

CCASE:
SOL (MSHA) V. MINERALS EXPLORATION
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TTEXT:

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

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

v.

MINERALS EXPLORATION COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 81-79-M
A.C. No. 48-01181-05026
Docket No. WEST 81-81-M
A.C. No. 48-01181-05025 V
(Consolidated)

Sweetwater Uranium Project

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Anthony D. Weber, Esq., Union Oil Company of
California, Los Angeles, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Minerals Exploration Company, with violating safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits began on October 5, 1982 in Laramie, Wyoming.

Respondent filed a post trial brief.

Issues

The issues are whether Respondent violated the various safety regulations and, if so, what penalties are appropriate.
Jurisdiction

Respondent admits jurisdiction (Tr. 230).

WEST 81-79-M
Citation 576949

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.9-40(c). (FOOTNOTE 1)

Summary of the Evidence

During a lunch break MSHA Inspector Merrill Wolford observed two people in a front end loader. The door of the loader was open and one person was partly outside of the cab (Tr. 368-372). At the time the loader was spreading gravel in a congested area next to the main entrance of the administration building (Tr. 371, 372, Exhibit P6).

In the ensuing investigation Jerry Carpenter, a trainee supervisor, told the inspector that he had been instructing Stanley E. White, a new employee, in the operation of the vehicle (Tr. 371).

A photograph taken by the inspector and the testimony of Carpenter and White confirm Inspector Wolford's testimony. (Tr. 372, 379-383, 384-388, Exhibit P-5).

The cab of this particular loader, equipped with one seat belt, is constructed for one person (Tr. 372). In the inspector's opinion an inexperienced driver could have caused the other person on the vehicle to fall and be crushed under the wheels (Tr. 373). Alternative methods of training an employee would have been for the instructor to secure himself in the vehicle. In addition, any training should have been in a less congested area (Tr. 373).

Discussion

Respondent waived any post trial argument in respect to the citation (Brief, page 13). Since the uncontroverted evidence establishes a violation of Section 55.9-40(c) the citation should be affirmed. Cf. Heldenfels Brothers, Inc., 2 FMSHRC 3173, 3174 (1980).

Citation 576953

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.4-12.

At the hearing the parties sought to settle this citation by

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reducing the proposed penalty to \$65 from \$130. The parties further sought to drop the designation that the violation was significant and substantial (Tr. 229, 230, Order, October 25, 1983).

In support of his motion petitioner stated that in the original assessment the gravity had been overstated (Tr. 229, 230).

For good cause shown the proposed settlement was approved and is formalized in this decision.
Citation 576954

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.16-5.(FOOTNOTE 2)

Summary of the Evidence

MSHA inspector Merrill Wolford wrote this citation when he observed that respondent's oxygen and acetylene compressed gas cylinders (bottles) had their regulators attached while the cylinders were being transported. The clamp holding the cylinders was loose (Tr. 232, 241-242). Photographs of respondent's welding truck 2902 were received in evidence (Exhibits P2, P3).

The inspector found that the bolt holding the clamp could be rotated, whereas the bolt should have been tight enough to hold the clamp (Tr. 234, Exhibits P2, P3). The hazard here arises in this fashion: In the event of an accident the bolt could knock the regulator valves off of the cylinders. This would create a bomb (Tr. 234-235).

Abatement was achieved by tightening the clamp so the cylinders could not move (Tr. 242). In addition, the regulators should have been removed and the gas cylinders capped (Tr. 243). Two types of caps are available commercially for this purpose (Tr. 244, 245).

The inspector felt the violation here was of a significant and substantial nature because it could lead to an accident involving serious injury or death (Tr. 245).

Bobby Jacobsen, Jerome Connor, and Jerry McDermott testified for the respondent:

In April 1980, at Inspector Wolford's suggestion, respondent turned the cylinders in the truck, installed two vent holes, and mounted doors to hold the cylinders (Tr. 254, Exhibits R1, R2). The inspector indicated that with this arrangement, with a steel bar further securing the doors on the truck, the cylinders could be transported with their gauges on them as long as the cylinders were turned off and the hoses were purged of gas (Tr. 255). After the changes were made the truck operated in this mode until the instant inspection (Tr. 255).

Due to its frequent use it is necessary to transport this equipment in a truck (Tr. 256). Respondent's maintenance foreman didn't feel there was any hazard because the cylinders had been shut off (Tr. 258).

It is 12 to 14 inches from the top of the cylinders to the top of the compartment holding the cylinders (Tr. 259).

While checking the equipment Inspector Wolford tried, but could not, turn the nut holding the bracket. Witness Connor applied a wrench and the nut turned one quarter to one half of a turn (Tr. 262, 265, 272).

The bracket holding the cylinders is located at the midsection of the cylinders (Tr. 262-263). The angle iron bracket that fits the cylinders is cut in a horseshoe shape (Tr. 264, Exhibit R2). When changing the heavy gas cylinders the company welder, McDermott, completely removes the bracket (Tr. 266, 267). The bottom of the cylinders are held in place by brackets welded to the floor of the truck. These three to four inch brackets are curved to fit the bottom of the cylinders and to prevent their movement (Tr. 266). Before the gas cylinders will go into the well which holds them they must be vertical. The bottom forms a tight fit (Tr. 266, 267).

