were adjusted and an air leak was repaired (Tr. 34). The malfunctioning front brakes would also affect the functioning of the service brake (Tr. 38).

Mr. Oberg testified that he did not personally work on any of the cited trucks, but that the work was done under his direction. He also confirmed that he did not drive any of the trucks because it is against company policy for a foreman to drive any trucks, and he indicated that the last time he drove one when when he was employed as a shop mechanic (Tr. 40). He identified exhibit G-6 as a copy of the repair report for the No. 18 truck prepared by Southwest-Kenworth (Tr. 42). He also confirmed that the report reflects that the truck brakes were "very poor", and while the truck did have brakes he conceded that they were not adequate (Tr. 42). Mr. Oberg stated that had he known of the conditions of all of the trucks prior to the time the inspector cited them for the braking conditions in question he would have pulled them all in and had them repaired (Tr. 44-45).

Charles Gonzales testified that he is employed as a laborer at the quarry, but that in July 1981 he worked as a temporary haulage truck driver filling in for drivers who were on vacation. He confirmed that he is president of the local union at the mine, and was in that capacity in July 1981. He also confirmed that he drove the No. 7 water truck, and also drove the other water truck, and that the water trucks are used to keep the dust down on the mine haul roads. The No. 7 truck has a 2,000 gallon capacity, and while he drove it approximately eight hours a day, he could not state how many miles it would be driven on any given day (Tr. 50-52).

Mr. Gonzales testified that on July 6, 1981, he accompanied Inspector Goodspeed on a walkaround inspection, and when Mr. Goodspeed inquired about the condition of the brakes on the No. 7 water truck, Mr. Gonzales told him that "they weren't very good". Mr. Goodspeed then accompanied him in the truck to the water tower for a load of water, and as they descended from the "pretty sharp incline" he advised Mr. Goodspeed that the brakes were "not very good". He then traveled to another hill leading towards the north shop and when Mr. Goodspeed asked him to try the brakes "they wouldn't hold on that hill". Mr. Gonzales indicated that when he first started down the hill from the water tower he was in first gear because he did not want to come down too fast with a load of water, and he confirmed that this was his usual procedure because he feels safer driving in first gear and that this gives him additional braking (Tr. 52-54). He was aware that the truck brakes were not very good, but he did not test them at that time (Tr. 55).

Mr. Gonzales stated that after coming off the hill from the water tower, the road straightened out just before descending towards the shop area and that this portion of the road is a long incline. He was traveling at a speed of five to ten miles an hour and when he applied the foot brake pedal the vehicle would not stop and it "just kept rolling". Had the brakes been working properly, the truck should have stopped on the hill. He also confirmed that he applied the "oil" or retarder brake and the park brake, but that these would not stop the truck (Tr. 57). He believed that the application of these two braking systems should have slowed the

truck down, but indicated that they are not meant to stop the vehicle completely. He confirmed that the parking brake would not hold the truck on the hill (Tr. 58).

Mr. Gonzales stated that drivers "walkaround" their truck to check the tires and lug nuts, but that the only way to check the brakes is while the vehicle is in motion. He confirmed that he could refuse to drive a truck if he is not happy with the brakes, and while the brakes on the water truck were inadequate prior to July 6, 1981, he never refused to drive it because he was trying to do the best that he could to keep the dust down on the roads with the truck that he had. If he refuses to drive any particular truck, he would be given another truck to drive or assigned to other work (Tr. 60). He confirmed that he orally advised hill foreman Keith Barnett a week prior to July 6, 1981, that the water truck brakes would not hold the truck on the hills. He assumed that Mr. Barnett would report this condition to Mr. Oberg, and he (Gonzales) did not follow up on it because he "expected that they would get them fixed when they got around to them (Tr. 62). The truck was not taken out of service and it was driven until the inspector issued the citation. He drove it about three months prior to the time it was cited and he indicated that the brakes "were getting bad then. They just kept getting worse all the time" (Tr. 62).

Mr. Gonzales identified exhibit G-7 as the report he filled out on July 6, 1981, for the water truck in question, and while he could not recall when he filled it out, he confirmed that they are usually turned in at 3:45 p.m. Mr. Gonzales stated that the inspector advised him to take the truck out of service after they tested the brakes on the hill incline north of the shop, and he indicated that the inspector was not hostile but "just doing his job" (Tr. 64). He confirmed that he drove the truck after it was repaired and that the brakes would hold the truck on the hill and he felt safer driving it (Tr. 65). When asked whether the condition of the brakes on July 6, 1981, before they were repaired affected safety, he replied as follows (Tr. 67-68):

A. Well, let me put it this way. I could stop the truck. But if it had been an emergency, say if I had to stop it in a hurry, I couldn't stop it.

Q. Can you visualize a situation where you would have to do that in the operation of your daily routine?

A. Well, I'm in and out of haulage trucks, and I have to come down that incline and go through the north shops, and in front of the other shops. Somebody could pull out in front of me, or something, and if I would have to stop real quickly, I don't think I could have done it, no.

Q. Are there miners walking on the road where you generally operate your vehicle?

A. Just down in the shop area.

Q. In your daily operation, would you pass fairly close to these people?

A. Yes. I used to drive in front of the shops three or four times during the day for a sprinkle of water out there, to keep the dust down.

Q. Could you visualize a situation, under those circumstances, where you would have to stop quickly?

A. Like I say, if I would have had an emergency stop, I couldn't have made it.

Q. You thought you couldn't have done it?

A. Yes. That's exactly right.

On cross-examination, Mr. Gonzales confirmed that he drove the water truck for some three hours before the inspector arrived for his inspection. He also confirmed that he was with the inspector for a couple of hours before he got around to inspecting the water truck, and that prior this time the inspector had inspected some other haulage trucks in the pit area. Mr. Gonzales confirmed that during his normal course of work he would drive with a load of water down the same slope where the truck was tested with the inspector (Tr. 71). He confirmed that he did not previously report the brake conditions of the truck in writing on his daily reports, but did report it orally and the foreman "writes it down on a notebook" (Tr. 74). He also indicated that foreman Barnett told him he "was tired of writing it down" (Tr. 75).

Norman Thomas confirmed that he was employed at the quarry on July 6, 1981, as a truck driver and that he operated the No. 10 haul truck from the pit area to the mill or to the waste dump. He indicated that the truck is a 35 ton truck, and he confirmed that it was cited by Inspector Goodspeed on July 6, 1981, and that he was the driver during the day shift. He confirmed that the brakes on the truck "haven't been good for three or four months, maybe longer than that" prior to the time the inspector cited it (Tr. 98). He stated that on July 6 "you could put on all the brakes and they wouldn't hold you with a load on that hill". He identified "the hill" as "the one by the north shop that we tested it on" (Tr. 98). He confirmed that he had previously reported the brake conditions to shift boss Ed Westover or Keith Barnett within a month prior to July 6th, and that the reports were either oral or in writing (Tr. 99-100).

Mr. Thomas confirmed that he has the right to refuse to operate a truck that is not in safe condition, but he could not recall refusing to operate the No. 10 truck. He did not believe that the truck could be safely operated on July 6, but he indicated that "we did it just to get by". He also stated that the shift boss would comment "Well, if we can just get by today, maybe we can get with it" (Tr. 101). He confirmed that the mechanics had a lot of work, and he indicated that because of the brake conditions he had to take extra precautions when driving the truck. He confirmed that he operated the truck at speeds of 15 to 20 miles an hour, but indicated that the speedometers would never work (Tr. 102).

Mr. Thomas stated on July 6th Inspector Goodspeed tested his truck by having him apply the brakes while the gas pedal was depressed and the truck engaged in third gear. The brakes would not hold the truck and "it just crept away". The truck was then driven to a hill and placed in neutral, and when the brakes were applied while going three or four miles an hour "it still just rolled off" (Tr. 104). Mr. Thomas stated that he applied the service brake and the retarder and it still would not stop the truck. He also indicated that the dump brake was not working properly, and that when he was loading the force of the load being dumped into the truck would push the truck forward and the brake would not hold. He conceded that he did not report that specific condition to mine management but simply told them that "the brakes were no good" (Tr. 107). He believed that the defective dumping brake posed a hazard around the loading areas and that the other bad brakes posed a hazard since he would be unable to stop the truck if someone were to run in front of him (Tr. 107-108).

Mr. Thomas confirmed that the truck was taken out of service after it was cited by the inspector, and that after it was repaired the stopping capacity of the brakes improved (Tr. 110). He confirmed that it was company policy to report truck defects to the shift boss, but that the mechanics did not come to the pit areas to inspect any of the trucks. When asked whether the condition of the truck brakes affected his ability to safely operate the vehicle he replied "yes and no. Yes, they wasn't good enough to stop if you had to stop real quick" (Tr. 112). He did consider the brake conditions to be "a minor problem", and he stated that "They could be fixed. But how long it was going to take them to fix them, I didn't know" (Tr. 113). He also indicated that "you could get by with it, but it wouldn't be something you wanted to drive every day of the week". He never reported the brake conditions to the safety committee because he did not know who was on the committee, and he could recall no instances when the company took the No. 10 truck out of service after he reported the brake conditions (Tr. 114).

On cross-examination, Mr. Thomas confirmed that he had driven the No. 10 truck for four or five hours on July 6th before the inspector arrived on the scene. He described his normal route of travel that day, but could not recall whether he had driven the truck the week before, nor could he recall exactly

when he had reported the brake conditions to

~332

his foreman (Tr. 118). He confirmed that Inspector Goodspeed asked him to drive the truck to a hill that he ordinarily used to get back and forth from the shops and that the brakes were tested in that hill area. He confirmed that he applied all of the brakes on a level while also applying the accelerator and the brakes would not hold (Tr. 120-121). After this test, he proceeded to the hill and applied the dump brake while coming down the hill at five miles an hour, but the wheels did not lock and it would not stop the truck (Tr. 123). He stated that "I might as well have pushed in on the clutch, if I had one, because it didn't slow me down one bit" (Tr. 125). He confirmed that the truck was in neutral when he tested the brakes, and conceded that he normally kept it under control by driving it in second gear when descending a hill (Tr. 126). He confirmed that he had filled out reports stating that the brakes were bad, but he could not recall when he did this (Tr. 127-128). When asked why he had not reported the brake conditions before the inspector cited the truck, he replied (Tr. 131):

Because on the back of this, I had writer's cramp from writing down the things. After recording them for so long, they don't want to fix them, so what do you do? I got a family to feed, so that's what I do instead of getting in trouble with the management.

