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

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 81-136
A.C. No. 15-02008-03036

v.

No. 32 Mine

UNITED STATES STEEL CORP.,
RESPONDENT

DECISION

Appearances: Carole Fernandez, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for the petitioner Louise Q. Symons, Esq., Billy
Tennant, Esq., U.S. Steel Corp., Pittsburgh,
Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Case

This case concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on July 6, 1981, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for an alleged violation of mandatory safety standard 30 CFR 77.1605(k), as detailed in a Section 104(a) citation no. 981185, served on the respondent by MSHA Inspector Alex R. Sarke, Jr., on January 23, 1981.

The cited standard states that "[b]erms or guards shall be provided on the outer bank of elevated roadways.". The inspector cited the alleged violation after concluding that the respondent had failed to provide appropriate berms or guards at three locations along an elevated roadway leading to the mine. At one location, the inspector observed an existing guardrail which had been dislodged for a distance of 29 feet. At a second location, he observed a berm 6 to 8 inches high for a distance of 22 feet in length, and at

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the third location he observed a berm 16 inches high for a distance of 29 feet in length. Locations two and three were cited because the existing berms were less than 22 inches, the axle height of what the inspector believed was the largest vehicle using the roadway. The relevant MSHA inspector's manual contained a policy providing that under Section 77.1605(k) berms "shall be at least as high as the mid-axle height of the largest vehicle using the roadway". The first location, where the inspector found the guardrail to be dislodged, was cited because the inspector considered the dislodged guardrail to be tantamount to no guardrail at all.

By summary decision issued on February 24, 1982, 4 FMSHRC 563, I vacated the citation after concluding that the language of Section 77.1605(k) is so vague and ambiguous as to render the standard unenforceable. I also concluded that the inspector could not rely on an MSHA internal "mid-axle height" guideline to support his citation because the guideline was not in fact part of the cited mandatory standard.

On appeal, the Commission reversed and remanded the case to me for further proceedings consistent with its decision, 5 FMSHRC 3, January 27, 1983. At 5 FMSHRC 5, the Commission stated as follows:

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See *Alabama By-Products*, supra. See also *Voegele Company, Inc. v. OSHRC*, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). The definition of berm in section 77.2(d) makes clear that the standard's protective purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." (Footnote omitted.)

The Commission agreed with my conclusion that the citation in this case was issued and litigated by MSHA largely, if not solely, on the basis of the inspector's manual mid-axle policy guideline, and observed as follows at 5 FMSHRC 6:

Reliance on the mid-axle guideline, without more, does not necessarily establish the berm or guard that a reasonably prudent person would have constructed under the circumstances. If the

Secretary believes that a berm of mid-axle height is indeed what a reasonable person would provide in a particular case, the Secretary must prove that by a preponderance of credible evidence.

With regard to the two locations where the existing berms were found by the inspector to be "inadequate" because they were less than 22 inches (the axle height of the largest vehicle using the roadway), the Commission held that in order to prove this allegation MSHA must present evidence as to what type of berm or guard a reasonably prudent person would install under the circumstances. With respect to the location where the guard was dislodged, the Commission observed that while a prima facie case of violation may have been established, I should have made findings as to whether the guard was actually missing and whether the respondent established a valid defense in its claim that the guard was being replaced at the time of the inspection and issuance of the citation.

After remand and completion of discovery by the parties, a hearing was conducted in Pikeville, Kentucky, on May 17, 1983, and the parties filed proposed findings and conclusions, with supporting briefs. The arguments presented therein have been considered by me in the course of this decision.

MSHA's Testimony and Evidence

MSHA Inspector Alex Sarke testified as to his background and experience, and he confirmed that he issued Citation No. 981185 on January 23, 1981, during a regular inspection of the mine. However, he confirmed that he was aware of a vehicular accident which had occurred when an automobile went through a berm, but indicated that the incident did not meet MSHA's Part 50 regulatory definition of a "reportable accident" (Tr. 14-17). Because of the heavy fog and slick roads, the so-called "accident" was not investigated until the day after it occurred, and based on his observations, he concluded that the car left the roadway without leaving any indications that the driver ever attempted to stop. In addition, he was of the view that the automobile was travelling in excess of the posted 20-mile speed limit. He issued the citation because of his belief that the berms at the three locations detailed in his citation were inadequate (Tr. 20).

Mr. Sarke indicated that the normal traffic on the roadway in question consisted of passenger cars used by the miners coming and going from work, half-ton equipment and supply trucks, and large "semi" trucks used to haul equipment and supplies. The roadway in question is the only main access road into

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and out of the mine (Tr. 22). The roadway is not used for coal haulage, and coal haulage trucks would not be part of the normal traffic (Tr. 22). He also indicated that some heavy equipment such as graders and "high-lifts" also use the roadway, but that they would be travelling at very slow speeds because they would be performing work on the roadway (Tr. 23).

Mr. Sarke described the roadway in question as having an average width of about 20 feet along its entire route, and an angle of incline of about 10%. In his opinion, the roadway is "a very steep roadway" (Tr. 24). He also believed that the entire roadway was an "elevated" roadway, and he defined the term "elevated" as "any roadway that is above normal levels. And I'm talking normal highway level. Once you leave the normal highway level and you start up -- when you start an incline, you have started an elevated roadway" (Tr. 25).

Mr. Sarke stated that the berms on the roadway "were in as good a condition as you could expect them to be" and he agreed that the respondent "does an outstanding job of taking care of the roads -- as a matter of fact, they do the best job of anybody I have. And they do a good job on the berms". He expressed his concern over the cited conditions as follows (Tr. 25-26):

And these particular areas, I don't know what happened to cause the berms to be -- other than the guardrail, I know why the guardrail was up, cause they had had a slip. But in the two areas where the berms were down a little lower than -- I don't know if it was just a mistake or if they had fallen off and they had put them back and hadn't gotten them up to, you know, par, or what.

Q. In other words, were the berms and the guards that you observed on the roadway, were they higher than were present at the three locations where you cited?

A. The berms had -- I started measuring those berms at the foot of the mountain as we started up. And at that particular time, I could find no berms that were -- the average ran two foot and above. These locations that I cited were the only locations that I could find that were lower, you know, than the rest of the berms on the roadway.

Q. Was there anything that you could point to such as, perhaps, the fact that the road wasn't

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as steep there or any other condition that would be a reasonable basis for reducing the height of the berms at those locations?

A. No, ma'am. I couldn't see reducing the height of the berms at these locations because even though those berms -- in an interrogatory I believe that the company stated that that was sufficient to stop a car, and I would agree, a 16-inch berm at one of the locations would stop a car. But the fact is we have so much other equipment on the highway besides passenger cars that it would not stop.

Mr. Sarke described the composition of the roadway as a mixture of "red dog" and gravel, or general "road-composition material". Guardrails were at three locations along the roadway, and guardrails, rather than berms, were at those locations because "you're looking straight down", and the company installed the guardrails there out of recognition of the fact that the steep locations were hazardous. In his view, the location of the guardrails were at a place where a reasonable person familiar with mining circumstances would have placed them (Tr. 28).