Discussion

At the hearing the Secretary sought to amend his citation by alleging a violation of Section 55.16-6 (FOOTNOTE 3) in lieu of Section

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55.16-5 (Tr. 235-240). The motion to amend was denied as being untimely (Tr. 240-241). The Secretary's counsel stated that in any event his evidence would establish a violation of both sections (Tr. 237).

As a threshold matter respondent asserts that the Secretary is estopped to maintain that any hazard existed. This position evolves from the uncontroverted evidence that Inspector Wolford was responsible for the design of the cabinet and clamp that secured the cylinders (Brief, page 12).

Respondent's contention is rejected. The doctrine of estoppel is generally not applicable against the federal government. *King Knob Coal Company*, 3 FMSHRC 1417 (1981); *Burgess Mining and Construction Corporation*, 3 FMSHRC 296 (1981).

The doctrine of estoppel does not apply but on the merits of the case I find no violation of Section 55.16-5.

The uncontroverted testimony and photographs P1, P2, and R1 clearly show that the cylinders were secured by the manner in which they fit into the truck. They must be vertically straight to go into a slot which then forms a tight fit. The clamp at mid-point further secures the cylinders.

A sharp conflict exists in the evidence as to whether the bolt holding the clamp was loose (In Exhibit P3 the clamp is marked). On this issue I credit the testimony of respondent's witnesses Connor and McDermott. They indicated the nut could only be tightened about a quarter of a turn after pressure was applied with a wrench (Tr. 262, 272). The action by respondent's witness in tightening the nut is not controverted by the inspector.

Based on the foregoing facts I conclude that the compressed gas bottles were secured in a safe manner within the meaning of Section 55.16-5.

Accordingly, no violation occurred and Citation 576954 and all proposed penalties should be vacated.
Citation 336285

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.9-2. (FOOTNOTE 4)

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The allegations here concern: (A), a crack in the rim flange of a haul truck, (B), a bolt missing on an operator's cab, and (C), an air leak in a braking reservoir.

A.

Concerning the 120 ton Wabco haul truck rim flange:

MSHA Inspector Martin Kovick observed what he described as a radial crack in a rim flange. The crack was approximately 4 1/2 inches in length. (Tr. 275, 278). If the rim came off it would put additional weight on the other tire. Possible blow outs or a tipping of the truck could occur (Tr. 275).

At this mine cracks in the rim flanges of the trucks are fairly common. A radial crack, according to Inspector Kovick, is one that goes the same direction as the wheel itself. It is the same as a circumferential crack (Tr. 283, 284-285).

The inspector didn't measure the depth of the crack but he did measure its length. The inspector generally knew of several fatalities that have occurred due to rims flying apart (Tr. 286).

Bobby Jacobsen and Casey Conway testified for the respondent:

Witness Jacobsen, the maintenance general foreman, has worked with tires for 12 years. He was not present during the inspection of the haul truck but the vehicle was sent to the "down line" where he inspected it (Tr. 316, 317, 331).

The four to five inch crack in the flange was a circumferential crack, that is, following the outside line of the wheel (Tr. 323, 324). A radial crack is one going across the face, from top to bottom (Tr. 324). If a circumferential crack is not broken out along its edge it presents no safety problems. (Tr. 324). This 51 inch wheel has a four to five and one half inch wide flange (Tr. 325).

When circumferential cracks have occurred in the past it is respondent's policy to replace the flange when they break down the tire. The only danger in a circumferential crack might be to the tire (Tr. 325, 326, 342). Even if a circumferential crack exists there isn't any danger as long as the tire is inflated (Tr. 329). Jacobsen has never known a tire to loose pressure due to such a crack. If a radial crack occurs it will cause the tire to wear (Tr. 329-330). If a piece, or a part, of the flange breaks out of a radial crack then the tire will wear severely at that spot (Tr. 330).

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If a flange had a radial crack Jacobsen would probably remove it from the truck as soon as possible. This would be particularly true if the defect was on a front tire (Tr. 331).

Respondent's practice of changing flanges depends on the size of the crack (Tr. 343, 344). Jacobsen agrees that a crack could conceivably, if allowed to develop, fail to provide structural support to the tire (Tr. 345).

When respondent's personnel evaluate a crack in a flange they look at its length and use a feeler gauge or knife to determine its depth (Tr. 350). The cracked flange observed by the inspector wasn't "that bad." It was about one sixteenth of an inch. Jacobsen would change this particular flange if it was about 16 inches in length and one quarter of an inch deep. Wabco trucks are quite susceptible to cracks in the flanges.

Casey Conway, respondent's safety supervisor, inquired of MOTOR WHEEL, a subsidiary of Goodyear Tire and Rubber Company concerning rim flanges (Exhibit R3). The company's correspondence indicated that rim flanges are in compression due to tire loads. Due to the compression no safety hazards exists from radial or circumferential cracks (Exhibit R4). The company further noted that a radially cracked flange should be removed and any cracked flange should be discarded when the tire is changed (Exhibit R4). The general reason for making the change is to prevent damage to the tire (Exhibit R4).

Discussion

The gravamen of any violation of Section 55.9-2 is whether an equipment defect exists and, if it does, whether the defect affects safety. Allied Chemical Corporation, 4 FMSHRC 506 (1982).