In response to further questions, Mr. Thomas confirmed that when the truck brakes were tested on the flats and on the hill, the brakes would not hold, and he also confirmed that he knew before the test that the brakes weren't very good but that he had no idea about the kinds of tests that would be made by the inspector (Tr. 135). He also confirmed that no one from maintenance tested the brakes while he was driving the truck in question (Tr. 135).

Stephen Farr testified that he is unemployed but that he did work at the quarry in question and that on July 6, 1981, he was employed there as a truck driver on the No. 18 truck. He stated that except for the brakes the truck was in good condition. He stated that the drive-line brake, the service brake, and the dump brake would not stop the truck when they were tested (Tr. 140). He confirmed that the inspector got into the truck and it was first tested on level ground in front of the hopper. The park brake was engaged and the engine was under 1,000 rpm's when the brake was engaged and the truck moved forward. The truck advanced at a slow speed and then picked up a bit, and this indicated to him that the brakes weren't very good. He also tested the service brake in the same gear and with the same rpm's and the truck continued forward, even with the brake pedal all the way down. The same result was achieved when the dump brake was similarly tested (Tr. 140-144). After these tests, Mr. Goodspeed advised him that the truck did not meet the standards and he instructed him to drive it down the same hill that the other trucks had been tested on to a parking area past the north shop. As they proceeded down the hill, the inspector asked him to again test the brakes and the brakes would not hold. Mr. Farr had to slow the truck down by putting the transmission in

reverse, and he believed he was half way down the hill in third or fourth gear at this time doing about five miles an hour (Tr. 145).

Mr. Farr stated that had the truck brakes been in good condition the service brake would have stopped the truck on the hill where it was last tested, and that after the brakes were repaired the truck could be stopped by the service brake. He believed that the test performed by him and the inspector was a fair test and that the road grade where the test was performed was similar to the road grades he used every day during the course of driving the truck in question and the conditions were similar. In fact, he indicated that the brake tests were conducted while the truck was unloaded. Mr. Farr believed that each driver should test his truck daily to insure that the brakes operated properly. However, he indicated that the former site superintendent insisted that each driver arrive at his work station within ten minutes and that this resulted in the driver's making a hasty walkaround inspection of their vehicles (Tr. 149).

Mr. Farr confirmed that he was a member of the mine safety committee and that safety meetings were called to discuss the possibility of driver's being given more time to inspect their vehicles with company management, but nothing ever came of this (Tr. 150-151). He also confirmed that prior to July 6, 1981, he had made both verbal and written reports about the brake conditions on the No. 18 truck, but he could not confirm the dates on which these were made. He also indicated that reports were made to Mr. Barnett or Mr. Westover, but that no one would ever tell him what was done to correct any problem. However, he did confirm that he was given the opportunity to use other trucks while his was being repaired (Tr. 155).

Mr. Farr confirmed that he was aware of the fact that he could refuse to drive a truck which he felt was unsafe. He also confirmed that he had previously refused to drive the No. 18 truck because of a steering problem and not because of faulty brakes. He indicated that the steering problem was corrected the next day, and no one told him he had to drive it when he initially refused to do so (Tr. 157). When asked to explain why he continued to drive the drive the truck if he thought the brakes were inadequate, he responded as follows (Tr. 158):

A. Well, I think that your brake wear is kind of a gradual thing. Sometimes that creeps up on you before you realize that you are already there, as far as wearing goes. So the, I think the Federal Mine Safety Board sets standards to help us to determine when we've reached that point. This particular day, when Mr. Goodspeed came down, we were reminded of what those are. Like anyone else, if you're not making your employer money, they are not wanting you around, either.

Q. Were the brakes on the No. 18 truck gradually getting worse up until the time that the order was issued, or were they in the same relative condition for a period of time?

A. I don't think it was a sudden thing, no. As I commented before, there was a time prior to that date that the parking brakes did work and, I think, the park brake is the easiest of any of them, you might say, to burn out or wear out. While the wheel brakes take longer to wear out. I don't believe that truck had worn out brake shoes on it, except for the drive-line brake. It has smaller shoes and heats up faster.

Mr. Farr could not specifically recall when he had last driven the truck in question prior to the inspection of July 6th, but he was aware of the fact that the brakes were not working properly that same morning before the inspector cited it because of the tests that he (Farr) had performed on it. He had tested the service and dump brake on an incline and they were not operating according to his own standards, and while he had the option of turning the truck down he elected to go ahead and drive it. He indicated that he would probably have continued driving it all day if the inspector had not arrived on the scene (Tr. 162). He later determined from Mr. Oberg that the drive-line brake shoe linings were burned out, and he received a list showing the repairs which were made to the truck in question. He also learned that the truck was out of service for several days awaiting parts, but that after the repairs were made the truck brakes worked better and the service brake was able to bring the truck to a stop (Tr. 163-164). When asked whether he believed the condition of the brakes prior to the issuance of the order on July 6th had any affect on safety, he replied as follows (Tr. 166):

THE WITNESS: Like I say, if I were to happen to stop that truck on a hill, on an incline, it wouldn't have held. There have been occasions where there have been parts of vehicles laying alongside the road, lug nuts, rock bars, whatever else it might be. It's our responsibility, the driver's to move them out of the road, rather than run over them and ruin tires. That's pretty hard to do if your truck won't hold you.

On cross-examination, Mr. Farr explained the operation of the dump brake on the No. 18 truck, and he conceded that it was not intended

~335

to hold a truck while it is in motion. However, he believed that a park brake should hold a vehicle from going backward or forward, and he confirmed that when he was with the inspector he tested the park brake "on the mill flat by the hopper, and on the hill" (Tr. 177). He also stated that during his normal operation he used the truck retarder brake and also his gears while descending grades (Tr. 178-179). He also confirmed that all of the brakes were tested on July 6th on the level and on the hill when he was with the inspector (Tr. 180).

Mr. Farr confirmed that MSHA had conducted previous inspections at the quarry and that other inspectors had tested the brakes on the trucks. Some were tested "on the level", some inspectors simply determined whether the brakes would stop a truck, and other inspectors wouldn't check them at all (Tr. 182). He also confirmed that he reported the brake condition on the truck in question the day of the inspection but he could not recall the date when he reported it previously, but believed it may have been a week or two prior to the inspection (Tr. 186). He also confirmed that the brake conditions on the trucks were discussed at safety committee meetings where Mr. Barnett was present, but he could not recall any of the specifics, nor could he recall whether the No. 18 truck was specifically mentioned (Tr. 187-191).

Mr. Farr confirmed that he knew the brakes were bad when he drove the No. 18 truck on July 6th, and he also knew that he was putting his own personal safety in danger but stated "I was going to ride it" (Tr. 197). He could not state why the inspector did not cite the "park brake" or the "truck brake on a slope" as part of the cited conditions (Tr. 198).

MSHA Inspector Tyrone Goodpseed, confirmed that he has had prior truck driver experience, and has taken some MSHA training courses dealing with loading, hauling, and dumping. He confirmed that he conducted a regular mine inspection at the quarry on July 6, 1981, and that this was his first visit to that mine. He also confirmed that he inspected the trucks which were cited. He began with the No. 7 water truck because it was the first one available. He accompanied truck driver Gonzales on a test run of the truck, and then asked him to make his normal run to see how the brakes worked. The brakes were tested during the trip along the road by the water incline. The service brake and park brake were tested on the flat level area of the roadway and they would not slow the truck down (Tr. 203-212).

Mr. Goodspeed stated that when the No. 7 truck was tested on the level flat area, it was going four or five miles an hour, and when he asked Mr. Gonzales to apply the service brake fully, it did not hold and the truck kept rolling. After "pumping" the brakes and applying the parking brake, the truck gradually stopped. Mr. Goodspeed confirmed that he issued imminent danger order No. 583637 primarily because of the service brake, even though the other three brakes did not work (Tr. 214). When the service brake was applied during the test, the truck was in third gear while in motion, and after coming to a complete stop, he goes through a regular procedure in testing the truck brakes with the engine running and while the truck is in a "creeping motion". The procedures he uses are detailed in certain guidelines as reflected in exhibits G-8, G-9, and G-10, and he uses these in conjunction with what he has learned during his inspector's training (Tr. 214-221).

Mr. Goodspeed confirmed that he tested the truck on the level portion of the property and also on a nine percent hill, and he explained how he asked Mr. Gonzales to test the brakes. After the testing, he advised Mr. Gonzales that he considered the truck to be an imminent danger and that he was going to ask the company representative to take it out of service (Tr. 223). He advised Mr. Westover that he was going to issue him an imminent danger order, and told him that the truck would have to be fixed before it could be put back in service. Mr. Westover had the mechanics remove the battery from the truck and render it inoperable (Tr. 224).

Mr. Goodspeed stated that Mr. Gonzales told him that he had informed mine management on several occasions that the brakes did not work, and that Mr. Oberg informed him that "the brakes on this unit have never worked" (Tr. 224). Mr. Goodspeed also indicated that he reviewed some company maintenance records, but he could not state with any certainty whether or not he found any recorded record or notations concerning the brakes in question (Tr. 225-226). He also indicated that his notes do not reflect that he found any records to show that anyone had complained about the brakes (Tr. 228).

When asked for his opinion as to whether the brake conditions he cited had an affect on safety, Mr. Goodspeed stated as follows (Tr. 229-231):

Q. Do you have an opinion as to whether the conditions described in the citations had an affect on safety?

A. Did it have any affect on safety?

Q. Yes.

A. Yes, it did. Definitely.

Q. Why do you say that?

A. Because there was no way that he could control that vehicle when we were coming off that hill, as far as braking it and stuff like that, and being able to stop it.