With regard to cited location No. 1 directly across from the bathhouse where a 29 foot area had no berm or guardrail, Mr. Sarke confirmed that at one time a guardrail had been there, but that it slipped off and was lying under the hill and "was no benefit whatsoever". He did not know how long it had been dislodged, and in his opinion it became dislodged when the dirt ran off and slipped at the corner of the bathhouse, thereby causing the guardrail to "just sagged down" and collapsed. He discussed the condition with a company official, and no one advised him that repairs were being made, and he saw no evidence that the guardrail was in the process of being repaired (Tr. 29). The roadway drops off approximately 10 to 12 feet "straight over the edge" at that location, and cars, trucks, and a soft-drink vending truck used the roadway at that location (Tr. 30).

With regard to the second location mentioned in his citation, Mr. Sarke confirmed its location as "three-tenths of a mile from the bathhouse and an area of twenty-two feet, having a berm of six to eight inches". In his opinion, the existing berm was not the height that a reasonably prudent person familiar with the mining industry at this mine would have installed at that location, and he believed that a reasonable berm there would have to be the height of the biggest part of the berms on the roadway which ranged from 24 to 36 inches. In that area, passenger cars, trucks, graders, and supply trucks used the roadway (Tr. 31).

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As for the third location, identified as the site of the accident, Mr. Sarke agreed that it was 1.6 miles from the bathhouse, and that the height of the berm which was provided was 16 inches for a distance of 29 feet. He described that area of the roadway as slightly inclined, as well as curved, with a width of about 21 to 22 feet and a straight drop of 30 feet off the edge. When asked if the existing berm was of a height a reasonably prudent person familiar with mining conditions, general and local, would have installed, he replied in the negative. He believed that judging from the types of vehicles traveling on the roadway, a berm two feet in height, such as those the respondent had elsewhere, would be appropriate. He admitted that even a two foot tall berm would not restrain a vehicle traveling at an excessive speed, but insisted that even if the axle-height standard never came to his attention, he would still have required a berm two feet high as well as a guardrail at that location (Tr. 32-35).

On cross examination, Mr. Sarke confirmed that he began the mine inspection in January 1981, but did not know whether he had been there in December 1980, or whether the inspection in question was the first one he had made at that mine. He had no idea how many times he had driven up and down the mine access road in question before issuing the citation. He confirmed that he had not felt endangered traveling on the road and had considered all the berms adequate except those which were only six to eight inches high. When asked why he made no determination as to the adequacy of the berms until January 1981, he replied that inspection procedures entail examining underground first, and leaving the surface area for last (Tr. 36-37).

Inspector Sarke believed the berm at the location of the accident to be adequate for cars and trucks, but not for the heavy equipment. He considered the roadway to be a haulage road, but was unaware of any official definition of "haulage road" in the MSHA regulations. Also, he confirmed that he did issue the citation under the regulatory section entitled "Loading and Haulage" (Tr. 38).

When asked if he knew of a definition of "elevated roadway" in the standard, Mr. Sarke replied in the negative. He denied stating that a road became an "elevated road" when it left the public road on mine property, but agreed that an "elevated roadway" could be one running across a plateau, or a route along a mountainside where there is a possibility of falling off on one side. Mr. Sarke did confirm that the road to Mine 32 was about the same as most public roads in Harlan County. More specifically, he remembered driving on Black Mountain and recalled guardrails posted along the roadside. But he agreed

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that in most cases there were no rails or berms. He disclaimed knowledge of public road standards for the purpose of comparing to those he applied to the cited mine access road (Tr. 47).

Inspector Sarke agreed that it was impossible to build sufficient barriers to keep cars from overtraveling on many stretches of Kentucky mountain roads. However, with regard to the access road in question, he did not believe it was impossible to build such barriers because there were existing guardrails and berms everywhere along that route. He confirmed that the first instance where guardrails were located on the road was on a bridge crossing a stream, but he did not know how those rails were mounted. He did recall that the rails consisted of metal posts joined by a steel rope, but did not know how effective they would be in preventing a car from falling into the stream. He guessed they could restrain an average car traveling at ten miles an hour (Tr. 50).

Mr. Sarke stated that at location #1 where he observed the dislodged guardrail, the foreman's parking lot connects with the lot used by other employees. He estimated that 20 automobiles would be passing through that location at any given time, and that these were automobiles driven by the men during shift changes. He agreed that this part of the roadway was level and was approximately 15 feet wide, but that two cars would not be able to pass each other at that location. He confirmed that one could observe any traffic coming from one parking lot to the other. He also confirmed that there had been problems with the ground washing away at this location, but denied any knowledge of a timber being fitted along the outer edge of the roadway. He did not know how deep the guardrail holes were, and assuming that they were in place, he could not state how much protection they would have provided for passing vehicles. He could not recall how the guardrails were installed to achieve abatement of the citation (Tr. 56-59).

Mr. Sarke conceded that due to the road conditions, the installation of guardrails directly adjacent to the roadway where the guardrail was dislodged was not possible. While he believed that there was a danger of cars going off the hill because of the dislodged guardrail, he could not state whether the guardrail prior to being dislodged because of ground erosion would have restrained a vehicle (Tr. 60).

Mr. Sarke testified that he considered the road in question to be a haulage road upon which people, trucks, and supplies

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moved. As for the abatement, it was his recollection that the guardrail was reinstalled so that it appeared to be capable of adequately preventing an automobile from going over the drop-off. Since he approximated the drop-off as 12 feet, he estimated that the depth of the holes in which the guardrail was installed would be deeper, but he could not recall what the guardrail was constructed of 16-foot posts (Tr. 66-68). He denied any knowledge of the welding of guardrail plates going on at the time the citation issued, and he believed that any such activity would have taken place at the shop located some 250 feet from the bathhouse. He confirmed that he did not visit the shop during the inspection (Tr. 70).

With regard to the citation at location #2, Mr. Sarke described the road as being level, approximately 20 feet wide, with an additional 15 foot wide level area extending along the outer edge. He confirmed that he considered the existing berm as inadequate, and expressed an opinion that a 24 inch berm would be acceptable, but conceded that an automobile could still overtravel such a 24-inch berm and turn over. He also agreed that in determining what is reasonable, he might consider the amount of room a driver would have to maneuver in before reaching the berm, and he believed that at other locations along the road where the berms were adjacent to the roadway, 24 inches would be acceptable. Although he first indicated that a driver would have to travel an additional 15 to 20 feet to reach the berm, he then indicated that the berm was actually located on the road and not on the outer bank (Tr. 72). He explained further that the road was straight, and while the law only required the respondent to place berms on the outer bank, the respondent exceeded this requirement at location #2 by constructing the berm immediately on the road. However, the problem was that it was only six to eight inches high (Tr. 73-75).

Mr. Sarke testified that he had interviewed the individuals involved in the accident, but did not ascertain how long they had worked at the mine, how many times they had ridden on the road, or if they understood what the speed limit was. He confirmed that the men told him they were not speeding, and he believed they understood the speed limit to apply to the entire road. He reported that he had no idea how fast the men were driving, but in his opinion they had to have been speeding (Tr. 79).

He described the stretch of road where the accident had taken place to be curved, about 20 feet wide, with an area of ground on the right hand side before the drop-off, and afterwards, also on the left-hand side. In addition, he

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intimated that there might be a few feet of apron between the roadside and the drop-off point. Mr. Sarke confirmed that while he regarded a 16 inch berm at this location to be unreasonable, a two foot berm would be reasonable. The car involved in the accident, however, probably would have traveled over a two foot berm due to its excessive speed. He admitted telling respondent's chief safety Inspector Albert Wagers that absent the inspector's manual instructions, he considered these berms adequate to restrain a car traveling at its normal speed (Tr. 84). While 16 inches might be acceptable for ordinary traffic, it was his view that the passage of heavy vehicles necessitated a 24 inch berm. These vehicles, he stated, weighed thousands of pounds and crawled along at less than 5 mph in low gear. He conceded that it was unlikely that the drivers of these vehicles would lose control and drive off the mountainside (Tr. 85-86).