In the instant case an equipment defect existed because a rim flange would not ordinarily be cracked.

However, the Secretary's case fails on the issue of whether the flange crack affected safety. On this issue I credit respondent's expert testimony. Such expertise is considerably greater than the inspector's. In addition, the Secretary's case is lacking in particulars. Specifically there is no evidence of the depth of the flange crack. A mere crack is not shown to have affected the safety of this equipment.

For the foregoing reasons the initial portion of this citation, involving the cracked flange, should be vacated.

B.

Concerning the bolt missing on the operator's cab:

According to MSHA Inspector Kovick 4 to 6 bolts hold the cab to the frame of the vehicle. One of the bolts, on the upper portion, was missing. The inspector felt that a hazard would occur if the other bolts became loose or broken. The inspector didn't check to see if the cab was welded to the frame (Tr. 280).

Jacobson and Conway testified for the respondent:

Jacobsen is familiar with Wabco trucks. The bolt referred to by the inspector attaches the cowling which is the sheet metal in front of the truck. It does not attach to any part of the cab (Tr. 318-320).

The cab is welded to the deck which is, in turn, bolted to a 3 x 3 tubular pipe which is bolted to the frame (Tr. 318). When Jacobsen looked at the truck the bolt had been replaced (Tr. 317). A mechanic had put a nut onto the bolt to tighten down the cowling (Tr. 321).

In discussing the citation Jacobsen told Kovick that he couldn't believe what they were talking about (Tr. 318-319). Kovick did not reply (Tr. 319).

In rebuttal Inspector Kovick recalled that the bolt was in the back but he didn't remember the side where it was located (Tr. 354).

Inspector Wolford indicated that respondent previously welded the cabs to the frame because of problems caused when the main strut supports break through the bolt holes (Tr. 355, 356). Probably all of respondent's haul trucks have struts welded to the frame (Tr. 356).

Discussion

The Secretary's case fails for several reasons. The evidence is unconvincing that this single missing bolt in any manner affected the safety of the cab. Inspector Kovick testified that if other bolts were to become loose or broken a hazard could result (Tr. 276). The section in contest, 59.9-2, requires more than the mere possibility that the equipment defect might affect safety in the future.

I further credit respondent's evidence as to the function of this bolt. A person charged with the obligation of maintaining these vehicles would know whether the bolt connected to the frame or the cowling.

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For these reasons the second portion of the citation, relating to the missing bolt, should be vacated.

C.

Concerning the air leak:

Inspector Kovick indicated an air leak existed in the reservoir tank located behind the compressor. In his view the air leak could contribute to a braking hazard (Tr. 275, 276, 281). This condition should be corrected particularly because of the weight of the haul trucks (Tr. 276). The witness indicated this air reservoir involved the emergency braking system and the leak was in one of the lines that connected to the tank (Tr. 281). During the inspection a person could hear the leak even though the motor was running (Tr. 287).

Respondent's evidence:

Foreman Jacobsen heard the air escaping when he walked around the back of the truck on the right hand side (Tr. 319). Jacobsen told his mechanic to check the pop off valve on the air tank. He further instructed him to set the air governor at 155 pounds (Tr. 321). They found the air governor was not functioning properly so Jacobsen told the mechanic to change it (Tr. 321).

The reservoir is a storage compartment for air. The governor controls the air compressor pump (Tr. 322). If you do not set the air governor the compressor is going to continue to pump. This was an air leak at the pop off valve. The compressor was pumping air into the reservoir at 170 psi and the pop off valve was unloading. The air governor was replaced (Tr. 323).

After being replaced the air governor shut off at the desired setting. The pop off had occurred because the governor wasn't adjusted properly. The leakage was at the top of the air tank (Tr. 332).

The pop off valve is a relief valve for the air compressor system. The valve presents no hazard but, to the contrary, it promotes safety. The pop off valve emitted a sound similar to leaking air (Tr. 349).

Discussion

I credit the expertise of respondent's witness Jacobsen. He identified the leaking air sound as the pop off valve. He further corrected the situation which did not in any event affect safety.

Since safety was in no way affected by the condition of the pop off valve the third portion of the citation should be vacated.

Citation 576958

This citation asserts there were 48 missing bolts on respondent's fuel truck which affected its safety. Accordingly, the Secretary claims respondent thereby violated 30 C.F.R. Section 55.9-2, cited in footnote 4.

Summary of the Evidence

MSHA Inspector Merrill Wolford checked respondent's fuel truck No. 2901. On the bottom side he found that all 48 bolts that secure the dispensing units to the truck were loose. The bolts attach the dispensing units and they are connected to angle iron flanges. Some bolts formed egg shaped holes and some had pulled through the plate (Tr. 492-494, Exhibit P11). The bolts are one and to two inches long and the inspector could see a gap under a lot of them. In some cases the gap was as much as a half inch. Five or seven bolts were missing and there were no washers on the bottom side (Tr. 500, 501).

The units attached to the truck bed contain diesel, fuel, hydraulic oil as well as antifreeze (Tr. 494). The inspector felt that in the event of a sudden stop or accident the fuel tanks could shear off and crush the cab (Tr. 494).

On February 6, 1980, in a previous inspection, Inspector Wolford issued a withdrawal order on this vehicle. One of the conditions he found at that time were loose bolts holding the dispensing tanks (Tr. 495).