Q. Did you reach an opinion as to the condition of the service brakes on the No. 7 water truck after your test, as to the condition of the service brakes?

A. Yes, I did. When we came down the hill and the service brakes would not even slow it down. And this vehicle operates in and around that plant area with foot traffic and et cetera, and in the shop area, and you have your general offices and there were people in the area at this time --

Q. I understand that. But what was your opinion of the condition of the brakes?

A. I thought that they were inoperable. They were very unsafe.

Q. There must have been some affect that the service brake had on slowing the vehicle. Was it completely inoperable?

A. I would say that it maybe had some affect, yes. I would definitely say that it had some drag or tension on it.

Q. But they were not adequate?

A. Definitely not.

Q. Do you have an opinion of whether they were capable of bringing a vehicle to a stop on an incline?

A. Certainly it would not. We tried it.

Q. That, in your mind, is an important criteria for determining whether the brakes on a particular vehicle are adequate or not adequate?

A. Certainly.

Q. If the brakes were proper, if the service brakes were working, were adequate and in good condition, should they have been able to bring the vehicle to a halt upon an incline?

A. Certainly.

~338

Q. Are you saying that the condition itself, if allowed to continue, would reasonably, likely, cause an accident?

A. Yes. I would say so. I very definitely believe so.

When asked about his imminent danger finding, he stated (Tr. 231-232):

Q. Here you issued an Imminent Danger Order. When could this condition cause this accident, in your opinion?

A. Anytime anybody would walk out in front of that vehicle and go through that yard, or somebody would back out in front of them, or go down one of those ramps, or whatever -- meeting head on with a truck and couldn't stop -- you could create a heck of a problem. And to me, that's an imminent danger. And if it was not corrected --

Q. Could it have happened that day?

A. It could have happened at any time.

When asked about his "significant and substantial" finding, he stated (Tr. 232):

Q. Now, you also marked on the violation, "S" and "S". Now, I think you explained that somewhat, but just to explain why you indicated that this particular violation was "S" and "S", what does that term mean to you?

A. Significant and substantial is the boxes that I marked. It's what we are referring to. Significant and substantial. It could significantly cause or create an accident. That's what we are talking about, reasonably seriously and reasonably likely to happen.

Q. So you are saying that you felt that the condition was reasonably serious, very serious, or what?

A. I think that it is very serious. You take a truck that size, and if you should be struck by it or run over by it, definitely it would be serious. We have fatal grounds in the past that have so indicated --

Mr. Goodspeed stated that he concluded that management knew or should have known about the brake conditions because of Mr. Oberg's statements that they never did work, and also by his own observations when he first

~339

observed the truck in the morning after Mr. Gonzales was "waved down". When he came off the hill after being waved down, "he just kept going", and when "I asked him what was the matter, he said his brakes didn't work too well" (Tr. 210, 234).

On cross-examination, Mr. Goodspeed stated that he could not recall issuing any citations for violations of section 56.9-1 during his inspection of July 6, 1981 (Tr. 235). He denied that Mr. Oberg ever explained to him that driver inspection reports are turned in only if a driver reports something, and that if he doesn't, they are thrown away (Tr. 236). He also indicated that he was informed that drivers sometimes made verbal reports (Tr. 237).

Mr. Goodspeed stated that section 56.9-1, only requires reports of defects, that it does not require records of repairs or daily reports (Tr. 238). He confirmed that the No. 7 truck was totally full of water when it was tested, and that the 2,000 gallons of water weighed approximately 16,000 pounds (Tr. 239). He explained the braking procedures utilized by the driver during the testing on the level as well as on the hill going toward the shop (Tr. 239-241). He stated that it took the truck 200 yards to come to a complete stop after they left the level area where the service brakes were first applied (Tr. 242).

Mr. Goodspeed went on to describe the tests which were performed on the truck while he was with the driver, including the different brake systems which were applied during the test (Tr. 242-247). He conceded that the torque converter was operable and that over the speed of five miles an hour, it did have a "slowing action" effect on the truck. However, he confirmed that when he issued the citation, he was concerned that even with the other brakes applied, the truck would not hold (Tr. 248). Mr. Goodspeed described the "hill area" where the truck was also tested, and described the different gears used by Mr. Gonzales in his attempts to stop the truck. He denied that he himself had created the imminent danger by instructing the driver to drive the truck into the shop area, and conceded that he only instructed him to "take the truck to the shop" (Tr. 249-254). His testimony in this regard is as follows (Tr. 255-256):

Q. You have testified that when you came off the first hill, it took you 200 yards to stop. And yet you didn't consider those brakes so bad that you needed to stop that truck right on the spot?

A. Right on the spot?

Q. Yes.

A. You mean to take it out of service right on the spot?

Q. Yes.

A. I definitely knew there was a problem. I definitely knew there was a serious problem with the brakes. There was no doubt about it. We were going to take the truck back to the shop and put it on the line until they had it fixed.

Q. But if it was actually an imminent danger coming off that hill because you couldn't stop in 200 yards, why didn't you stop the truck right there and walk down the 90 yards to the shop and get people to go back and fix it?

A. Because it was not an imminent danger at that time. It had defective safety. We took it back to have it corrected.

Q. What made it an imminent danger?

A. Because we never tried it on the hill there and when it came down off of this small incline and the grade that they had there were people there. It totally surprised me, it really did.

Q. If it took 200 yards to stop it coming down the first hill, I don't know why it would surprise you that it took 90 yards to stop before it came down the second hill.

A. I have no comment on that.

Q. I think the answer was that an Imminent Order was the only way you could take the truck out of service. The truck was parked, initially when Mr. Gonzales reported the brakes were bad and sat there for three hours, then they went back and got in it and conducted the test. Isn't that true?

A. Somewhat, yes.

THE COURT: The inspector was first notified about the faulty brakes when they first flagged Mr. Gonzales down. The inspector testified that Mr. Gonzales had some problems slowing the truck down. He went right by the inspectors party. That indicated to him that the brakes were bad. The inspector said to Mr. Gonzales, "How come you rolled past us? What's the problem? Have you got a brake problem?" And he said, "Yes." The brakes on his truck weren't that good. He told him to leave the truck there. That they had to go inspect the shop and do these other things and then they would come back and get the truck later. The truck stood there for three hours, approximately. Then they came back and got in the truck and went up and got the water and proceeding with all of these other tests. Is that true?

MS. SYMONS: Yes.

THE COURT: Okay. Quit while you are ahead. The question, it's obvious to me why he issued an Imminent Danger Order.

BY MS. SYMONS (Resuming):

Q. Why didn't you take the truck out of service in the morning when Mr. Gonzales told you that the brakes were bad?

A. Why didn't I take it out?

Q. Why didn't you issue a withdrawal order at 10:30 in the morning when Mr. Gonzales told you the brakes were bad?

A. A withdrawal order for what, ma'am?

Q. Bad brakes.

A. Is that a withdrawal order situation, bad brakes?

Q. You cited a lot of other trucks for it.

THE COURT: The answer is, he hadn't inspected the truck at that point. There is no way he's going to pull the order on it. He just said, "Leave the truck, we'll get to it." That's what happened.

BY MS. SYMONS (Resuming)

Q. Aren't your instructions as an inspector that you are not supposed to subject yourself or any miner to hazardous conditions.

A. Yes.

Q. Yet you took a truck that you knew had bad brakes, put a maximum load on it, and brought it down the hill into an area where you knew there were people, and you knew you couldn't control the truck. And both you and the truck driver were in danger.

A. That's true. To find out how bad the brakes were, you had to test them under normal conditions. We did it with a full load. I realized the brakes were bad and they definitely were. We took it back to the shop to have it fixed. We could not stop it and it would not hold. I guess you might say that I probably did, actually, endanger mine and his life. We really did. We could have overturned coming down that incline. We could have run into somebody. That's true. I'll agree with that.

~342

Mr. Goodspeed identified exhibits G-9 and G-10, as "checklists" which he obtained a year and half ago during his training (Tr. 261-263). He explained that he did not cite the truck for "inadequate brakes" under mandatory safety standard section 56.9-3, because he believed that if maintained in a proper condition, the brakes would not be inadequate. He believed the truck had "defective brakes that affected safety", and his intent in issuing the citation was to bring the brakes up to the manufacturer's specifications (Tr. 264-265). He explained his answer further, at Tr. 272:

THE COURT: Mr. Inspector, you did not cite them for 58.9-3, for inadequate brakes with what?

THE WITNESS: They did have brakes on the trucks. They brakes were there. It's just that they didn't work. I can't say that these brakes have been modified to where they were inadequate. They were a manufactured brake. And it was an adequate brake for the haul unit, or I'm sure they wouldn't have bought it. They didn't work so they affected safety.

THE COURT: Now, if the brakes were not capable of stopping the truck and holding a fully loaded vehicle on the grade that it came down, that would fit the definition of inadequate, wouldn't it?

THE WITNESS: Yes. That's true.

Mr. Goodspeed confirmed that he advised the mine representative the cited truck was under an imminent danger order after all of the tests had been completed and the truck had been driven back to the shop area (Tr. 270). He conceded that when he first tested the truck on the level he thought about issuing only a section 104(a) citation, but that coming off the hill and "it just kept going", and in view "the exposure that you have to people and everything else, to me, that was definitely, at that time, an imminent danger" (Tr. 271)

Mr. Goodspeed confirmed that he issued a section 104(d)(1) unwarrantable withdrawal order on the No. 18 haul truck, and that he did so after being informed by the driver, Mr. Farr, that "they were having problems with the brakes", and after the truck was road tested. Mr. Goodspeed confirmed that his "walkaround and visual" inspection of the truck when he first observed it detected nothing with the truck. He had the driver test the dump brake at the dump area, and it would not hold the truck. He also had the driver test the other braking systems, and he explained the tests which were performed on the service brake as well, and he indicated that the service brakes were tested on the level and on the hill (Tr. 275-284; 289-291).