In response to further questions, Mr. Sarke testified that he knew of no tests conducted on the berms, and he confirmed that he interpreted the berm standards based on his experience as a miner and as an inspector. He did not know how long the cited guardrail had been dislodged (Tr. 89). He confirmed that all types of vehicles used the roadway cited at locations #2 and #3, but that at the location of the dislodged guardrail only automobiles and an occasional private soft drink vending truck would use the road (Tr. 89). He also confirmed that it was not likely that a truck would go off the roadway at that location, but that the possibility did exist (Tr. 90). When asked his interpretation of the cited berm standard, Mr. Sarke responded as follows (Tr. 93-95):

Q. And is it your testimony as an MSHA inspector that a mine operator must base the height of his berms upon the largest vehicles using the road or the type most commonly found on the road?

A. No, I would -- in my -- you know, my summation of it, he has got to do what is necessary to prevent cars from traveling over it.

Even though I mentioned in my citation, you know, I mentioned the axle height of the Petibones, I believe it was. Even though I mentioned that, that was just for informational purposes telling, you know, that we do have a piece of equipment with a high axle on this roadway that is using this roadway. And we need to make our berms to where it's going to support that piece of equipment as well as others.

Q. Well, is it your testimony, Mr. Sarke, that a reasonably prudent mine operator can base the height of his berms upon merely the cars using the road?

A. I wouldn't think he would be using very good reason if he just based it solely on the cars if he had other vehicles that used it besides cars.

Q. Mr. Sarke, could a reasonably prudent mine operator take into consideration the possibility or likelihood that bigger vehicles would be going slowly and less likely to run off the road in determining the height of a berm he thought was necessary?

A. I think so, yes.

Q. Could a reasonably prudent mine operator assume on the basis of his past history that large vehicles were not likely to go over the side of the road and base his decision as to the height of the berm upon that information?

A. He would probably take that into consideration.

Q. If it's true that no large vehicles have ever gone off the road at No. 32 Mine, why should the operator base his berm height upon a possibility that one might?

A. To me, that's the intent of the law. What might happen, that is the intent of the law. It might be that one may never go off, if there never was a berm on the road. But to me that's why the law was written, because they have had it in cases where things have gone over, and things that moved at slow speeds, too. Not just things that move at high speeds. And we're talking heavy equipment. We've had lots of heavy-equipment accidents where they just go right over to the edge and go right over. A lot of them without reason, that we never could find the reason why.

Q. And Mr. Sarke, isn't it true that if one of these heavy pieces of equipment got loose and went over the side of that road, no berm could restrain them?

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A. If we're talking about a truck coming down that mountain, and its brakes went out, I don't know if there is anything short of a solid steel wall that would stop them from going over.

Mr. Sarke confirmed that the berms on the roadway in question are constructed by road grading materials to form berms along the entire length of the roadway, except at three locations which have guardrails (Tr. 102). The accident of January 22, 1981, is the only such incident he was aware of on the road, and while he had previously inspected the road, he never issued prior citations for any violations of the berm standards (Tr. 104). In response to certain bench questions, Mr. Sarke explained his application of the berm standard as follows (Tr. 105, 110):

Q. -- what do you consider when you decide whether or not a particular mine operator's elevated roadway is in compliance with this standard?

A. Okay. I have to consider all the traffic that travels that roadway, the different types of equipment that are using the roadway, and what would be sufficient to take care of the equipment that does travel that roadway.

Q. Now, how do you generally communicate this to a mine operator?

A. Okay --

Q. Have you ever had occasion -- just let me ask you a follow-up question -- have there ever been occasions where you have gone to a mine and you've determined that the berm is inadequate? And if so, how have you communicated this other than issuing a citation?

Q. Okay. If I found the berms to be inadequate, I issued the citation, okay? I have talked to operators about their berms where there were instances where, you know, it might be a borderline case, that they needed to do a little extra something other than what they've got already. I have talked to them. And I have got them to do it.

* * * *

Q. Do you have any suggestions as to how a mine operator -- what he should use as a guideline?

A. What he should use maybe reflects back to what I use. Just take the situations of what travels the road, you know; how many times a day it goes; the size of it; the amount of times they're there a day, a week, a month. If he's reasonable in his thinking of what would protect that when it goes up and down there --

And, at Tr. 115-117:

Q. But do you believe that under the test the Commission has set up an operator is supposed to build his berms to take care of the situation when a truck is out of control coming down the mountain?

A. No. I believe what he's supposed to do is take into consideration that truck coming off of that mountain and try and design them in a way that it could give him some protection. That's what they're there for, is for some. We know that if he gets going 50 miles an hour, you're not going to stop that truck coming off that mountain.

Q. Well, isn't it true that at 20 miles an hour those two-foot and three-foot berms that you saw wouldn't stop him coming off the mountain?

A. Possibly they wouldn't. I don't know; I've never had one going into that situation on that particular --

Q. But isn't it true that when you issued the citation you saw approximately 50 feet of an area of a 7.1 mile road that you considered to be inadequate?

A. You're talking about what I wrote up. Yes.

Q. And you considered the rest of it to be adequate?

A. Yes, ma'am.

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Q. And yet it is your testimony that most of that wasn't adequate to hold a truck coming off the mountain?

A. I said I didn't know whether it would or not. I said we can't go into those given situations. I don't know whether it would or whether it wouldn't until after it happens. I considered what they had, other than the areas that I mentioned, to be adequate at that time. Yes.

Respondent's testimony and Evidence

Albert Wagers, chief inspector for respondent's Lynch District, and former superintendent of the No. 32 Mine, testified that the road in question was constructed in 1962, and that it was built by the construction superintendent Mr. Vicini, and it did not originally have berms. Mr. Wagers confirmed that he was mine superintendent from 1970 through 1972, and that during this time there were some berms, but they were not located along the entire length of the road (Tr. 131-133). He confirmed that the respondent and MSHA agreed that the road was an access road, and not a haulage road, and that in 1973 a federal inspector told him that he was going to start citing violations for the lack of berms. Mr. Wagers stated that the inspector had cited another mine operator's haulage road and that the operator complained that he was required to have berms while the respondent did not. Mr. Wagers recalled telling his supervisor that the law did not cover access roads, only haulage roads, and that he wanted to test the law. However, when his supervisor raised the issue of cost, he pointed out that under normal conditions there were graders on the road which could create berms at no additional expense and that berm construction, rather than litigation, was preferred (Tr. 131-135).

Mr. Wagers testified that the road graders began constructing berms beginning in November 1973, but that no determination was made as to how much material had to be graded to form an adequate berm. Because of constant grading, the berms generally grew in height, and there were places along the road where the shoulder had eroded to such a degree that berms could not be maintained without widening the road, a task requiring more effort than could be expended at the time. He stated that in such locations the respondent tried to publicize road narrowness with horizontally laid telephone poles and other warnings (Tr. 136).