Respondent's evidence:

Casey Conway was under the truck when Inspector Wolford made his observations. He asserts the inspector merely tested four to eight bolts and not all 48 (Tr. 506-508). A diagram prepared by respondent's draftsman shows exactly 40 one half inch nut and bolt connections (Tr. 503, Exhibit R10).

Conway counted the bolts a year after the inspection. In addition he didn't know when the diesel dispenser and generator had been welded to the bed of the truck (Tr. 506-507, 509).

Jamieson, the lub truck driver, tightened the loose nuts that secured the units. On the left side a dozen were extremely loose and others were snug up to the lock washer. Jamieson torqued these down anyway (Tr. 510-513).

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While some bolts were very loose others required a quarter of a turn, and some no turn at all. Jamieson considered that a bolt was tight even if he tightened it down a quarter of a turn (Tr. 515).

Discussion

I find MSHA's witness Wolford credible. When he was under the truck he observed the loose bolts.

While respondent's witness Conway was under the vehicle with Wolford at the time of the original inspection, he concedes he did not count the bolts until a year after the inspection.

Respondent's evidence also includes a mechanical drawing. It was no doubt offered to show that there were only 40 one half inch bolts under the truck bed as per the drawing. Therefore, with such evidence, respondent should prevail on this credibility issue.

I put no credence in the drawing. The record fails to reflect when it was prepared. The drawing shows that three different dispensing units were welded to the truck but Conway didn't know when they had been welded. Without such pivotal evidence I give zero weight to the drawing.

Further, I give zero weight to Jamieson's testimony: Jamieson considers a tight bolt to be one that will take a quarter of a turn (Tr. 515).

Respondent's post trial brief strenuously argues that Wolford's testimony is incredible when contrasted with Conway's testimony and the drawing. On the contrary, I credit Wolford's testimony which clearly shows that "there were 48 bolts I counted loose and there are other bolts on the truck. There is a compressor and dispensing hose rack on the truck and there are other pieces of equipment mounted on that truck" (Tr. 496-497).

On this basis I conclude there were more than 48 bolts under the truck at the time of the accident. Such a direct count of "48 and more" causes me to reject respondent's contrary evidence.

For the foregoing reasons citation 576958 should be affirmed.

The citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.5-3. (FOOTNOTE 5)

Summary of the Evidence

MSHA Inspector Merrill Wolford observed dust or sand rising from the tail of the drill stem when he was 300 to 400 yards away. Rocky Anaya, upon observing the inspection party, went around and turned the water on at the tank (Tr. 517-521). When the water was turned on the dust emissions came under control (Tr. 530).

When the inspection party reached the scene the dirt coming out of the drill hole was damp, but the inspector saw no water in the hole. The water tank was full, although drillers Anaya and Stressler stated they had drilled four holes to a depth of 45 feet. The holes had a 9 inch diameter (Tr. 517, 518, 521, 522).

Anaya and Stressler said other inspectors and supervisors had told them to drill wet only if they were in rocky ground (Tr. 518, 519). Neither men were wearing respirators. But there were 3M respirators in the cab of their vehicle (Tr. 517-518).

The hazard here is mainly respiratory. Mononucleosis can result. The long time effect is life threatening (Tr. 519).

Joe Drake, Jerry Carpenter and Rocky Anaya testified for respondent:

Drake, the drilling and blasting foreman had instructed the workers to use water anytime dust is encountered. Sometimes they strike water. In that event there is no need for water as a dust control measure (Tr. 527-529). The criteria is not whether the ground being drilled is wet or dry but whether the drilling produces dust (Tr. 528).

Rocky Anaya turned on the water when he saw the inspection team approaching. He thought he might be cited for not having the water turned on. He was then drilling in wet sandy material and he didn't need water. When the inspector arrived wet sandy material was coming out of the drill hole (Tr. 524-526).

Discussion

I find the inspector's testimony to be credible. He observed dust, or sand, at the drill stem. He approached and saw that the material then coming out was damp. The rest of the offal was dry.

If Anaya was drilling in wet sandy material there was no necessity for him to turn on the water when he saw the inspection team. He was already following respondent's instructions. I accordingly reject respondent's factual defense.

Respondent's post trial brief asserts that the testimony of Inspector Wolford is not credible. This argument arises in Wolford's testimony that he didn't know whether he was observing dust or sand. Further, he didn't know the materials in which Minerals was drilling (Tr. 521). In short, respondent asserts that Anaya's testimony is unrefuted that the material was sandy and wet. Therefore, no violation existed.

I disagree. When questioned on this point Inspector Wolford stated that when he looked at the offal around the edge of the hole "the last little bit right at the top where they had just finished the hole was damp, but the rest of it was dry" (Tr. 523). Whether the materials were soluble in water or not is not relevant in this factual setting. Under either circumstance respondent was not using any dust control measure whatsoever. It was therefore in violation of the regulation.

For these reasons Citation 576959 should be affirmed.
Citation 576960

This citation alleges that two bolts were missing from the anchor plate of respondent's 9H Cat in violation of 30 C.F.R. 55.9-2.

At the hearing respondent withdrew its notice of contest stating that the proposed penalty had been paid (Tr. 391, 392; Order, October 27, 1983).

Pursuant to Commission Rule 29 C.F.R. 2700.11, the motion was granted and it is formalized in this decision.