Mr. Goodspeed testified that the No. 18 truck brake conditions which he cited were "significant and substantial" because "it was reasonably serious and reasonably likely", and that an accident was reasonably likely to occur and someone could

have been injured by the inability

~343

of the truck to stop (Tr. 285). He based his conclusion that the citation was "unwarrantable" on the information given to him by the driver that the brake conditions had been reported to mine management verbally and in writing, but that his check of the company records failed to disclose any record of the defects (Tr. 285-287). He also confirmed that he knew that a section 104(d)(1) citation had been issued, and he didn't consider the condition of the No. 18 truck to be an imminent danger because the "personal exposure" was not present, there was a "lesser degree of danger", and there was less traffic in the pit area (Tr. 288).

On cross-examination, Mr. Goodspeed conceded that his citation on the No. 18 truck does not state that it was tested on a grade and he confirmed that he cited the truck because the service brake failed his test on both the level and on the hill grade (Tr. 292). He also confirmed that since the service brake would not hold the truck while it was idling in third gear on the level area where it was tested, he concluded that the brakes were defective and that the condition affected safety (Tr. 293-294). He also confirmed that the dump brake was tested while the truck was in the "dump position", but he could not specifically recall how far the truck moved forward while the brake was applied (Tr. 297). In his view, the brakes were not working at all, and he saw no reason to note the distances which the truck moved (Tr. 298).

Mr. Goodspeed confirmed that he decided to issue the unwarrantable failure order on the No. 18 truck after it was tested on the level by the mill area, and the truck was then "taken down and parked on the line. Then I told the operator" (Tr. 299). He explained further that he had the driver take the truck to shop to the shop to have it repaired, and he saw no hazard in having him drive it to the shop because it was unloaded and was a different weight than the water truck (Tr. 300-301), and he did not believe that an imminent danger existed with the No. 18 truck (Tr. 301-302).

Mr. Goodspeed stated that when he first spoke with the driver of the No. 18 truck, the driver told him that he had spoken with Mr. Barnett and Mr. Westover, and informed them numerous times that the brakes didn't work, and that they informed him that they needed time to fix them (Tr. 303-304). Mr. Goodspeed could not specifically recall speaking with Mr. Barnett or Mr. Westover about the truck in question, and indicated that they are required to know the regulations (Tr. 308).

Mr. Goodspeed confirmed that he issued a section 104(d)(1) Order for the No. 10 truck, and that he first observed it when it came to the dump. He and the driver, Mr. Thomas, walked around the truck and visually inspected it, but nothing in particular caught his eye at that time. Mr. Thomas informed him that "as far as he was concerned, the brakes didn't work very good" (Tr. 311). They then got into the truck, and he instructed Mr. Thomas to perform certain tests on the brakes, and he followed the same

procedures as he did for the other trucks which he cited that day (Tr. 312). Mr. Goodspeed confirmed that the dump brake, park brake, and service brakes were all tested, and he described the tests as being similar to those administered to the other trucks (Tr. 312-315), and he confirmed that the brakes would not hold the truck when tested.

~344

Mr. Goodspeed confirmed that he decided to issue the order on the No. 10 truck when it was first tested at the dump. He knew at that time that the brakes were not working properly, and he instructed the driver to take the truck to the shop to be repaired, and while in transit down the ramp he had the driver test the service brake and included that condition in the order (Tr. 317). He confirmed that Mr. Thomas told him that he had reported the brake conditions to management, and this gave him the impression that management had prior knowledge of the brake conditions (Tr. 317). He also checked the company records, and found nothing pertinent, and he considered the brake conditions to be serious, but not as serious as the brakes on the No. 7 truck (Tr. 318).

Mr. Goodspeed believed that the No. 10 truck brakes were defective, and that the defective brakes would affect safety because "they would not be able to stop under emergency type conditions" (Tr. 320). He could not recall precisely when he told mine management that he was going to cite the truck (Tr. 321).

On cross-examination, Mr. Goodspeed went over the tests conducted on the truck, and he confirmed that he told Mr. Thomas that he was citing the truck for an unwarrantable failure when he first tested it on the level (Tr. 322). The truck was then taken "on the line, and it was parked there until it was rendered safe to operate" (Tr. 323). When asked why he didn't park the truck immediately, Mr. Goodspeed replied "an unwarrantable failure has nothing to do with how bad they are, does it really" (Tr. 324). He explained further as follows (Tr. 324):

Q. Well, you labeled this citation, significant and substantial.

A. Reasonably serious and reasonably likely --

Q. But not that serious that it was too dangerous to take it down to the shop?

A. I think under a controlled situation -- the truck was empty and everything else.

Q. How could you keep it under control if you didn't have brakes?

A. We kept it under control enough to stop it, to get it down there under those conditions -- not full --

Mr. Goodspeed confirmed that Mr. Thomas told him he had "turned in the truck numerous times", but that a search of the mine records failed to disclose any written reports filed by Mr. Thomas on the truck in question (Tr. 326).

Contestant's testimony and evidence

Phillip Rusti, testified that he has been the quarry superintendent since February 12, 1982, but was not there at the time of Mr. Goodspeed's inspection in 1981. He sketched the slopes and shop area of the quarry (exhibit R-1), and testified as to the degree of slopes and grades, including the distances and grades over which the trucks which operate at the quarry are expected to travel. He stated that the trucks are not designed to travel on a 20 degree grade, and that the manufacturer recommends that they be restricted to travel over an eight percent grade, and that the grade has a definite effect on a truck's braking capability. He also confirmed that he has driven the trucks in question and that he would use first gear to travel down the hill in question. He also explained the different braking systems on the trucks in question, and explained their functions (Tr. 341-347).

Mr. Rusti testified that he would test the brakes on a 35 ton truck on a two percent grade and that he would never test the park brake on such a truck while it was in motion for fear of burning them. He also described the service brakes on the trucks, and indicated that they are air shoe-type brakes activated by a pedal in the cab. He agreed that a truck which "creeps a little" on a level area while in gear with the engine at 650 rpms is "allowed", but that "excessive creep" would indicate that the brakes needed adjustment. He described "excessive" as a creep of more than a foot or two while the truck was "held" for 15 seconds (Tr. 349). He stated that he expected his drivers to test the brakes while going downhill, and that if the brakes are not holding "that's a test in itself". He also saw not much need for the brakes on a hill if the proper gears and torque features are used properly (Tr. 349).

Mr. Rusti explained the functions of an emergency, park, and retarder brake, and stated that problems are caused when drivers use service brakes on hills rather than retarders, and that this causes excessive brake wear, burning, and the bleeding off of the air from the system (Tr. 351).

On cross-examination, Mr. Rusti confirmed that prior to his employment at the quarry in question, he worked as a general foreman at a large limestone quarry in Michigan, and that large haulage trucks were used in that operation, and that a preventive maintenance program was in being at that operation (Tr. 354). While at that operation, he relied principally on the drivers to determine the adequacy of the brakes on the trucks they were driving (Tr. 355). He confirmed that he never drove the three trucks which were cited by Inspector Goodspeed, nor did he road test them or any other vehicles (Tr. 355). He did not believe that a braking system should be designed to stop a truck on a 20 percent grade, such as the hill where the trucks in question were tested, and he explained his answer as follows (Tr. 356-358):

Q. When you are talking about, in your opinion, in third gear, going down an incline at five miles an hour, you don't think that if you apply the service brakes, the No. 7 vehicle, it would be able to stop. Is that just conjecture on your part?

A. No. It's not conjecture. I'm quite certain it wouldn't. You have to remember, now, we are talking about 100 feet of horizontal distance on that incline. Now, if you were going to go half a mile, I'm sure you could stop eventually, but in 100 feet, that's an awful short distance. That's only about twice the length of this room.

Q. I think the testimony was that, though the hill might have been 100 feet, the vehicle never stopped, and, in fact, rolled down into the flat area.

A. Where it stopped?

Q. Where it eventually stopped. You don't think a braking system should be designed to stop a vehicle on an incline?

A. Not a 20 per cent.

Q. That's incredible. How did you measure the 20 per cent incline?

A. With a tape.

Q. With a tape? Did you go out there?

A. Yes.

Q. When was this?

A. When Mr. Gonzales, the federal investigator, was out at our property going over citations. We measured this distance. We also measured the distance to the water tower. We did quite a bit of measuring.

Q. You said that the haulage trucks weren't designed to go down that particular incline?

A. No, I didn't say that.

Q. I thought you did.

THE COURT: He said they weren't designed to be operated on a 20 per cent grade.

BY MR. COHEN (Resuming):

Q. Is that what you said?

A. That's right.

Q. If this was a 20 per cent grade, they weren't designed to go down this particular grade.

A. They were not designed to operate on that particular grade. You can go down there.

Q. What's the difference between operating and going down?

A. With a load, you shouldn't go up or down a 20 per cent grade. It's not your normal operating procedure. This road is a service road. By a service road, that means that you take a vehicle out of there, mainly for maintenance purposes. This is not a normal haulage operation. On our haulage operations, we maintain an 8 per cent maximum.

Q. I thought the testimony was, in fact, that the vehicles did use this road?

A. But not for haulage.

Q. Well, I don't know about that. Do you know, in fact, that they didn't use the road for haulage back in that time?

A. Yes.

Q. How would you know that?

A. Just by the pattern of what we are doing now, and we haven't changed that any. Why would you want to haul something to the shop?

Q. Well, how about going down with a full load of water to the shop area?

A. That's very possible. But you are talking about tons versus thirty-five or forty.

Mr. Rusti was of the opinion that the fact that service brakes on the three trucks in question would not slow them down on a 20 per cent incline does not indicate a problem with the brakes. Although he indicated familiarity with the manufacturer's specifications for the

~348

trucks in question, he indicated that they "were sketchy" and found nothing to support his opinion other than the "test" used on a horizontal level where the service brakes were applied while the engine was running at 650 rpm's (Tr. 360-361). He confirmed that this test was essentially the same one used by the inspector when he tested the truck brakes on level ground (Tr. 361).

Mr. Rusti stated that since he was not at the mine site at the time of the inspection and citations, he had no way of knowing whether the brakes on the trucks which were cited were adequate or not, and when asked an opinion as to whether the conditions cited by Inspector Goodspeed were an "imminent danger" or an "unwarrantable failure", he responded "I won't even make an observation" (Tr. 362). When asked to account for the fact that Inspector Goodspeed found the brakes in such a condition as to warrant the issuance of such orders, he responded "I wasn't there so I don't know" (Tr. 370).