Mr. Wagers recalled building the bathhouse in 1971, and he confirmed that he was responsible for building the two parking lots and the connecting road. He agreed with Mr. Sarke that

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the road was about 15 feet wide, and that part of the bathhouse was situated in fill, and after five years or ordinary drainage part of the fill turned into mud (Tr. 137). He also confirmed that he decided to erect a guardrail made up of railroad ties laid end on end, and this was intended to warn people that the road was narrow. He did not think it necessary to warn of the bank because he felt it was plainly visible, and the guardrail installation took place after the MSHA citation (Tr. 139).

Mr. Wagers stated that no experiment had been conducted to test the effectiveness of the poles for stopping cars, nor was he familiar with any means of testing. He confirmed that, judging from its construction, the cited guardrail would be incapable of restraining a vehicle. He insisted that they were only intended as warning signals, and he confirmed that there was not enough room to build anything sturdy enough to restrain automobiles because of space limitations, and because of the deterioration of the fill (Tr. 141).

With regard to cited location #2, Mr. Wagers agreed with Mr. Sarke as to the dimensions of the roadway, and the depth of the drop-off. He stated that because he had no way of testing what type of construction would stop a vehicle, he could not state how high a berm should be to provide such protection. He further stated that because miners leaving by the road tended to travel quickly, the company tried to keep all traffic off the road in question at the time, and speed limits were posted above and below the hill, and safety meetings were held every week (Tr. 142-143).

Mr. Wagers described the road in question as an extension of a county road beginning at a bridge where the asphalt ended. Three of the 7.1 road miles were designed in a "zigzag fashion", with a steep curve at each leg, and a shallow grade between each curve. The remaining four miles was generally level, and if one were coming to work one would generally be on the bank side, and going home, on the hill side. The speed limit varied on different parts of the road, and at location #1 it was 10 mph (Tr. 143-145).

When asked about location #3, Mr. Wagers stated that as one approached the bathhouse one would be on the bank side, but beyond that point one would be on the hill side. The road had a sharp left hand curve going toward the bathhouse and was about twenty seven feet wide with a drop-off of about thirty five feet (Tr. 146). He guessed that the car involved in the accident, assuming that it hit the berm, was being driven at 35 to 40 mph, and he did not believe that there was any way

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to determine how much force a berm could withstand. In view of this uncertainty, it was his opinion that a berm could not be built for such a purpose, but should be intended to guide traffic. Assuming that access roads were governed by the berm requirements of the cited regulation, he believed that the road needed berms along its entire length, with the degree of elevation not important in calculating berm height. He admitted that the amount of berms was related to the degree of curve in the road, and stated that they might be necessary to help a driver on the sharp turns. Furthermore, he believed that any inside curves would not need the same type of berms as would an outside curve (Tr. 147-151).

In reference to location #2, Mr. Wagers said that it was coming out of an inside curve, and since outside curves received most of the berm material, he regarded the 10 or 12 inches present at location #2 sufficient to stop a car on the inside curve (Tr. 152). He believed that the guard at location #1 was no less effective dislodged as it was erect. He described it as a light power pole, eight to 14 inches in diameter, round, fixed on top of other poles, supported by dirt and topped by a fence (Tr. 152). He doubted that it would even stop a motorcycle, as it was constructed only as a warning apparatus. He believed it was possible to build a wall capable of restraining trucks at the curve by piling up dirt thirty to fifty feet high at the turns, but he did not think protection could be provided on the road segment between these turns. He concluded that more protection existed on the access road than on the public highway over Black Mountain, and on the county highway which connects up to the access road there were neither berms nor guardrails (Tr. 155).

On cross examination, Mr. Wagers agreed that he had not wanted to construct berms because he considered the road an access road rather than a haulage road. He said that the guardrail had been displaced in the past and that each time it had been restored. He conceded that at this location it would be reasonable to have some kind of protection, and in general berms did improve safety conditions. He reiterated that MSHA had issued citations in 1972 because of the lack of berms. He further stated that there were many rocky areas without much in the way of berms (Tr. 156-160).

In response to bench questions regarding Exhibit R-4, depicting Location 1, Mr. Wagers estimated the drop-off shown in the right side of the photograph to be about seventy feet on an angle. He confirmed that one driving past the guardrail could be killed, but denied that the rail was any more than a warning post or a curb feeler. He believed that the regulation

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in 77.1605(k) applied to an elevated roadway to prevent heavy equipment and large trucks from falling off of the hill, and he disputed its application to Location 1, a parking area. He believed that in order to build a restraining device there with a drop of seventy feet at an angle of seventy five degrees, he claimed, one would have to build retaining walls and a fifty foot wide base on the bottom to compensate for the fill foundation (Tr. 177).

When asked to compare the guardrails as depicted in Exhibit R-4 to those in Exhibit R-5, Mr. Wagers admitted that the former represented what MSHA regarded as compliance, but claimed that no less protection was offered by the unrepaired guardrails in R-5. MSHA, he indicated, issued citations when the rails became unsightly. He regarded it as impractical to build a restraining wall at the location in R-5, and said that it had been his idea to mount railroad ties on the bank so that cars could be warned by scraping against them. Later, the company received a citation instructing it to put berms or guardrails along the entire length of road, a citation the company accepted by not contesting (Tr. 180-181).

With regard to Exhibits R-2 and R-3 representing cited location 3, Mr. Wagers confirmed that the four foot berm shown in R-2 would do a better job of keeping a vehicle on the road than the sixteen inch berm depicted in R-3 as it existed the day after the accident. He agreed that it was no engineering problem to provide a four foot berm. He also said that because of the curved nature of the road, there would be reason to worry about drivers going over the side everywhere on it. However, he claimed it was physically impossible to have a continuous four foot berm along the entire 7.1 miles of road (Tr. 184-186). When asked if he believed the access road to be in compliance with section 77.1605(k) at present, Mr. Wagers replied positively, explaining that there was no place on the road where some sort of protection was not provided. He did not think one could draft a safety standard to fit all situations, and preferred to negotiate with MSHA on safety questions (Tr. 187).

Robert Wilkerson, superintendent of No. 32 Mine at the time the citation in question was issued, testified that in his opinion the berms at locations 2 and 3 were adequate. He regarded reasonable speed and the speed limit to be his main determining factors. He stated that he had participated in the construction of the guardrail in 1973, and was aware of its state of disrepair in 1981. He further stated that he and his construction foreman had discussed repairing it, but had not yet done so at the time the citation issued. He

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confirmed that two new posts were completed and two more were being prepared. He described each post as consisting of a four inch pipe with a plate welding on the bottom, and two railroad spikes driven through two holes to hold it upright. Two new posts were added near the employee parking lot, and a post was rolled back over and the ropes drawn taut with a truck before Mr. Sarke would abate the citation (Tr. 197-201).

Mr. Wilkerson denied that the guardrail fence was designed to prevent vehicles from going off the road, and he stated that it was only to warn people, especially during foul weather when visibility diminished. He also explained that when one traveled up to the mine there was about a half mile in which the drop-off was on one's left, and for the rest of the journey it was on one's right. He agreed that except for this one half mile, on the downward trip, one always drove on the high-wall side. When asked what he would do if he had brake problems while driving a truck down the road, he said he would drop his wheels into a ditch which followed along the highwall side, and he was certain that this action would slow a truck down, and probably stop it (Tr. 202-203).