Citation 577061

This citation asserts respondent's 65 ton water truck had three defects. These were defective brakes which caused the truck to pull, a wobbling tire, and a separation of a tread from a tire.

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In addition, it is alleged that the tire with the separation had been removed from service but not tagged out.

A.

The initial allegation concerns the brakes which caused the truck to pull to the right. This defect violated 30 C.F.R. Section 55.9-3.(FOOTNOTE 6)

Summary of the Evidence

MSHA Inspector Merrill Wolford observed respondent's water truck No. 2901 pulling very hard to the right (Tr. 447, 452). The driver could not prevent such movement. The pulling caused by the brakes is a severe hazard (Tr. 452, 453).

Bobby Jacobsen, respondent's foreman, indicated the front brakes on the truck had been relined two weeks before the inspection (Tr. 456). Different linings had been installed (Tr. 456).

Discussion

Inspector Wolford's testimony is uncontroverted: The water truck's brakes caused the vehicle to pull very hard to the right. Respondent's evidence confirms the defective condition. Respondent's was concerned that the truck might pull so they placed a notice on the dash directing drivers not to operate the vehicle in excess of 10 miles per hour (Tr. 457; Brief, page 19).

The evidence clearly establishes that the brakes on the truck were not adequate. This establishes a violation of Section 55.9-3.

For the above reasons the initial portion of Citation 577061 should be affirmed.

B.

This portion of the citation asserts that the left front wheel of the truck was wobbling. This condition violated 30 C.F.R. Section 55.9-2, cited in footnote 4.

Summary of the Evidence

MSHA Inspector Wolford observed that the left front tire of the truck was wobbling "very badly." He first observed this condition when he was 300 to 400 yards away. Upon inspecting it first hand he found a lot of play in the steering mechanism; further the ball joints were worn (Tr. 447, 448, 452). In the inspector's opinion the wobbling was caused by worn out steering (Tr. 452).

The wobbling tire was a severe hazard that could cause a loss of control (Tr. 453).

Respondent's evidence:

Bobby Jacobsen recognized that the company had experienced some problem with the shimmy of the truck (Tr. 455, 457). According to Jacobsen wobbling is the same as shimmying. It was a three to four inch shimmy (Tr. 458, 459).

A corn nut used to adjust the steering valve would occasionally back out (Tr. 457). Excessive pressure into the steering valve would cause the wheel to shimmy (Tr. 457, 458).

After the inspection Casey Conway inspected the steering arm and its configuration. There was nothing found by the visual inspection but later they learned there was a left hand steering cylinder problem (Tr. 472, 473). Too much pressure in the cylinder can cause a shimmy (Tr. 473).

While Conway saw the vehicle, shimmying as described, the vehicle did not demonstrate any lack of control (Tr. 473-474). There was nothing found in the steering area having to do with the ball joints (Tr. 473-474).

Discussion

The inspector's testimony establishes the violation. Respondent's evidence confirms it.

The second portion of Citation 577061 should be affirmed.

C.

The third allegation focuses on the allegation that the outside tire of the dual tires on the truck had a 15 inch separation, was split, and was bulging. The citation then cites 30 C.F.R. 55.9-2, which is cited in footnote 4. In addition, the citation further alleges that the safety department had taken the

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truck out of service. Yet it is alleged the truck was being operated and it had not been tagged out, citing 30 C.F.R. 55.9-73. (FOOTNOTE 7)

Summary of the Evidence

Inspector Merrill Wolford observed that the tread on the rear dual 2700 x 35 recap tire was separated and bulging (Tr. 447, 448, 451, Exhibits P7-P10). The tread was separated from the tire carcass for 15 inches on one side. The separation went through toward the other side (Tr. 449). By pushing on the tire he could feel a difference between the separation and the rest of the tire (Tr. 450). When the truck moved the tire flexed from side to side and bulged to the outside (Tr. 450). A possible blowout, with resulting loss of control, could occur on this terrain which was mostly dirt and rough ground (Tr. 450-451).

Respondent's evidence:

Robert Jones, Kenneth Davis, Bobby Jacobsen, and Casey Conway testified. Robert Jones, a person with 16 years experience in servicing, managing and selling tires, was familiar with the tires on a Wabco 65 ton truck (Tr. 392, 393). His primary business is tire maintenance and he is familiar with separations that occur on the General Tire Company tires used on the Wabco 65 ton water truck (Tr. 397, 398, 433, Exhibit R9).

The carcass, which contains nylon, is the main body of the tire. On the outside of the carcass are bead breakers. The face of the tire, that is, the whole tread area, are above the bead breakers (Tr. 400, 410, Exhibit R9)

In the operation of the truck heat will cause the nylon cord to stretch. When this occurs the rubber tread fails to stretch with it. A cracking or separation results (Tr. 400, 401).

The same carrying capacity exists and no hazard is involved at lower speeds. But a hazard could exist with a tread separation if the vehicle was on a five to ten mile trip and running in excess of 30 or 35 miles per hour (Tr. 401-402). A hazard begins

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when the tire loses part of the rubber and starts to wear through the cord body (Tr. 402).

The carcass of the tire holds all the pressure and all the weight of the tire (Tr. 405). There is no greater risk as long as the cord body is intact (Tr. 410, 434). "Bird nesting" is where the rubber comes apart from the ply which then starts to wear (Tr. 413).