Mr. Rusti confirmed that subsequent to the issuance of the citations in question by Inspector Goodspeed, MSHA conducted another investigation to determine whether any "willful" violations should be issued because of the truck brake conditions, and he identified the MSHA Investigator who conducted that investigation as a Mr. Gonzales. He also confirmed that his measurements of the distances previously referred to by him in his testimony took place at that time, and he confirmed that MSHA found no basis for issuing any "willful" citations (Tr. 363-369). Mr. Rusti also confirmed that the normal procedure is to service the trucks every 1,000 hours, and that they are brought in for lubrication and a general checkup (Tr. 369).

Keith M. Barnett, production foreman, testified that he supervised the drivers of the trucks which were cited and that during the period May through the first part of July 1981, none of them reported any problems with the trucks. If anything had been wrong with the trucks, they would have ordinarily reported it to him. When asked whether any drivers had ever reported "problems with the brakes on the No. 7 water truck", he responded "not to a degree that it would create a safety hazard" (Tr. 392). When asked about the other two trucks, he responded as follows at Tr. 392:

Q. How do you judge what is a degree that would create a safety hazard?

A. It's in the daily operation of the truck. And I observe each piece of equipment each day. If I notice the operator is having trouble controlling the truck, if there is an unusual circumstance, or if the operator does indicate that there is a serious problem with the truck.

Q. Did anyone report to you that there was a problem with the brakes on No. 10?

A. No.

Q. During the period of May, June or July of 1981?

A. There again, that's a specific question. I mean, that's over a period of several months. There could have been some discussions to that point, but, there again, nothing that would have created a serious safety situation.

Q. What about with Truck No. 18? Do you remember anybody reporting any problems with the brakes on Truck No. 18?

A. No. That was very much a surprise to me.

Mr. Barnett confirmed that he was probably the one who first "flagged down" driver Gonzales, and he confirmed that it took him some 100 feet to stop the truck. He did not believe this to be unusual since "it takes that kind of distance to stop most of those pieces of equipment". After he stopped, Mr. Gonzales made no specific complaint about the truck (Tr. 393).

On cross-examination, Mr. Barnett indicated that he considered Mr. Thomas to be a good, conscientious driver who is safety conscious. As for Mr. Farr, he stated that he made a lot of safety complaints, some of which were frivolous, and a lot of them were made to him orally rather than in writing (Tr. 394). "Oral complaints" are usually noted in a book kept on Mr. Oberg's desk, and written ones are on forms used for that purpose (Tr. 395). Mr. Gonzales "was not shy" about making complaints (Tr. 402).

When asked about any prior knowledge of the condition of the brakes on the trucks in question and the field service report prepared by the contractor, exhibit G-6, after one of the trucks was repaired, Mr. Barnett stated as follows (Tr. 398-400):

Q. Are you saying, sir, that you were completely unaware of the condition of the defective brakes on the Nos. 7, 10 and 18 trucks on July 6th, 1981? Is that what you are saying?

A. No, sir. I'm not saying I was unaware at all. I try to keep very close tabs on my equipment. I try to keep track of the condition of the brakes on all my equipment, not only the brakes, but the general operating condition.

Q. So you were aware of the brakes?

A. Yes. I would say I was.

Q. How were you made aware of that fact?

A. Being in contact with the drivers and the equipment itself on a daily basis.

Q. Would you agree that the brakes on the No. 7 truck on July 6th, 1981 were not sufficient?

A. No, I wouldn't agree to that at all.

Q. You think they were safe?

A. In my estimation, they were adequate.

Q. How about No. 10?

A. The same thing.

Q. How about No. 18?

A. That's the same thing.

* * * * *

Q. If I told you that their description of the condition, after looking at the brakes, subsequent to the issuance of the order, that the brakes were -- I'll use the very term, "Very poor brakes." Would you disagree with that statement?

A. This was his assessment of the situation. I couldn't agree or disagree.

Q. Were you made, subsequently, aware of the repair work that was done on the brakes after the inspector issued his orders?

A. Yes, I think so.

Q. Did that, in any way, change your mind with regard to the general condition of the brakes?

A. No. Because it verified Mr. Oberg's testimony, that all the mechanical parts of the brakes were there in the truck. Some of them were under limited operating conditions, but generally they were in operating condition.

Q. How about the master cylinders? Didn't he testify that two of the master cylinders were defective?

A. Yes.

Q. That doesn't cause you any concern?

A. Yes. Of course, it causes me concern.

~351

Mr. Barnett testified that at no time on July 6, 1981, between 9:30 a.m. and 1:30 p.m., when Mr. Goodspeed started his testing of the trucks, did he observe anything in the operation of the trucks that led him to believe that the brake conditions presented a safety hazard, and had he observed such conditions, the trucks would have been parked (Tr. 405).

The parties stipulated that if Mr. Edward Westover were called to testify, he would also testify that he received no complaints concerning the brakes on the three trucks which were cited by Inspector Goodspeed (Tr. 405).

Mr. Oberg was recalled and confirmed that he told Mr. Goodspeed that the No. 7 water truck never had good brakes (Tr. 374). He explained the braking system and confirmed that the brakes on that truck were the ones that the manufacturer put on it (Tr. 375). He also confirmed that after the citation was issued, the wheels were pulled off the truck and he found "three quarters of a brake shoe left on the truck", and he indicated that these were sufficient to stop the truck "if they are adjusted right" (Tr. 376). He believed the citation could have been abated by merely adjusting the brakes (Tr. 377).

Mr. Oberg confirmed that the No. 10 truck wheels were also pulled off, and he found two out of the six master cylinders to be defective. He found the other four to be "pretty well up to par" (Tr. 377). He also confirmed that No. 18 truck wheels were also pulled off, and when the brake shoes were inspected "we figured there was at least 50 to 80 percent on them". In his opinion, this was enough to stop the truck if the brakes were adjusted (Tr. 378).

Mr. Oberg testified further that at no time prior to the inspection in question did the drivers of the trucks in question or their foremen tell him that the brakes were defective, and had he been told he would have taken them off the line (Tr. 379). In response to further questions, he testified as follows (Tr. 380-381):

Q. Mr. Oberg, when you testified yesterday, I believe you said you were aware of the condition of the trucks. That you subsequently learned, after the trucks were pulled off the line and inspected, you said that you would have taken them off the line yourself. Do you stand by that statement?

A. If I would have known, I would have taken them off, yes, knowing that they had bad brakes.

Q. You still agree that all three trucks had bad brakes?

A. I'm not saying one way or the other on that, no. I feel that all three trucks had partial brakes on them.

Q. Partial?

A. At least partial.

Q. But they weren't adequate, were they?

A. I don't know whether they were adequate or not.

Q. Because, in effect, you don't really look at them. Didn't your mechanics, really, inspect the brakes?

A. They did after they were pulled off.

Q. So you really didn't have any independent knowledge, because you just relied on your mechanics.

A. I rely on my mechanics all the time.

Q. I think you stated in your prior testimony, the best indication that there is a problem with the brakes, is the truck drivers? Is that right?

A. That's right.

Q. That's how you base if there is a problem? You rely on the truck drivers to tell you?

A. There's a problem with the truck, I depend on those truck drivers to report it to their foreman. I, in turn, depend on the other foremen to report it to me.

Q. But by the same token, you would agree that they would be the best judges of whether a particular truck has adequate brakes or inadequate brakes, because they are the ones that drive it every day?

A. They drive it every day. They are the ones that would know.

Q. You heard the three truck drivers testify yesterday. Would you question any of their judgment as far as their opinion that the brakes on the trucks were inadequate?

A. I won't question anybody's judgment.

And, at Tr. 386-388:

THE COURT: Now, if they weren't adjusted correctly, what would your answer be.

THE WITNESS: Okay. If you are back to yesterday's testimony, I made a statement that that left-hand wheel had bearings on the cams that was froze up. So, therefore, that was not functioning properly.

THE COURT: Okay. Let me ask you this question. Do you consider brakes that are 75 per cent good, 50 to 85 per cent good, to be effective brakes, adequate brakes, or is it hard to answer?

THE WITNESS: If it's got 50, 75, or 85 per cent of the linings there, there's no reason why that brake couldn't be good.

* * * The three trucks that were cited by the inspector, when you pulled the wheels, did you actually see the conditions themselves? Were you actually physically there when the mechanic broke these three trucks down and pulled the wheels?

THE WITNESS: You bet. I was there when they pulled the wheels off. After we got the drums off and everything, the linings were there. They came and found me and said, "I would like you to come and look at the linings on this truck."

THE COURT: Now, given the conditions that you observed on the three trucks when the wheels were dismantled, place yourself in the position of the inspector, and you had knowledge of the condition of all of these three trucks. Without subjecting those trucks to any tests or anything, could you come to any conclusion that these brakes were defective or inadequate?

THE WITNESS: I don't think 18 was up to par, but it was actually not totally out of brakes, either. Any time you have a cam bearing which is particlly froze up, you have got one wheel that is not functioning. And if your other wheel is, say, flacked off from wear or use, then you aren't going to have number one brakes, no.

THE COURT: How about the other two trucks?

THE WITNESS: I feel they were all about the same.

THE COURT: You have been here two days listening to the testimony of the inspector, listening to his testimony concerning the tests that he subjected these trucks to. And his testimony was that they wouldn't stop on certain grades, and under certain conditions. Do you have any comment as to whether or not you feel that these citations were in order?

THE WITNESS: Well, I thought he was quite severe.

THE COURT: Did you voice your objections to tell him that at the time?

THE WITNESS: I was never asked.

Stipulations

The parties stipulated that the Keigley Quarry is subject to MSHA's jurisdiction, that the operator U.S. Steel Company is a large operator and that any reasonable penalties assessed will not affect its ability to continue in business. The parties also agreed that all of the citations issued in these proceedings were abated in good faith, that the inspectors who issued them were duly authorized representatives of the Secretary, and that for the purposes of these proceedings U.S. Steel's history of prior violations at the quarry in question consists of six citations issued during the 24 months prior to the issuance of the citations in question in these cases (Tr. 4, Exh. G-1).