On cross examination, Mr. Wilkerson confirmed that since Mr. Vicini accompanied the inspector, he was not aware if Mr. Vicini had told the inspector of work being done on the guardrails. Mr. Wilkerson confirmed that the respondent had never considered closing off the parking lot, and he agreed that the two new posts were installed after the citation was issued, and estimated that the guardrail had been dislodged a week to two weeks prior to the issuance of the citation (Tr. 207). Mr. Wilkerson also confirmed that Mr. Vicini was in charge of road maintenance, and that the grader operator reported to him. He further stated that the grader did not spend much time on the road during the summer, but during the winter he was assigned there twenty-four hours a day (Tr. 208).

Inspector Sarke was recalled and testified that he did not remember seeing any speed limits posted other than the 20 mph speed limit sign. He agreed that the guardrail represented in Exhibit R-4 was as it appeared when repaired, but he disagreed that Exhibit R-5 depicted what the unrepaired guardrail looked like. Except for two posts at the end, the rest were lying down under the bank, and not on the road (Tr. 209).

Mr. Sarke confirmed that Exhibit R-3 corresponded to his recollection of location 3's appearance at the time of the citation and he speculated that the place that the car went off the road was shown in the lower left hand corner of the photograph, but was not sure because he did not know at what angle the picture was taken. With respect to the width of the roadway, he testified that, depending on how it was measured, the figure could vary. Although he admitted that Exhibit R-3 showed a portion of a berm which was three to four feet high, he asserted that if the camera had been swung more to the right, the view of the cited area would be more accurate (Tr. 211-213).

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In response to further questions, Mr. Sarke repeated his contention that with normal safe 20 mph driving, a sixteen inch berm would be adequate for passenger cars. Under certain conditions he said, it was possible that a ten inch berm would be acceptable, but not for cars traveling at 20 mph. He did not remember a 10 mph sign posted in the road at the conveyor belt, and stated that he assumed it said 20 mph (Tr. 219). Mr. Sarke disagreed with Mr. Wager's view that the guardrail was to be used as a "curb feeler". He pointed out that Mr. Wilkerson said that the wire ropes were tightened, as though to give them strength to hold something back. When he used the axle-height test, he had understood that the intent of the section 77.1605(k) standard was to prevent overtraveling of the road, and did agree that a berm would not stop a runaway truck (Tr. 221).

Mr. Sarke did not believe that a six or eight inch berm would keep somebody from going over the drop-off at Location 2, where the berm was at the edge of the road. Even if the six to eight inches had been on the outside, he would still consider it inadequate. He asserted that he was unfamiliar with the view that the purpose of berms was to give somebody a signal so he could jump out of the truck, or to alert people that they were getting to close to the edge (Tr. 223).

Mr. Sarke denied that he disapproved of the sixteen inch berm at Location 3 merely because that was where the accident took place. Had the car in that situation been driven under normal circumstances, it probably would not have gone off the edge. He believed that the mere fact that the car did not go off at Location 2 did not mean that the six to eight inch berm there was acceptable, even if the car was traveling at the speed limit. He indicated that his concept of the "reasonable-man test" basically reflected his personal intuition with regard to specific circumstances, and he confirmed he had not conducted the actual investigation of the accident. Finally, when asked if whether, in retrospect, using the reasonable-man test to the available facts, including the fact that the vehicle was speeding, he would have issued a citation in regard to this one location, he replied that he probably would not (Tr. 226).

Mr. Wilkerson was recalled in rebuttal and testified that before the citation was issued there were five to seven posts in the fence at cited location 1. Two of the end posts were laying on the bottom and the others were leaning. When he reset the posts, two poles were added, wires were threaded through the other two posts, and this wire was pulled to straighten out the structure, but there was not much tension on the wires. Afterwards, Mr. Wilkerson explained, the ropes were

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anchored by pulling an anchor plate, nailing or sticking it to the telephone pole, and tying the rope to it. He also pointed out a 10 mph speed sign visible in Exhibit R-5. He confirmed that he tightened the guardrail wires with a truck, but emphasized that this was only to straighten out the rope (Tr. 228).

Respondent's arguments

In its posthearing brief, respondent, for the first time, argues that the road in question is an access road and not a haulage road, and that section 77.1605(k) does not apply. In support of its argument, respondent asserts that while the term "haulage road" is not defined by the regulations, the subtitle for subpart Q of the regulations, "Loading and Haulage", deals only with surface areas of mines where coal or ore are hauled. Citing sections 77.1600, 77.1604, and subsections (i) (j), and (l), all of which deal with haulage road vehicles, ramp and dumping locations, respondent concludes that section 77.1605(k) obviously is not designed to cover the mine access road.

Assuming arguendo that the access road is covered by section 77.1605(k), respondent maintains that the Commission's "reasonable person" test gives no guidance in this case. Respondent points out that beginning in 1973 it was first cited by MSHA for lack of berms on its access road, and that this resulted from complaints filed by another mine operator who had been cited by MSHA for lack of berms on its haulage roads. Following this, the berms along the roadway in question have been constructed by the grader operator piling materials scraped from the road to the side to form a berm, and no road construction or engineering guidelines have ever been agreed upon by the parties for the construction and maintenance of berms. As a matter of fact, respondent points out that no such evidence was introduced at the hearing, and that the only evidence of record is that the public authorities who construct roads in the Commonwealth of Kentucky that are traveled by cars, trucks and semis do not feel berms or guardrails are necessary at most locations. The public road on the same mountain where the access road to No. 32 mine is located has few berms or guardrails (Tr. 47).

The respondent maintains that the Commission's "reasonable person" test has no relevance to the areas cited by Inspector Sarke. In support of this conclusion, the respondent states that cited location #1 simply connects the two parking lots used by cars, pickup trucks, and a soft drink vending truck. Since there

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is a steep drop off, there is no way to construct a berm, and the respondent has provided guardrails which consist of pipes attached to a power pole which lays by the side of the road. Conceding that this arrangement is not strong enough to physically restrain a vehicle, respondent points out that Inspector Sarke abated the citation after the pipes in the middle of the guardrail were placed back in an upright position. Respondent maintains that the only reason for the guardrail was to warn drivers of the drop-off, and that since it served only as a warning, it was effective as long as some of the poles could be seen. Respondent also suggests that it seems logical that the foremen who drove this area day after day know the width of the road and used the side of the building as a guide rather than the poles.

At cited location #2, the respondent points out that Inspector Sarke was of the view that a berm of 6 to 8 inches was not sufficient despite the fact that the vehicle had an additional 15 feet to gain control before reaching the drop off. Respondent contends that 6 to 8 inches is sufficient to guide vehicles on a flat piece of road, and that a berm of higher dimensions might serve to turn a vehicle over.

Respondent maintains that MSHA now seems to agree that the location of the accident should not have been cited and that the berm was adequate. Part of the problem, states the respondent, is the fact that there is no agreement concerning what the berms are to protect and how. Respondent says that since the heavy trucks barely crawl up the steep grades at the mine there is little danger of them going off the side of the road on the trip up the mountain. When coming down the hill when empty, the respondent recognizes the fact that the trucks could attain higher speeds, but points out that most truck drivers would gear down if they totally lost their brakes and would steer into the ditch by the hill. However, if the driver crashed into a berm constructed substantially enough to stop a runaway truck, respondent concludes that the driver probably would not survive the impact.