The tread of this tire is 18 to 20 inches. The outside circumference of the tire is 20 feet.

The bulging in the tire is a result of the rubber coming away from the cord ply (Tr. 438). If there is cord damage the bulge would be more severe. Further, "bird nesting" will occur because the ends will start to curl up (Tr. 441).

Kenneth Davis, respondent's mine superintendent, probed the separation on this recap with a screw driver. He was only able to insert the screwdriver three to four inches into the separation until it hit rubber (Tr. 477, 488, 490). The separation was 10 to 12 inches from the shoulder of the tire (Tr. 482).

The water truck wasn't carrying its designated weight. It was originally a 65 ton rock truck with a carrying capacity of 215,000 pounds. Refitted as a water truck it weighs 150,000 pounds when loaded (Tr. 485).

In March 1981 respondent arranged a meeting with representatives from General Tire Company and Redburn Tire Company. The meeting was for Wolford's benefit to discuss tire separations (Tr. 486, 487).

Bobby Jacobsen confirmed that if the cord of the tire is not breaking down no hazard results from continuing to use a tire with a separation of this type (Tr. 461-462).

Casey Conway accompanied the inspection team and they inspected the water truck about 9:30 a.m. The truck was taken to the tire shop and parked. No citation was written until there was a later inspection that day (Tr. 469-470).

At 4:30 p.m. that day the truck was driven past Wolford and Conway. Wolford stated "he thought we had shut it down" (Tr. 471). Wolford looked like he was getting angry because respondent was operating the vehicle without changing the tire (Tr. 453, 454, 471, 472).

Acosta and Wolford discussed whether the tire should have been removed from service. There was no question about the hazard. (Tr. 475). Wolford referred to the fact that the company

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had agreed to move the dual from the outside to the inside. To avoid a confrontation the company decided to change the tire from the outside to the inside (Tr. 475).

Discussion

As already noted, the gravamen of this portion of the citation is whether the tire was unsafe.

On this credibility issue I find in favor of respondent's evidence. At the outset I note that Inspector Wolford demonstrated no particular expertise concerning tires. On the other hand respondent's witness Robert Jones has considerable experience in this area of expertise. At the hearing respondent, for illustrative purposes, presented a tire similar to the Wabco truck tire. The testimony of the witnesses, as outlined in the factual statement, causes me to conclude that the recap tire here, with its 15 inch tread separation, was not unsafe.

The third portion of the citation further states that "the truck had been observed with the bad tire and the safety department had taken it out of service to have the tire rotated inside. Yet, this truck was being operated on the evening shift and the operator stated it had not been tagged out, mandatory standard 55.9-73."

Since I find that the tire was not defective in such a manner as to affect safety I conclude that this portion of the citation should be vacated as to the alleged violation of Section 55.9-73.

For these reasons the third portion of Citation 577061 should be vacated.

Civil Penalties

The citations, their disposition, and the remaining proposed penalties are as follows:

Citation No.	Disposition	Proposed Penalty
576949	Affirm	\$ 255
576953	Settled, reduced to	65
576954	Vacate	-
336285	Vacate	-
576958	Affirm	122
576959	Affirm	295
576960	Contest Withdrawn	195
577061A	Affirm	725
577061B	Affirm	725
577061C	Vacate	-

The mandate to assess civil penalties is contained in Section 110(i), [now 30 U.S.C. 820(i)], of the Act. It provides:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Concerning the operator's history of prior violations: Respondent was assessed a total of 154 violations between August 8, 1978 and August 18, 1980 (Exhibit P1).

Concerning the appropriateness of the penalty to the size of the business of the operator charged: the parties stipulated that the size of the operator is contained in the notice of assessment in each case. In WEST 81-79-M the size of respondent's mine is noted to be 273,078 man hours per year (Tr. 3, 230, Notice of Assessments).

Concerning the negligence of the operator: With the exception of the lack of bolts to the underside of the truck carrying the fuel units all of the situations presented open and obvious conditions. The condition of the bolts holding the dispensing units could easily have been ascertained during routine maintenance.

Concerning the effect of the penalty on the operator's ability to continue in business: The parties stipulated that proposed penalties will not affect the business of the operator (Tr. 3).

Concerning the gravity of the violation: Severe injuries could have been caused by any of the violative conditions. I consider the gravity to be severe in each instance where the violation is affirmed.

In connection with Citation 577061 A and B respondent's post-trial brief asserts that the proposed penalty is excessive because the company posted a notice instructing its drivers not to operate the vehicle over 10 miles per hour. True, the notice was posted. But a swerving truck and wobbling tire are severe hazards at any

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speed. Further, posting a notice is a totally unacceptable method of abating such defects.

Concerning the good faith of the operator in abating the violative conditions: To the operator's credit it rapidly abated the violative condition.

Considering all of the statutory criteria and the relevant facts I conclude that the proposed penalties, as outlined above, should be affirmed.

WEST 81-81-M
Citation 337741

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 55.4-12.(FOOTNOTE 8)

Summary of the Evidence

When inspecting respondent's lube shop Inspector Merrill Wolford found large pools of oil, diesel fuel, grease, and rags practically everywhere. This condition was throughout the service bays, the pump rooms, the office and the lunch area (Tr. 540-544, Exhibits P2-P13).

A commercial absorbent, referred to as floordry, had been applied on parts of the floor. In some areas the accumulations were one eighth to one quarter of an inch thick (Tr. 560, P-2, P-8).

The inspector was concerned about a serious fire hazard as the accumulations and various materials were flammable and combustible (Tr. 541). Ignition sources included electrical motors as well as the various vehicles being serviced in the shop. Inspector Wolford ordered all six workers withdrawn. However, he permitted those in the clean-up crew to remain (Tr. 541, 556). Except for the overhead lights he ordered all electrical power turned off (Tr. 541, 544).

If a fire occurred a fatality could occur or the workers could be burned (Tr. 544).

In the previous week the inspector had issued a citation for the violation of the same standard in the same area of the lube shop (Tr. 544, 545, Exhibit P-14). The violative conditions were readily observable (Tr. 546). The earlier citation was abated in

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three hours. The instant citation was abated in nine to ten hours (Tr. 548).

The accumulations occurred in the shift before the inspection (Tr. 548, 549). The oil and grease will fall to the floor during the servicing of equipment (Tr. 547-548).

Respondent's superintendent Martin told the inspector that it is customary to clean the shop every day but due to some problem the lube area hadn't been cleaned the day before (Tr. 550).

Casey Conway, Gary Denault, Jerome Connor and Bobby Jacobsen testified for respondent:

Witness Conway testified as to the flash and ignition points of the various lubricants used in the lube bay (Tr. 568, 569). The NFPA (National Fire Protection Association) defines a flash point as a point at which a liquid contained in a closed container, when heated, emits suitable vapors so that when a flame is introduced the vapors will burn (Tr. 570, 571). Ignition temperature, also measured in a closed container, is that temperature of the vapors into which you introduce an ignition source and the vapors will thereafter burn independently of the ignition source (Tr. 571).

Respondent's materials have the following flash and ignition points:

Material	Flash Point	Ignition Point
Ethylene glycol (antifreeze)	232F	752F
SAE Oil, 10 weight	410F	
SAE Oil, 30 weight	451F	
SAE Oil, 40 weight	464F	
SAE Combination Oil	410F to 451F	
C3 Hydraulic Oil	464F	
Hydraulic Fluids	over 464	
Gasoline	around 45C	

(Tr.568-575, 588).

The doors in the lube bay, unlike a closed container, are 25 to 30 feet wide and 40 to 45 feet high (Tr. 575). In an open environment, and with proper ventilation, vapors will tend to dissipate thereby lessening a fire hazard (Tr. 581). Materials with high flash points will not tend to have vapors that will accumulate with proper ventilation (Tr. 580).

A flammable material has a flash point of 100 degrees (F), or less, at 40 psi. A combustible material has a flash point greater than 100(F) at 40 pounds psi. A flammable material has a greater

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burning potential than material that is merely combustible (Tr. 583, 584).

The term flammable is used to describe a combustible material that ignites easily, burns intensely, or has a rapid rate of flame spread (Tr. 586). Paper and oil soaked rags are combustible (Tr. 587). A cigarette or plain paper would smolder and turn into a flame (Tr. 588).

Gary Denault, a mechanic in the lube bay on the day of the inspection, indicated the lube bay got "messed up" as it normally does during a rush day. There was a "mess" in the pump room (Tr. 592-593). Denault had spent all day working on the 2301 loader. About ten minutes before the end of his shift the oil filter sprang a leak and dumped approximately five gallons of 15/40 oil on the floor (Tr. 593-594). Denault threw down some floordry and trapped the pool of oil. He then sought his supervisor to see if he should remain and clean it up. The supervisor had already left (Tr. 595, 596).

Denault might have had some smaller spills from earlier trucks. The practice was to clean up any accumulations at the end of the shift (Tr. 599).

William Jamieson, who worked the swing shift, entered the lube bay and saw oil on the unswept floor, cardboard boxes, and full trash receptacles. These conditions had been caused by the day shift (Tr. 603, 604, 606, 607). Johnson went to the safety office to report the condition. The inspector arrived at the lube bay shortly thereafter (Tr. 604, 605)

Normally the cleanliness of the lube area would range from clean to slightly dirty or messy. It's condition would depend on what had transpired on the prior shift (Tr. 604).

Jerome Connor, respondent's safety superintendent, wasn't aware of the condition in the lube until Jamieson reported it to him and the MSHA inspectors (Tr. 609, 611).

As a result of the citation in the previous week strict attention had been paid to the area (Tr. 610).

Bobby Jacobsen, respondent's general maintenance foreman, indicated the seven foot high neon lights were spark resistant (Tr. 613, 614).

The tanks for the various lubricants are underground. Electrical equipment in the lube bay includes the steam cleaner and air compressor. The electric motor is mounted with the steam cleaner in a separate room in the lube bay (Tr. 615, 616).

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Respondent, in its post trial brief, initially contends that the spillage and debris was within the "range of risks" for which the facility was designed.

I disagree. No facility is designed to be operated within a "range of risks". The evidence from MSHA witness Wolford was that he had never seen anything this bad before; he further described in detail the accumulations of oil and grease. I agree that it is not anticipated that a lube bay will be a model of cleanliness but conversely it is not anticipated, and the regulation prohibits, an unsafe accumulation as established by the oral testimony and confirmed by the photographs. In short, this facility was beyond its range of proper usage.

Witness Denault said "there was a mess in the pump room" (Tr. 592-593). Witness Johnson was so upset he went to the company safety officer to report the condition (Tr. 604). Further confirming the extent of the accumulations, it is uncontroverted that it required eight to nine hours to clean the lube bay. In contrast, on the prior citation a week earlier, the cleaning was done in three hours.

Respondent's evidence relating to the flammability and combustibility of its oils and lubes, as rated by their flash and ignition points fails to establish a defense. The Commission is bound to follow the definitions in Title 30, Code of Federal Regulations, Section 55.2. These definitions follow:

"Combustible" means capable of being ignited and consumed by fire. "Flammable" means capable of being easily ignited and of burning rapidly.

These definitions easily encompass the factual situation presented in the lube shop.

The Secretary proved a violation of the standard. He is not required to prove a risk related to the design and construction of the lube shop. Respondent's contention to that effect is without merit.

Respondent finally asserts that it exercised utmost good faith in the situation. It cites the testimony of Denault in containing the five gallon spill, the testimony of Jamieson in reporting the condition, and Connor's testimony that he lacked prior knowledge.

I am not persuaded. True, Denault contained the five gallon oil spill. But what of the rest of the accumulations. From the photographs it is apparent the accumulations had not all been a sudden occurrence. Jamieson did report the condition but supervisors are in and out of the lube bay during the day.

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Connor's lack of prior knowledge fails to establish a defense. His testimony that the crews "had been fastidious in keeping it clean" (Tr. 609, 610) runs counter to the facts observed by those persons who were in the lube shop.

For these reasons Citation 337741 should be affirmed.

Civil Penalty

As previously noted the statutory criteria for assessing civil penalties are set forth in 30 U.S.C. 820(a). The operator's prior history indicates it was assessed 59 violations in the two years beginning April 29, 1978 (Exhibit P1). The parties stipulated that the size of the operator's mine was 273,078 man hours per year (Tr. 3, 230, Notice of Assessments). The operator was negligent since the grease and oil accumulations were obvious and should have been seen by supervisors. In addition the operator should have been particularly attentive to this problem as the lube bay since it had been cited in the previous week for the same condition. The parties stipulated that the proposed penalty will not adversely affect respondent's ability to continue in business (Tr. 3).

The gravity of the violation is severe. A misplaced smoldering cigarette could cause a fire with the possibility of severe consequences. Respondent did not abate this condition until the inspector ordered the miners withdrawn from the lube bay.

Considering the statutory criteria, I consider that the proposed penalty of \$1,250 is appropriate. It should be affirmed.
Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

1. The Commission has jurisdiction to decide these cases.
WEST 81-79-M
2. Respondent violated the mandatory standards as alleged in Citation Nos. 576949, 576958, 576959, 577061 A, and 577061 B. Further, the proposed penalties in the total sum of \$2,122 are appropriate for such violations and they should be affirmed.
3. The settlement of Citation 576953 is approved together with the amended penalty of \$65. The violation as alleged is affirmed but it shall not be classified as significant and substantial.

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4. Respondent's motion to withdraw its notice of contest as to Citation 576960 is granted. The citation and proposed penalty of \$195 are affirmed.

5. Respondent did not violate the mandatory standards as alleged in Citation Nos. 576954, 336285, and 577061 C. Accordingly, said citations and all proposed penalties therefor should be vacated.

WEST 81-81-M

6. Respondent violated the mandatory standard as alleged in Citation 337741. Further, the proposed penalty of \$1,250 is appropriate and it should be affirmed.

ORDER

Accordingly it is ORDERED:

WEST 81-79-M

1. That the following citations and the penalties provided therefor are affirmed:

CITATION NO.	PENALTY
576949	\$ 255
576958	122
576959	295
577061A	725
577061B	725

2. The settlement of Citation 576953 is approved and a penalty of \$65 is assessed.

3. Citation 576960 and the proposed penalty of \$195 are affirmed.

4. Citations 576954, 336285, and 577061C and all proposed penalties therefor are vacated.

WEST 81-81-M

5. Citation 337741 and the proposed penalty of \$1,250 are affirmed.

6. Unless previously paid, respondent is ordered to pay the total sum of \$3,632 within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
~FOOTNOTE_ONE

1 55.9-40 Mandatory. Men shall not be transported:
(c) Outside the cabs and beds of mobile equipment,

except trains.

~FOOTNOTE_TWO

2 55.16-5 Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner.

~FOOTNOTE_THREE

3 55.16-6 Mandatory. Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

~FOOTNOTE_FOUR

4 55.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

~FOOTNOTE_FIVE

5 55.5-3 Mandatory. Holes shall be collared and drilled wet, or other efficient dust control measures shall be used when drilling nonwater-soluble material. Efficient dust control measures shall be used when drilling water-soluble materials.

~FOOTNOTE_SIX

6 55.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

~FOOTNOTE_SEVEN

7 55.9-73 Mandatory. Defective equipment, removed from service as unsafe to operate, shall be tagged to prohibit further use until repairs are completed.

~FOOTNOTE_EIGHT

8 Mandatory. All flammable and combustible waste materials, grease, lubricants or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.