Findings and Conclusions

These consolidated dockets present somewhat similar factual situations concerning the braking systems on three trucks being operated at the quarry at the time of the inspection of July 6, 1981. Inspector Goodspeed's "inspection" of the three trucks included his visual inspection of each vehicle, as well as a "check ride" where he accompanied the drivers and requested them to perform certain "tests" on the braking systems. The inspector's special attention to the trucks was the result of certain observations made by him as to how one of the trucks was being driven, and certain comments made by the drivers concerning the condition of the brakes. All of these factors prompted the inspector to inspect the No. 7 water truck, and two haulage trucks, and his inspections resulted in the sequential issuance of a section 104(d)(1) unwarrantable failure citation and an imminent danger order for the brake conditions on the water truck, and two section 104(d)(1) unwarrantable failure orders for the brake conditions on the No. 18 and No. 10 haul trucks. The inspector also cited violations of mandatory safety standard 30 CFR 56.9-2, and found that each of the alleged violations were "significant and substantial".

Fact of Violations

At pages 1, 2 and 7, of its brief, respondent makes reference to the inspector's citation of section 30 CFR 55.9-3. This is in error. Respondent is not charged with any violations of that section, it is charged with violations of section 56.9-2. In each of his citations, Inspector Goodspeed asserted that the cited conditions of the truck brakes constituted a violation of mandatory standard section 56.9-2, which provides that "Equipment defects affecting safety shall be corrected before the equipment is used". Therefore, one of the initial questions presented is whether MSHA has established by a preponderance of the evidence

that the cited brake conditions constituted a violation of section 56.9-2.

~355

The No. 7 Water Truck

Although Contestant's maintenance foreman Oberg asserted that the brakes needed "minor attention", he did not dispute driver Gonzales' report that they "were bad", and he conceded that the brakes were poor. He confirmed that the parking brake was inoperative and had to be replaced, that one of the front wheels had a chipped bearing which had to be replaced, that new brake shoes were installed, and that the dump brake would not hold the truck on level ground.

Mr. Oberg confirmed that the water truck was a converted haulage truck and that the drivers were reluctant to drive it on a hill because it had poor brakes. He conceded that the brakes were in need of repair.

The driver of the truck, Charles Gonzales, confirmed that when the truck brakes were tested on hills they would not hold, and when he applied the foot brake at a speed of five to ten miles an hour the truck would not stop and just kept rolling. He also confirmed that the retarder and park brakes, when applied, did not slow the truck, and that the park brake would not hold the truck on a hill.

Mr. Gonzales confirmed that after the brakes were repaired he could hold the truck on hills and felt safer driving it.

The No. 10 Haul Truck

Mr. Oberg confirmed that after the truck was cited and taken out of service, the driver and a mechanic drove it and found that the brakes were not working properly. He also confirmed that the truck had two faulty master cylinders which had to be repaired, and that the faulty cylinders would affect the brake pressures. He also confirmed that the parking brake needed to be adjusted, and that all of the brake linings were replaced even though they had three-quarters of the linings left.

The driver of the truck testified that when the truck brakes were tested on the hill they would not hold the truck. He also testified that the service brakes and retarder would not hold the truck at three or four miles an hour and that the dump brake was not working properly because the truck would move forward when loaded with the brakes applied. He confirmed that the brakes would not hold when they were tested on the level with the engine idling.

The No. 18 Haul Truck

Mr. Oberg testified that this truck was an old secondhand truck and that when the brakes were checked the left wheel cam shaft that rotates the brake shoes and locks the wheel was worn and was beginning to freeze up. He indicated that these conditions would affect the ability

~356

of the vehicle to stop within a certain distance. He also confirmed that in addition to repairing the defective wheel cam shaft, the front brakes were adjusted and an air leak was repaired. He confirmed that the malfunctioning front brakes would affect the functioning of the service brakes and he conceded that the brakes on the truck were not adequate.

Truck driver Stephen Farr testified that the service brakes and dump brakes would not hold when tested. He confirmed that the truck was out of service for several days awaiting parts, but that after the brakes were repaired the service brakes were able to bring the truck to a stop.

Inspector Goodspeed testified as to the conditions of the brakes on each of the trucks which he tested and cited, and he confirmed that the brake conditions which he found affected the safe operation of each of the trucks. With regard to the No. 7 water truck, Inspector Goodspeed stated that the conditions of the brakes prevented the driver from controlling the vehicle on the hill where it was tested. He concluded that the inability of the driver to slow the truck down when the service brake was applied indicated to him that the brakes were inoperative and unsafe and were incapable of bringing the truck to a stop on an incline.

With regard to the No. 18 haul truck, Inspector Goodspeed testified that when the driver applied the service brake while the truck was in idle and while on an incline, the brakes would not hold the vehicle. He also confirmed that the dump brake was not working at all, and when it was applied the truck simply rolled forward and would not hold. As for the No. 10 haul truck, he confirmed that when tested, the dump brake, park brake, and service brake would not hold the truck. He believed that the truck braking systems were defective and affected safety because the driver would be unable to bring the truck to a quick stop in an emergency.

In defense of the citations, the contestant presented the testimony of quarry superintendent Rusti and production foreman Barnett. Mr. Rusti was not employed at the quarry at the time the citations were issued, and he did not drive or test the trucks cited by Inspector Goodspeed. Further, he declined to offer an opinion as to whether the brake conditions warranted the orders issued by the inspector, and he confirmed that he had no way of knowing whether any of the truck brakes cited were adequate or not.

Mr. Barnett testified that he believed the brakes on all of the trucks were adequate. However, when asked to comment on the contractor's assessment that the brakes on one of the trucks were "very poor", he said that he could not agree or disagree with that assessment. He conceded that the work done on the brakes after the orders were issued confirmed that some of the brakes were in limited operating condition, and that the two defective master cylinders did cause him some concern.

Contestant also called Mr. Oberg as its witness. He confirmed that he told the inspector that the No. 7 water truck never had good brakes. He also confirmed that two of the six master cylinders on the No. 10 truck were defective, and while he would not concede that all three trucks had bad brakes, he did say that they all had partial brakes. Further, he could not say whether the brakes on all the trucks were adequate, and he did not question the judgment of the drivers when they testified that the truck brakes were inadequate.

Mr. Oberg confirmed that while the No. 18 truck was not totally out of brakes, it was not up to par because one wheel had a frozen cam bearing which would prevent that wheel from functioning.

The driver of the No. 7 water truck, Gonzales, confirmed that he drove the truck for about three hours before the inspector arrived on the scene. As a matter of fact, when he was first "flagged down", he experienced some difficulty in bringing his truck to a stop, and that prompted the inspector to ask him to park his truck so that it could be inspected more thoroughly after the inspector completed his other inspection rounds. The driver's statements that the brakes "were bad" led the inspector to a more thorough inspection of that truck as well as the other two trucks which were subsequently inspected.

The driver of the No. 10 haul truck, Thomas, confirmed that he had driven that truck for 4 or 5 hours before the inspector inspected it on July 6th, and the driver of the No. 18 haul truck, Farr, admitted that he had driven that truck prior to the inspection knowing full well that the brakes were bad.

In view of the foregoing testimony and evidence, it seems clear to me from the record in these proceedings that MSHA has established by a preponderance of the evidence that the brakes on the three trucks which were cited by Inspector Goodspeed were defective, that these defects affected the safe operation of those trucks, and that the cited trucks were in fact used and operated before the necessary repairs and corrections which were required were made. This is not a case where there is an honest difference of opinion between and inspector and mine management as to the defective conditions of the brakes. The record here establishes that without a doubt the brakes on all three of the cited trucks were defective, and these conclusions are supported not only by the drivers and the inspector who subjected them to certain tests under actual operational conditions, but also by U.S. Steel's maintenance foreman who was responsible for maintaining and repairing the trucks, the records of the contractor who made repairs to the two haul trucks, and by the evidence which establishes the extent of the repairs which were necessary to render the braking systems operational and safe.

Respondent's defense to the alleged defective braking conditions consists essentially of an attempt to establish that the testing methods and procedures followed by the inspector were somehow suspect. In addition, respondent argues that the conditions of the brakes, as found after the trucks were taken out of service, were the result of abuse and wear and tear which happened while the inspector was testing the trucks with the drivers.

Respondent's argument that MSHA has failed to establish through any objective tests that the brakes were worn to the point where they constituted defects affecting safety is rejected. While one may agree with the proposition that a large haul truck, fully loaded and coming down a hill, is not engineered to "stop on a dime" when the brakes are applied, in this case the testimony and evidence establishes that the drivers were having problems holding the trucks on levels and hills using all of the braking systems. Again, this is not a case where there is a difference of opinion as to whether the brakes were defective or not. All of the truck wheels were pulled after the trucks were taken out of service, and the brake defects and repairs which were made are detailed and documented through the testimony and evidence of record in this case, and leave little room for argument.

While it is true that the "tests" applied by Inspector Goodspeed, as detailed in his testimony, as well as exhibits G-8, G-9, and G-10, may not be part of any officially adopted mandatory MSHA regulation, I am not convinced that the tests were totally irrational or wrong, and respondent has not advanced any testing procedures of its own to dispute what the inspector did in this case. What the inspector did in this case was to test the brakes on a level area with the engine running and on certain inclines and hills with the truck in certain gears. While one may question the inspector's judgment in taking a truck on a hill for a test when he had reason to believe that the brakes were bad, this fact does not detract from the fact that when the brakes were applied to the trucks coming off the hills, they could not hold the trucks.