Finally, the respondent concludes that in this case the only evidence presented by the petitioner that the berms on the roadway were not adequate was Inspector Sarke's opinion that in 2 of the 3 cited locations he thought the berms were inadequate. However, the respondent maintains that Mr. Sarke used none of the guidelines established by the Commission to arrive at his conclusions. Respondent finds it difficult to determine why Mr. Sarke's opinion is any more valid than that of the respondent's, particularly in a case where the mine operator has spent 10 years dealing with the roadway in question

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on a constant basis with no accidents resulting in injuries to people, and where Mr. Sarke did not even realize that the guardrails were not designed to restrain a vehicle. Further, respondent concludes that Mr. Sarke's experience as an MSHA inspector does not seem to give him any more authority to judge the sufficiency of a berm with an additional fifteen feet of road than anyone else, and that the question as to why a vehicle would need a 2 foot berm, which might cause it to flip over, to realize it was getting too close to the edge when it had an additional 15 feet to stop was never explained.

Petitioner's arguments

In its posthearing brief, petitioner states that the roadway in question is a mine access road where men, equipment and supplies are transported to and from the mine. In response to the respondent's argument that an access road does not come under the cited section 77.1605(k) mandatory standard, petitioner cites several Commission Judge's decisions to the contrary, including one of mine, Peabody Coal Company, VINC 77-102-P, December 13, 1977. In addition, the petitioner cites cases interpreting the terms "haulage roads" and "elevated roadways", and petitioner concludes that on the facts presented in this case, it has met its burden in establishing the fact that at all three cited locations, respondent's berms failed to comply with the requirements of section 77.1605(k).

With regard to cited location #1, the petitioner argues that the respondent had provided a guardrail which had fallen down and had not been replaced at the time the citation was issued. Citing Secretary v. Allied Products Co., 2 FMSHRC 2517, 2523 (1980), aff'd in relevant part, 666 F.2d 890, 893 (5th Cir. 1982), petitioner argues that the failure to provide any berm or guard at a location along an elevated roadway is a violation of section 77.1605(k).

With respect to the argument that the respondent may have taken initial steps to repair the guardrail, petitioner takes the position that this is not an absolute defense to the citation. On the evidence presented here, petitioner suggests that it is clear that at the time the citation was issued, respondent had taken no visible actions to correct the conditions as they were observed and cited by Inspector Sarke.

In response to the respondent's suggestion that the condition of the cited guardrail was sufficient enough to serve as a "warning", petitioner takes the position that the broken down guardrail would not be adequate. Petitioner takes the position that the guardrail had been displaced on more than one occasion and replaced (Tr. 156). Petitioner asserts

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that it is ludicrous to consider that any reasonable person would not replace the fallen down guardrail if it were reasonable to put the guardrail up in the first place. Although the two posts which remained standing may have constituted some form of warning, even respondent's witness Mr. Wagers did not consider that a warning sign would have been adequate at this location (Tr. 174). A warning sign would provide a visual warning, which would be of limited use under some conditions such as heavy rain, fog, or darkness. Whereas, a guardrail, even an inadequate guardrail, might provide some warning on the full length of the section of elevated roadway concerned. Although it is not the petitioner's position that a warning was sufficient or that the respondent intended the guardrail to constitute merely a warning, petitioner believes it is clear that there is a violation in this case even under the very limited standard which respondent asserts as reasonable at location No. 1.

With regard to cited location #2, petitioner concedes that there was a berm of 6 to 8 inches in height. Petitioner also concedes that the roadway was very level and straight, and that there was a fifteen foot or more distance between the edge of the road and the drop-off. However, petitioner points out that both the inspector and the respondent considered that there was some danger of a vehicle running off the road at this point and going off the drop-off, and that all types of vehicles used the roadway.

Petitioner points out that the Commission had indicated that the reasonable prudent person should consider the circumstances present and that the type and size of traffic using the roadway is a factor to consider. Relying on Inspector Sarke's testimony that a six to eight inch berm is "just a bump in the road", petitioner asserts that it is obvious that such a berm would provide for some of the vehicles using the roadway an insignificant amount of control and guidance of motion tantamount to no berm at all.

In response to the respondent's argument concerning the distance between the edge of the roadway and the drop-off, petitioner suggests that while this may be relevant to the issue of whether or not the roadway was elevated, Inspector Sarke considered that there was some danger of a vehicle going over the edge of the drop-off. Conceding that it is not clear from the evidence exactly how great the distance was between the edge of the roadway and the drop-off, petitioner maintains that the respondent has provided no evidence that would support a finding that a vehicle of the size of those using the roadway, traveling within the speed limit, would be able to stop before it had traveled the distance between the edge of the road and the drop-off. Under these circumstances, petitioner concludes that a berm or guardrail that would provide at least some control and guidance, should be required.

With regard to cited location #3, petitioner concedes that the parties are in agreement that the automobile involved in the accident was exceeding the posted speed limit and that Inspector Sarke was of the opinion that the 16 inch berm provided at this location was reasonable for a passenger car traveling within the posted speed limit. However, petitioner maintains that passenger cars are not the only type of vehicle using the roadway at this location and that the traffic on the roadway is a factor to be considered by the "reasonable man". In this regard, the petitioner argues that Inspector Sarke testified that based on the traffic on the roadway a two-foot berm would have been reasonable (Tr. 35). The Inspector also testified that he had measured the berms along the roadway, that the berms he measured averaged two feet in height or higher, and that the locations which he cited were the only locations where he could find berms which were of a lower height than the rest of the berms on the roadway (Tr. 26). A two-foot berm apparently was the standard size berm which the respondent had adopted for use along the roadway. Considering the conditions present at location No. 3 - an incline, a curve in the road, and a steep drop-off of approximately 30 feet (Tr. 32), petitioner concludes that it appears that a reasonable person would have provided at least the standard sized berm in use on the roadway at this location.

Petitioner concedes that there was some distance between the edge of the roadway and the drop-off at location #2, but states that it is not clear from the testimony exactly what the distance was since the distance depends on the point from which a measurement is taken. In any event, petitioner argues that there is no showing that the distance was significantly greater at this point than at other points where the respondent had provided 2 foot berms, nor is there any showing that a vehicle leaving the roadway would be able to stop in the distance between the roadway and the drop-off.

Petitioner takes the position that the respondent has set its own general standards along the roadway in question and has failed to comply with them. Further, the petitioner maintains that in applying the standards set forth by the Commission in its decision of January 27, 1983, in this case, it should be concluded that at location #1 there was a violation of 77.1605(k) in that no berm or guardrail was provided at that location. Although the respondent may have taken some initial steps toward repairing the guardrail which had been used at the location, petitioner maintains that the respondent has not established that it was in the process of repairing the guardrail at the time the citation was issued. At location #2 petitioner asserts that the height of the berm

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was so low that it would have provided an almost insignificant amount of control and guidance of motion for some of the vehicles using the roadway. At location #3, the circumstances were such that a reasonably prudent person would have installed at least the average size berm in use along the roadway. At this location respondent may be said to have acted unreasonably in light of its own standards.

Findings and Conclusions

Application of section 77.1605(k)

Respondent's argument that section 77.1605(k) is inapplicable to the cited roadway because it is a mine access road rather than a haulage road IS REJECTED. This same issue was raised and rejected by me in Peabody Coal Company, VINC 77-102-P, decided December 13, 1977. At page 10 of that decision, I made the following ruling which I incorporate by reference as my ruling in the instant case:

%y(3)5C The regulation does not distinguish between access roads and haulage roads, but simply states "roadways". The Dictionary of Mining, Mineral and Related Terms, 1968, at page 931, defines a "roadway" as "an underground passage, whether used for haulage purposes or for men to travel to and from their work". It also defines "access road" (page 5) as "a route constructed to enable plant, supplies, and vehicles to reach a mine, quarry, or opencast pit." While we are dealing in the instant case with a surface roadway, I find the definitions equally applicable even though the dictionary definition refers to underground. Respondent's assertion that for purposes of the regulation there is a distinction between an access road and a haulage road is rejected. I conclude that section 77.1605(k) makes no such distinctions and is applicable to all roadways on mine property used to transport coal, equipment, or men, regardless of the size, location, or characterization of the road being used. The purpose of the safety regulation is to protect the miner and to eliminate or prevent death or injury to men traveling the roadways during the course of their mining duties.

Although it is true that coal is not hauled on the roadway at the No. 32 Mine, the record establishes that the roadway is used to facilitate the movement of men, equipment, and

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supplies at the mine, and that these activities are directly related to the mining process. Accordingly, my prior ruling and decision in Peabody Coal Company applies in the instant case.

Fact of Violation

Inspector Sarke conceded that out of a total distance of 7.1 miles along the roadway in question, the distance of inadequate berms comprised only the locations cited in his citation, namely, 29 feet at one location, and 22 feet at another, for a total of approximately 50 feet. The berms on the remaining portions of the roadway were adequate (Tr. 12). He confirmed that the automobile incident of January 1981, was the first that he was aware of, and in his opinion the respondent's berm program is outstanding (Tr. 26).

It seems clear to me from the record in this case that the incident concerning the automobile traveling through the berm and over the drop-off caught Mr. Sarke's attention and prompted the issuance of the citation. This is not an unusual occurrence, and it is not the first time that MSHA has been prompted to act after the fact. However, even though Mr. Sarke characterizes the incident as an "accident" on the face of the citation, his testimony is that it was not technically a reportable "accident" because no one was injured. He testified that unless there is an injury, the regulatory definition of "accident" does not apply, and no formal investigation was conducted. The fact that a speeding occupied automobile went through a berm and became airborne before dropping over the embankment obviously caused Mr. Sarke to reflect on the possible inadequacy of the berms and guardrails along the remaining portions of the roadway.

It is also clear from the record in this case that Mr. Sarke issued the citation because he found that the berms at two of the cited locations were less than 22 inches, the mid axle-height of the largest vehicle which he believed used the roadway at any given time. He mechanically applied the 22 inch "mid axle-height" standard when he issued the citation, and he abated the citation after the berms were constructed to at least that height. Now, the Commission has directed that I apply a "reasonable prudent man" test to determine whether the citation is supportable. In my view, prior to the Commission's remand, Mr. Sarke never heard of such an individual, and MSHA's promulgation of such "mid axle-height" guidelines are apparently communicated to the inspectors so as to preclude interference from any such being.

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As previously noted, respondent is charged with one violation of section 77.1605(k), even though the inspector cited three separate locations where he believed the berms or guards were inadequate and in violation of the standard. Findings and conclusions as to each of the cited locations follow below.

Location No. 3

Mr. Sarke confirmed that the automobile which went through the existing berm at location #3 was exceeding the posted speed limit and that the existing berm obviously did not prevent it from going over the embankment. However, with regard to the adequacy of the existing 16 inch berm at this location, Mr. Sarke's testimony is somewhat contradictory. When asked on direct whether the existing 16 inch berm was of a height a reasonably prudent person would have installed, he replied "no" (Tr. 33). He explained that based on the types of vehicles using the roadway at that location, he would recommend a 24 inch berm similar to those provided by the respondent along other portions of the roadway, even though the application of the "axle-height" guideline would call for a 22 inch berm (Tr. 33). He then conceded that a 24 inch berm would not restrain an automobile traveling at excessive speed.

On cross-examination, Mr. Sarke stated that the existing 16 inch berm at the accident location was adequate for cars and trucks, but not for heavy equipment such as "petibones, semis, and supply trucks" (Tr. 38). He also indicated that he did not feel he was putting his own personal safety in danger while traveling up and down the road, and that the existing berm at the accident location was adequate to keep his pick-up truck from going off the road (Tr. 37). Mr. Sarke candidly admitted that he told Mr. Wagers that absent the "axle height" MSHA guidelines, the 16 inch berm was adequate to restrain an automobile using the road. Mr. Sarke also conceded that any heavy equipment using the roadway "crawled along at less than 5 mph in low gear", and he conceded that it was unlikely that the drivers would lose control and drive over the edge (Tr. 85-86).

I reject the petitioner's argument that since the respondent's berms along other portions of the roadway were determined to be at least two feet high that this somehow became a reasonable standard for the respondent to follow at all locations where berms were required, and that if the respondent failed to follow this standard a violation of section 77.1605(k) would result. While the petitioner's argument suggests that the respondent accepted the 22 inch "mid-axle" height guideline and therefore constructed its berms to exceed that height to insure compliance,

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there is no evidence to support such a conclusion. In my view, if the respondent had constructed all of its berms to a height of 20 feet, Inspector Sarke would still have issued the citation because of the "mid-axle height" guideline he was following, and petitioner would obviously not argue that respondent was following its own standard.

Petitioner's evidence that the 16 inch berm at location #3 was inadequate for vehicles other than automobiles and trucks consists entirely of the opinions of Inspector Sarke based on his experience as an inspector. However, there is no showing that Mr. Sarke has any particular expertise on road and berm construction, and his conclusion that a 16 inch berm is inadequate for "petibones, semis, and supply trucks" is unsupported by any credible evidence of record. Quite the contrary, Mr. Sarkes conceded that any heavy equipment using the roadway would travel at a "crawl" in low gear at less than 5 mph. Further, he also admitted that the existing berm was adequate for his pick-up truck, that he felt safe on the roadway with the existing berm, and that it was unlikely that drivers of heavy equipment would lose control of their vehicles. Mr. Sarke conceded that a reasonable prudent mine operator could take into consideration the possibility or likelihood that larger vehicles would be going slowly and were less likely to run off the road in determining the height of a berm he thought was necessary (Tr. 94). He also conceded that such an operator could also assume on the basis of his post accident-free history that large vehicles were not likely to go over the side of the road (Tr. 94).

After careful consideration of all of the credible testimony and evidence adduced in this case, I conclude and find that the petitioner has failed to establish by a preponderance of the evidence that the existing berm of 16 inches cited by Inspector Sarke was inadequate and in violation of the cited standard. I concluded and find further that the petitioner has failed to establish that the respondent failed to act in a reasonable and prudent manner to insure the safety of the miners using the roadway in question. Accordingly, that portion of the citation which alleges a violation of section 77.1605(k), at location #3 IS VACATED.

Location No. 1

Exhibit ALJ-1 is a rough sketch of cited location No. 1, adjacent to the bathhouse. The roadway is approximately 15 feet wide at the point between the edge of the bathhouse and the drop-off opposite the bathhouse. Photographic exhibit R-4 depicts the guardrail as it is supposed to look, with all poles or pipes in an upright position anchored by cables (Tr. 170).