Respondent presented no credible testimony or testing procedures of its own to establish that the brakes on the cited trucks were in fact not defective and could do the job. As a matter of fact, respondent's witness Rusti, who was not at the quarry when the trucks were cited, and who had never driven or tested them, agreed that Inspector Goodspeed's test of the brakes on the level with the engine idling was a proper and acceptable test. His dispute was over the number of rpm's applied to the engine, and the resulting "allowable" or "excessive" creep which may result. As for the testing on the hills, he candidly admitted that he expected his drivers to test the truck brakes while driving them on hills and inclines, and he agreed that if the brakes were not holding that "this was a test in itself". His after-the-fact dispute seems to lie with whether or not the driver may have had the truck in the proper gears while applying the brakes. He also took issue with the areas

~359

where the trucks were tested, and maintained that they were not designed to operate on 20 percent grades. However, his opinion in this regard is rejected as totally unsupported by any credible evidence. He never drove the trucks, he never tested them himself, and he admitted that the manufacturer's braking specifications "were sketchy". As a matter of fact, respondent did not produce any manufacturer's information as to the braking systems, and relied on Mr. Rusti's testimony, to which I give very little weight.

I find Mr. Barnett's testimony as to the condition of the truck brakes to be rather equivocal. He conceded that he was not completely unaware of the defective brakes on all three trucks. When asked whether it was true that the brake conditions on all three trucks were not sufficient, he disagreed and state they "were adequate". Yet, he did not disagree with the contractor's assessment that one of the trucks had "very poor brakes", nor did he disagree with the fact that one of the trucks had two defective master brake cylinders which in fact caused him some concern, and he candidly admitted that some of the trucks were operating under limited braking conditions.

On the basis of the foregoing findings and conclusions, I conclude that MSHA has established the fact of violation as to all three trucks and that it has proven by a preponderance of the credible and probative testimony and evidence that the brakes on the three cited trucks in question were defective and that these defects affected the safe operation of those trucks. I reject the respondent's suggestions that the defective brake components which were found after the trucks were taken out of service for repairs were caused by the inspector or the drivers during the testing of the vehicles. The evidence in this case makes it clear to me that the defective brake conditions were present on the trucks prior to the inspection and that they were driven in those conditions. Clearly, the facts and circumstances here presented meet the tests laid down by the Commission in *Secretary of Labor v. Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, decided April 10, 1981. Inspector Goodspeed's actions in citing the respondent with a violation of section 56.9-2, in each of the three contested citations are AFFIRMED.

The alleged imminent danger - Order No. 0583637

"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."

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.*, 405 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.

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 brakes 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 defective brakes at the time the order issued also presented such an imminently dangerous situation.

The evidence in this case establishes that the brakes on the No. 7 water truck were first tested by the inspector when he and the driver were on an incline after obtaining a load of water. Driver Gonzales advised the inspector at that time that the brakes were "not very good". The inspector then had him test the truck on another hill, and when the service brake was applied, the driver had some difficulty holding the truck, even though he was in first gear. As they descended off the hill traveling towards the shop area at a speed of five to ten miles an hour, the driver applied the service brakes and the truck would not stop and simply kept rolling, even after the driver applied the retarder and park brake. The inspector testified that the service and park brakes had previously been tested on a flat area and they would not slow the truck down. After "pumping" the service brakes, the truck eventually was brought to a gradual stop. However, after the test on the hill, the inspector advised the driver that he was issuing an imminent danger order and the truck was taken out of service for repairs by a company mechanic removing the battery. Once the truck was taken in for service, and the wheels pulled, a chipped front wheel bearing was discovered, and it was replaced. In addition, the parking brake had to be replaced and new brake shoes were installed on all four wheels.

Although it is true that the driver drove the No. 7 water truck on July 6, 1981, before it was removed from service and the brakes repaired, maintenance foreman Oberg candidly admitted that the drivers did not like to drive it on hills because the brakes "were poor". In my view, this evaluation of "poor brakes" was confirmed by the test on the hill and on the level, as well as the subsequent repairs which were made to the brakes. Under these circumstances, I conclude and find that the inspector's

decision to issue an imminent danger order after finding that the service brakes would not slow or hold the vehicle while descending the incline by the shop area was reasonable in the circumstances. While there may be some question as to the validity or wisdom of applying a dump or park brake while descending a hill, the fact is that the main braking system, the service brakes, were not functioning properly and in fact proved to be defective and would not do the job. Further, even though the inspector may have contradicted himself when he stated that the brakes were not "inadequate" for purposes of a possible violation of section 56.9-3, and even though the inspector may have exposed himself and the driver to an imminent danger when they drove down the hill towards the shop and found that the service brakes would not slow or stop the truck, U.S. Steel has not rebutted the fact that the service brakes were defective and that this defect affected the safety of the driver and the inspector. Under all of these circumstances, I conclude and find that the inspector acted reasonably and the imminent danger order IS AFFIRMED.

The modifications of the section 104(d)(1) citations

At the hearing, MSHA's counsel moved to vacate the section 104(d)(1) Citation No. 0583636, the underlying citation which supported the subsequent section 104(d)(1) withdrawal orders, and the motion was granted (Tr. 7-8). U.S. Steel's counsel argued that since the underlying citation has been vacated, the subsequent withdrawal orders must also be vacated since they are now unsupported. Counsel's motion for dismissal was denied and taken under advisement (Tr. 8), and MSHA's counsel suggested that the circumstances and facts developed during the course of the hearing would support a modification of the first 104(d)(1) withdrawal order to a citation, and that this citation may serve as the support for the remaining withdrawal order. The hearing proceeded, and testimony and evidence was presented concerning all of the citations in issue.

In its posthearing brief, MSHA cites the Commission decision in Secretary of Labor v. Consolidation Coal Company, 4 FMSHRC 1791, October 29, 1982, in support of its argument that I may modify the first section 104(d)(1) order issued by Inspector Goodspeed, No. 0583639, back to a section 104(d)(1) citation, and that this citation may then support the section 104(d)(1) order, No. 0583638. In the Consolidation Coal case the Commission held that the statutory provisions found in sections 104(h) and 105(d) of the Act expressly authorize the Commission to "modify" any "orders" issued under section 104. The Commission noted that "this power is conferred in broad terms and we conclude that it extends, under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations", 4 FMSHRC 1794. The Commission went on to discuss what it believed to be the "appropriate circumstances" in the case under consideration, and these included such factors as prejudice, any lack of proper or fair notice to the operator charged, and whether the operator's defense would have been any different had the modification not been allowed. In upholding the Judge's

authority to modify the citation in question, the Commission

~363

also noted that to do otherwise would allow the kind of serious violation encompassed by section 104(d) to fall outside of the statutory sanction expressly designed for it--the 104(d) sequence of citations and orders, and that "such a result would frustrate section 104(d)'s graduated scheme of sanctions for more serious violations", 4 FMSHRC 1794.

In the instant proceedings, MSHA's counsel points out that he requested me to modify the withdrawal order in question at the beginning of the hearing before any testimony or evidence was presented, and that U.S. Steel had an ample opportunity to present any evidence as to why the requested modification should not have been granted. MSHA concludes that there has been no prejudice and that if I find that the first issued section 104(d)(1) order met the requirements of a validly issued 104(d) citation, then I should modify the order and preserve the unwarrantable failure chain.

In its posthearing brief, U.S. Steel concedes that the Consolidation Coal Company decision authorizes me to modify the order in question to a citation if the evidence supports such citation. However, counsel argues that Order No. 0583639 citing the No. 18 haul truck does not support a finding that the violation was of a significant and substantial nature. In support of this conclusion, counsel argues that even though Inspector Goodspeed testified that it was reasonably likely that a miner at the quarry would receive a reasonably serious injury from the cited brake conditions, he ignored the fact that the quarry had gone eight years without an accident or fatality involving the trucks, and that his testimony that someone could get hurt by walking in front of the trucks that were dumping or parked on hills also ignores the driver's testimony that there is no pedestrian traffic on the inclines. Counsel suggest that Mr. Goodspeed's "theory" that the driver himself was in a position of peril makes little sense in light of the accident history at the quarry. Further, counsel points out that the order the Secretary chose to modify to a citation does not even allege the brakes were not adequate to hold the vehicle, but merely that they would not hold at idle of 550 rpms (Government Exhibit 4), and even assuming the inspector followed his test procedures (Government Exhibits 9 and 10), he would only conduct this test where there was no pedestrian traffic.

After careful consideration of the arguments presented in this case, I conclude and find that MSHA's position is correct and that I do have the authority and discretion to modify the section 104(d)(1) order in question. Further, I conclude that while the better practice is for MSHA to file its motion in advance of any hearing, on the facts of this case I cannot conclude that U.S. Steel has been prejudiced by the solicitor making the motion at the hearing before any testimony or evidence is taken. Here, U.S. Steel had ample time to present its defense and I cannot conclude that it would have done anything different by way of any defense. It has had a fair opportunity to present its defenses and to cross-examine all of MSHA's witnesses, including its own employees called as adverse witnesses. If the

record supports the requisite "significant and substantial" and

~364

"unwarrantable failure" findings, the first section 104(d)(1) order, as modified, will stand in support of the second order. If it is unsupported, it will fall, and the "chain" will be vacated. My findings and conclusions on these issues follow below.

Significant and Substantial

The test for a "significant and substantial" violation was laid down by the Commission in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, April 7, 1981, a civil penalty case. 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.

104(d)(1) Order No. 0583639, issued at 2:10 p.m. July 6, 1981

Although Section 104(d)(1) of the Act does not require an inspector to make an "S&S" finding to support an unwarrantable failure order, Inspector Goodspeed made such a finding when he issued the 104(d) Order for the defective brake condition on the No. 18 haul truck, and the fact that he did so does not in my view ipso facto render the order illegal. Inspector Goodspeed cited a violation of mandatory safety standard section 56.9-2, found that the violation constituted an unwarrantable failure to comply, and his "S&S" finding was a "gratuity", which if supported, will stand. If not supported, it will fail.

U.S. Steel argues that the brake condition cited by the inspector is limited to an assertion that the brakes would not hold at a certain "idle" speed, and that the inspector's testimony that someone could be injured by inadvertently walking in front of the truck ignores the fact that there is no evidence that there were any pedestrians on the hill roads or in the area where the truck may have been dumping. Further, U.S. Steel maintains that the inspector's belief that the violation presented a reasonable likelihood of anyone being injured also ignores the eight year accident-free history of the quarry.

The accident-free record of the quarry is commendable, and I have considered this fact in assessing the civil penalties in this case. However, I cannot ignore the fact that the evidence and testimony in this case reflects that the service brakes were defective, that these defects affected the safe operation of the truck in question, and that the service brakes would not hold the truck on the level as well as on the incline where it was driven. The question of whether the violation is a significant and substantial one must be decided on the basis of the evidence presented to support that finding.

In this case, U.S. Steel's contention that the condition cited on the face of the citation issued by Inspector Goodspeed is limited to the inability of the brakes to hold the truck on the level while idling at 550 rpm's is correct. However, the driver and the inspector confirmed that the service brakes were also tested on an incline while the truck was being driven to the shop and that the brakes would not hold the truck. They also confirmed that the dump brake was tested and that it would not hold the truck. Although the conditions recorded by the inspector on the face of the citation are not a model of clarity, and the inspector's failure to include the fact that the brakes would not hold when tested on the hill and dump area as part of the cited conditions remains unexplained, the fact is that the evidence establishes that the service brakes were inadequate, the brake cam shafts were worn, and that the brakes needed adjustment.

Inspector Goodspeed's testimony in support of his "S&S" finding is that the violation "was reasonably serious" and that an accident "was reasonably likely to occur", and that someone would have been injured because of the inability of the truck to stop. Although his conclusions in this regard may be unreasonable in a situation where the truck is simply idling at a level location, they are not so unreasonable when one considers the fact that the service brakes would not hold the truck while it was being driven to the shop area to be taken out of service for repairs. The defective service brakes exposed the driver and the inspector to possible injury, as well as any other vehicular or pedestrian traffic which may have been encountered by the truck on the way to the shop. Further, while it is true that the inspector did not consider the seriousness of the situation to be such as to warrant an imminent danger order, and while it is also true that his initial decision to issue the order was made at the time the brakes were tested on the level, I cannot ignore the fact that the brakes would not hold the truck and that they proved to be defective. In these circumstances, I conclude and find that the violation was significant and substantial and the inspector's finding in this regard IS AFFIRMED.

104(d)(1) Order No. 0583638, issued at 3:00 p.m., July 6, 1981

Inspector Goodspeed found that the violation for the brakes on the No. 10 haul truck was "significant and substantial". Although he testified that he first decided to issue the order when he tested the dump brake on the level dump area, he also had the driver test the service brakes on an incline while the truck was being driven to the shop area for repairs, found that the brakes would not hold the truck on the incline, and he included all of these facts on the face of the order.

In support of his "significant and substantial" finding, Mr. Goodspeed testified that he believed the defective brakes would not be able to stop the truck "under emergency type conditions". He explained his rationale for permitting the truck to be driven to the shop with defective brakes by stating that the truck was empty and that the driver was able to keep

~366

it under control, and that under these "controlled conditions" he had no serious reservations about permitting the truck to be driven to the shop. Although the inspector's rationale may seem contradictory, and while it may have been wiser for the inspector to simply abandon the truck when he first decided to cite it, and have it towed to the shop, his decision to have the driver drive it to the shop, does not, in my view, lessen the fact that the brakes were defective, that they were in need of repair, and that they could not hold the truck on the incline. Given all of these circumstances, the fact that no one was run over on the way to the shop, does not detract from the dangerous and hazardous conditions of the brakes. Both the driver and the inspector were exposed to a hazardous condition, and the fact that the inspector may have used poor judgment does not excuse or cure the defective brake conditions. I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure

A violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care." Zeigler Coal Company, 7 IBMA 280, 295-296 (1977).

It seems clear to me from the testimony in this case that Inspector Goodspeed's decision to issue the unwarrantable failure orders was prompted by the fact that the truck driver's initially told him that their complaints to mine management about the defective brake conditions on the trucks which were cited fell on deaf ears and repairs were not made. While it is true that some of the drivers may have reported the faulty brake conditions the same day that the inspector was at the mine, I honestly believe they did so to protect themselves from criticism, and not so much out of any concern for their safety. If this were all of the evidence present in this case to support the inspector's unwarrantable failure findings, I would rule in favor of U.S. Steel on this issue. However, for reasons which follow, I believe that the record supports a finding that mine management was well aware of the defective brake conditions, and simply ignored them because they either did not have the available manpower to correct the conditions immediately, or simply did nothing because the drivers either did not complain or "assumed the risks".

Maintenance foreman Oberg candidly and honestly admitted that while most of the trucks at the quarry were generally maintained in "fair to good condition", because of certain budget and equipment constraints, "less attention" was paid to the trucks which were cited. Mr. Oberg also candidly conceded that the brakes on the cited trucks were in need of repair or adjustments, and he conceded that had he been aware of the brake conditions

~367

on the trucks in question prior to the inspector's arrival on the scene on July 6, 1981, he would have pulled them all into the shop for the needed repairs. That is precisely the point. As maintenance foreman, it seems to me that it is his primary responsibility to insure that the trucks are periodically road tested and checked to insure that the brake systems are maintained in a safe condition. On the facts of these cases, it should be abundantly clear to U.S. Steel that shifting this responsibility to the driver is simply inadvisable, particularly when U.S. Steel, and not the driver, is ultimately held accountable by MSHA.

The driver of the No. 10 haul truck testified that he had orally reported the conditions of the brakes to shift boss Westover and Barnett at least a month before the inspection, and he also indicated that the brakes "haven't been good" for three or four months prior to that time. The driver of the No. 18 truck also testified that he had made similar complaints, and while he conceded that he was given the opportunity to drive other trucks while the No. 18 was under repair, there is no evidence that the No. 18 was ever taken out of service or that mine management assigned him another truck on their own initiative. Given these circumstances, it seems clear to me that the maintenance boss or foreman was aware of the conditions of the truck or they would not have offered the driver an option of driving another one. Rather than doing that, these foremen should have taken the truck out of service and made the necessary repairs. By not doing this, they exposed themselves to the actions taken by the inspector in this case and they did so at their own peril.

Mr. Barnett denied that any of the drivers ever specifically complained to him about the brake conditions on the trucks. However, when asked specifically about any complaints on the No. 10 truck during the period May through July 1981, he indicated that there "could have been some discussions" but "nothing that would have created a serious safety situation". As for the No. 18 truck, he claimed that this "was very much a surprise to me". However, on cross-examination, he confirmed that he was not completely unaware of the defective brake conditions on all of the trucks which were cited, that he was in fact aware of the brake conditions, and that his "awareness" came about as a result of his being in daily contact with the drivers and the equipment.

Upon being recalled for testimony on behalf of U.S. Steel, Mr. Oberg again reiterated that he depends on his drivers and mechanics to inform him of defective brake conditions, and if they do not report the defects to him, he has no way of knowing that defects need correcting. Again, the short answer to this is that the man in charge of vehicle maintenance should make it his business to know about those conditions, and if he has subordinates who fail in their obligations, appropriate management measures should be taken to correct such a situation.

In view of the foregoing, I conclude and find that the record here fully supports the inspector's findings that the two

violations issued for the brake conditions on the No. 10 and 18
trucks resulted from U.S. Steel's

~368

unwarrantable failure to comply with the requirements of mandatory safety standard section 56.9-2, and that this failure by U.S. Steel was a direct result of a lack of due diligence and a lack of reasonable care to insure that the defective brake conditions were corrected prior to the time they were cited by the inspector on July 6, 1981. Accordingly, Inspector Goodspeed's unwarrantable failure findings as to both section 104(d)(1) orders in issue ARE AFFIRMED.

IT IS FURTHER ORDERED that the section 104(d)(1) Order No. 0583639, is modified to a section 104(d)(1) citation, and as modified IS AFFIRMED. The subsequent section 104(d)(1) Order No. 9583638 is also AFFIRMED.

Civil Penalty Assessments

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

The parties stipulated that U.S. Steel is a large mine operator and that any reasonable penalties assessed for the violations in question will not adversely affect its ability to remain in business. I adopt these stipulations as my findings on these issues.

History of Prior Violations

The parties stipulated that for the 24-months prior to the issuance of the citations in issue in these proceedings six citations were issued at the mine in question. However, the computer print-out submitted by MSHA, exhibit G-1, containing a summary of the history of citations at the Keigley Quarry, reflects a total of 39 assessed violations and three paid violations for the period July 6, 1979 to July 5, 1981. Three of these assessed violations are for citations concerning section 56.9-2. While the apparent discrepancy here remains unresolved, for purposes of my civil penalty assessments they are not critical, and I cannot conclude that respondent's history of prior violations is such as would warrant any additional increases in the proposed penalties. As previously noted, I have considered the fact that the quarry has a commendable accident-free safety record insofar as trucks and brakes are concerned, and this is reflected in my penalty assessments.

Good Faith Compliance

The parties stipulated that all of the violations in these proceedings were abated in good faith, and I adopt this as my finding on this question.

Gravity

I conclude and find that the brake conditions cited as violations in the section 104(d)(1) citations were serious. The failure of the brakes to hold the trucks while they were in operation exposed both the drivers and possibly other miners to

injuries which I believe were reasonably

~369

likely to result from any accident resulting from the failure of the brakes to hold the trucks on the hills and inclines where they were driven. I also find that the violation affirmed in the imminent danger order was very serious and that an accident was highly likely to occur since the driver was unable to stop the truck while going five to ten miles an hour even after he applied two additional braking systems.

Negligence

I conclude and find that all of the violations resulted from the negligence of U.S. Steel to insure that the brake conditions on the cited trucks were corrected before the trucks were operated. As indicated earlier in my findings and conclusions, the quarry maintenance department should have been more alert to the conditions of the trucks, and rather than relying on the drivers and mechanics, should have taken the initiative to insure that trucks with defective brakes are taken out of service and repaired.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me as reasonable penalties for the violations which have been affirmed:

Citation No.	30 CFR Standard	Assessment	
104(a)-107(a) No. 0583637	56.9-2	\$ 750	
104(d)(1) No. 0583639	56.9-2	\$ 500	
104(d)(1) No. 0583638	56.9-2	\$ 500	
		\$ 1750	Total

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of these decisions and order, and upon receipt of payment by MSHA, these matters are dismissed.

George A. Koutras
Administrative Law Judge