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Photographic exhibit R-5 depicts the guardrail as it appeared when it was in disrepair, and the parties agreed that the photograph generally approximates the condition of the guardrail at the time Inspector Sarke issued the citation (Tr. 170).

Inspector Sarke's narrative description of location No. 1 on the face of the citation states that no guardrail was present for the 29 feet adjacent to the drop-off. It then states that the guardrail had been dislodged. It now seems clear to me that the inspector treated the dislodged poles and cables which made up the guardrail as if no guardrail existed. In short, since the poles or pipers were not upright and the cables were not drawn taut to support them, the inspector obviously believed that the guardrail in that condition was inadequate.

As pointed out in my previous summary decision in this case, the term "guardrail" is not defined by MSHA's regulations. However, in its decision of January 27, 1983, the Commission stated that the protective purpose of section 77.1605(k), insofar as berms and guardrails are concerned, is that they are "capable of restraining a vehicle". In a footnote, the Commission explained the phrase "restraining a vehicle" to mean "reasonable control and guidance of vehicular motion". Thus, given the facts of this case, the question presented is whether the existing guardrail at the time the citation was issued was in compliance with the requirements of section 77.1605(k).

Respondent's assertion that it was in the process of repairing the collapsed guardrail at the time of the inspection IS REJECTED as an absolute defense to the citation. Even if the respondent could establish this was the case, I would consider this fact in mitigation of the penalty as an indication of respondent's good faith compliance efforts. However, I cannot conclude that the respondent has established through any credible evidence that it was in the process of repairing the guardrail. I accept the inspector's credible testimony that he saw no such activity going on at the time of his inspection, and my finding is that no such activity was taking place at the time of the inspection and the issuance of the citation.

With regard to the actual condition of the guardrail at the time the inspector issued his citation, the parties are in agreement that it was not as originally installed. That is, it generally looked like it appears in photographic exhibit R-5. Further, Inspector Sarke indicated that the drop-off over the edge of the roadway where the guardrail was located was a "straight over-the-edge drop" of some 10 to 12 feet. He confirmed that the guardrail had apparently become dislodged because of erosion, and he could not state whether the corrected guardrail was capable of restraining a vehicle.

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Respondent's witness Albert Wagers took the position that the cited guardrail was only intended to warn anyone travelling along that portion of the roadway that the roadway was narrow, and he conceded that given the way it was constructed, the guardrail would be incapable of restraining a vehicle. He believed the purpose of the guardrail was to serve only as a "warning signal" or "curb feeler" to alert a driver that he was getting close to the edge of the drop-off. However, he conceded that if one were to drive over the edge, the result could be fatal. Superintendent Wilkerson generally agreed with Mr. Wagers' conclusions.

I conclude and find that the condition of the guardrail at the time the citation was issued was inadequate and that it did not comply with the requirements and intent of section 77.1605(k). The record here establishes that the day of the inspection in question was not the first time the guardrail was allowed to be in disrepair, and that on each such occasion the respondent made the repairs so as to insure that the posts and cable were upright and taut so as to be effective. Under these circumstances, I conclude that the petitioner is correct in its assertion that any reasonable person would not replace or repair the guardrail if it were not reasonable to put it up in the first place. I reject the notion that the guardrail was installed merely to serve as a warning, and I conclude and find that the condition that it was in when the inspector observed it would not restrain a vehicle from over-travelling and falling over the edge. Accordingly, the portion of the citation citing a violation at location No. 1 IS AFFIRMED.

Location No. 2

Exhibit ALJ-2 is a rough sketch of cited location No. 2. The parties are in agreement that at this location the roadway is level and straight and, that it is approximately twenty feet wide. Also, while there is some dispute as to the actual distance, there is an additional fifteen foot wide shoulder between the edge of the roadway where the 6 or 8 inch berm was located and the drop off. Under these circumstances, a vehicle using the roadway would first encounter the berm and then would travel another 15 feet before reaching the edge of the drop-off.

Inspector Sarke believed that a reasonably prudent person would construct a berm 24 to 36 inches high at the cited location, and he stated that cars, trucks, graders, and supply trucks used that portion of the roadway. However, he conceded that an automobile could still overtravel a 24 inch berm and turn over, and while he believed that the respondent exceeded the requirements of section 77.1605(k) by locating the berm immediately at the edge of the roadway rather than at edge of the drop-off, he was of the view that the 6 to 8 inch berm was "just a bump in the road" and was inadequate.

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The question here is whether or not the existing berm of six to eight inches would provide "reasonable control and guidance of vehicular motion" for the vehicle traffic using the cited portion of the roadway. Given the fact that any heavy equipment on the roadway would be travelling at a slow speed, and given the fact that the berm was at the edge of the roadway with another 15 feet of shoulder to the drop-off, one could possibly conclude that the existing berm was adequate for "controlling and guiding" heavy equipment. Petitioner's post-hearing argument that the existing berm provided an insignificant amount of control and guidance of motion for some of the vehicles using the roadway suggests that this is not true for all of the vehicles using it. However, petitioner has presented no credible testimony to support its case and relies only on the opinion of Inspector Sarke. Since he obviously applied the "axle height" theory, his "hindsight" opinions applied retroactively to a cited condition which existed over two and one-half years ago is of no value. Under the circumstances, I cannot conclude that the petitioner has established a violation at location #2, and that portion of the citation IS VACATED.

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

The parties have stipulated that the respondent is a large operator and that the payment of the civil penalty will not affect its ability to continue in business. I adopt this stipulation as my finding and conclusion on this question.

Good Faith Compliance

The record establishes that the respondent acted in good faith in abating the cited condition and I have considered this in the civil penalty assessed for the violation in question.

Negligence

I conclude and find that with respect to that portion of the citation citing the guardrail location respondent failed to exercise reasonable care to maintain the guardrail in a condition that would provide reasonably adequate protection for vehicles passing by the area. Under the circumstances, I conclude that the cited condition resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

Given the general disrepair of the guardrail at the time of the citation I believe it is reasonable to conclude that it would not restrain a vehicle from going over the edge of the

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drop off. As a matter of fact, Mr. Wagers admitted as much, even though he believed that the guardrail was only there to provide a warning. In any event, I conclude that the cited condition was serious.

History of Prior Violations

Petitioner has submitted a computer print-out which indicates that no violations of section 77.1605(k) were issued at the mine in question during the two-year period prior to the issuance of the citation in issue in this case. However, the history report does show that the respondent has been cited four times during this same two-year period for violations of section 77.1605(k) but that these violations occurred at other mines. Under the circumstances, and taking into account the inspector's testimony that the respondent's berm program is one of the best that he has encountered in his district, I conclude that any additional increase in the penalty assessed because of respondent's history of prior violations is not warranted.

Penalty Assessment

Petitioner has recommended a civil penalty in the amount of \$295, an increase of \$125 over the penalty assessment proposed when this case was originally filed on July 6, 1981. That proposal took into account the fact that the citation cited three separate locations where the petitioner believed a violation of section 77.1605(k) had occurred. Given the fact that I have sustained the citation for the one guarding location and have vacated it for the other two berm locations, petitioner's recommendation is rejected. I believe that a civil penalty assessment in the amount of \$125 is appropriate for the violation which has been affirmed.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$125 within thirty (30) days of the date of this decision in satisfaction of Citation No. 981185, January 23, 1981, 30 CFR 77.1605(k), and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge