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SOL (MSHA) V. ALLIED CHEMICAL
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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 PROCEEDINGS Docket No. WEST 80-217-M A.C. No. 48-00155-05030 Docket No. WEST 80-292-M A.C. No. 48-00155-05038 I Docket No. WEST 80-299-M A.C. No. 48-00155-05039
v.	Docket No. WEST 81-28-M A.C. No. 48-00155-05058 Docket No. WEST 81-32-M A.C. No. 48-00155-05061 V Docket No. WEST 81-332-M A.C. No. 48-00155-05077 I
ALLIED CHEMICAL CORPORATION, RESPONDENT	Docket No. WEST 81-405-M A.C. No. 48-00155-05085 Alchem Trona Mine

DECISION

Appearances: Stephen Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
John A. Snow, Esq., VanCott, Bagley, Cornwall, and McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. In each case, the Secretary seeks to have a civil penalty assessed for an alleged violation of a mandatory safety standard.

An evidentiary hearing was held in Green River, Wyoming. Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in these proceedings; and, if so, (2) the appropriate civil penalties that should be assessed against the

respondent for the alleged violations based upon the criteria as set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

STIPULATIONS

The parties stipulated to the following:

1. Respondent is the owner and operator of the Alchem Trona mine.

2. The products produced by the said mine enter and effect commerce.

3. All of the above cited cases, except for Docket No. WEST No. 80-217, are governed by the provisions of the Federal Mine Safety and Health Act of 1977 and are properly before the Federal Mine Safety and Health Review Commission.

4. That if penalties are assessed in these cases, it will not affect respondent's ability to continue in business.

5. The respondent has two million, thirteen thousand and twenty five man hours annually and is considered a large mining operation.

6. The Mine Safety and Health Administration (MSHA) inspectors involved in the above cited cases were duly authorized representatives of the Secretary of Labor (Secretary) at all times relevant herein.

7. In respect to Docket No. WEST 80-217-M, in the twenty four months prior to September 25, 1979, 251 violations were assessed against the respondent.

8. In Docket No. WEST 81-32-M, 482 violations had been assessed against respondent.

9. In Docket No. WEST 81-405-M, 350 violations had been assessed against respondent in the 24 months preceding June 9, 1981.

Docket No. WEST 80-217-M

Citation No. 575879(A)(B)(C)(D)(E)(F)(G)

Petitioner issued a type 107(a) and 104(a) order alleging violations of several mandatory safety standards in a fuel storage area being used by Peter Kiewit and Sons Construction Company (Exhibit GX-1). The facts in this case show that the fuel storage area is located on property owned by Church and Dwight Co. Inc. This property is adjacent to the property where the Alchem Trona Mine (Alchem mine) operated by the respondent is located. The fuel storage area was being used by Peter Kiewit and Sons, an independent contractor working at the Alchem mine when the order was issued (Exh. GX-7). Based upon this record and subsequent to the hearing, the Secretary has filed a motion to dismiss Docket No. WEST 80-217-M with prejudice citing the Commission's decision in Secretary v. Phillips Uranium Corp., 4 FMSHRC 549. The Secretary stated that he felt the decision in Phillips, supra is controlling on the facts in this case. I agree. Docket No. WEST 80-217-M is ordered dismissed with prejudice.

Docket WEST 80-292-M

Petitioner alleges respondent violated 30 C.F.R. 57.9-3 when an accident occurred at the Alchem Mine causing serious injuries to a miner. The cited standard provides as follows:

> Mandatory. Powered mobile equipment shall be provided with adequate brakes.

Citation No. 336642 issued in this case states that the respondent's LBT lube truck was not provided with operable brakes and that the emergency brake was disconnected. The unit moved ahead and injured a miner working between the lub truck and a continuous miner.

The Secretary originally proposed the assessment of two penalties in this case as follows: Citation No. 336642A for violation of 30 C.F.R. 57.9-3 and proposed a penalty of $7,000.00 and Citation No. 336642B for violation of 30 C.F.R. 57.9-37 (FOOTNOTE 1) proposing a penalty of $3,500.00.

At the hearing, the parties moved that the Court approve a settlement in this case of $5,000.00 to be divided equally between the two alleged violations. The Secretary stated that it was his belief that he could not show a direct connection between the violation and the accident to establish a high degree of negligence in this case. However, it was believed that there is some degree of negligence involved in order to justify the proposed amended penalty of $5,000.00. Based upon a review of the record in this case and the representations of the parties, I find the proposed settlement is in accord with the Act. The stipulated agreement and motion of the parties is granted and penalty amounts of $2,500.00 each for citation Nos. 336642A and 336642B are approved.

WEST 80-299-M

Citation Nos. 336643 and 336644

In this case, petitioner alleges respondent violated 30 C.F.R. 57.21-78. The cited standard provides as follows:

> Mandatory. Only permissible equipment maintained in permissible condition shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gases are present or may enter the air current.

During an investigation of an accident at respondent's Alchem Mine, MSHA inspector Melvin Jacobson issued citation Nos. 336643 and 336644 charging that two non-permissible vehicles were operated in the last open crosscut.

Jacobson testified that he observed a lubrication truck and a maintenance vehicle located south of 96á23 crosscut in the 5 south entry of panel F-Main south of the Alchem Mine (Transcript at 4). This part of the mine consisted of seven entries (FOOTNOTE 2) which are referred to in the testimony as rooms, numbered from east to west as one (1) through seven (7). The mining process used in this particular mine is a room-pillar method. In the section where the violations are alleged to have occurred, there were two crosscuts. The most northerly was designated as crosscut 96á23 and the next crosscut to the south nearest the face as crosscut 97á23. Both crosscuts were driven through the seven rooms except for crosscut 97á23 which crosscut had not been completed or opened between rooms 5 and 4 (Exh. GX-13).

On the day of the accident prompting this inspection, the lube truck had entered the F-Main South panel coming from the north traveling south through room 3. At crosscut 96á23, it turned left

and traveled to room 5 where it was parked in the intersection of room 5 and crosscut 96á23 at a right angle in front of the continuous miner. The lube truck remained in this location for approximately 40 minutes with its engine running at a fast idle to provide power to run a compressor used to dispense material for servicing the continuous miner. The truck rolled forward pinning a miner between the truck and the continuous miner. After the accident, the lube truck was backed into room 5 just south of crosscut 96á23 near a maintenance truck also parked in the area. (Tr. at 8 thru 11 and Exh. GX-13). At the time the accident occurred, the mine was not in operation and only maintenance work was being performed (Tr. at 40).

The petitioner contends that the two trucks involved herein were not permissible equipment and were inby the 96á23 crosscut in room 5 and that this crosscut was the last open crosscut at this particular location in panel F-Main South (Petitioner's Brief at 1).

Respondent denies this and contends that crosscut 97á23 at room 5 was the last open crosscut in this section of the mine (Respondent's Brief at 7, 8).

The condition or practice cited by Inspector Jacobson in the two citations allege that the two pieces of non permissible equipment were being operated "in the last open crosscut." The cited standard 57.21-78 states that only permissible equipment shall be used beyond the last open crosscut or in places where dangerous quantities of flammable gasses are present. At the hearing, the inspector testified that he observed both vehicles "parked beyond the last open crosscut in room 5" (Tr. at 4). Although the wording of the two citations is not explicit as to the violation alleged to have occurred, there is no doubt from the evidence presented at the hearing and the arguments in the post hearing briefs that both parties understood the issues.

The threshhold issue is which crosscut, 97á23 or 96á23 at room 5, was the last open crosscut. There is no disagreement as to the fact that the two vehicles were both non permissible equipment under the Act or that after the accident, they were parked in room 5 south of crosscut 96á23.

Neither the Act or the metal and nonmetallic underground standards define the term "last open crosscut." The term "crosscut" is defined in the Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms, (1968) p. 280, as follows:

> a. A small passageway driven at right angles to the main entry to connect it with a parallel entry or air course . . . f. In room and pillar mining, the piercing of the pillars at more or less regular

> intervals for the purpose of haulage and ventilation. Synonym for breakthrough. Kentucky, p. 332. g. In general, any drift driven across between any two openings for any mining purpose. Bureau of Mines Staff.

Some clarity of the term last open crosscut can be derived from the standards that apply to underground coal mines. The common usage of various terms in the mining industry, although not necessarily universal, often applies to both coal and metal and nonmetallic mines. 30 C.F.R. 75.503 provides in part as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment . . . which is taken into or used inby the last open crosscut of any such mine."

The distinction here is that the coal standard states "inby the last open crosscut" whereas the standard cited in the present case reads, "beyond the last open crosscut." I do not believe the drafters of the standard intended a distinction here. Nor did the witnesses who testified at the hearing or the parties in their briefs contend a different meaning for they regularly referred to the location of the equipment as "inby" the last open crosscut rather than beyond. Accepting the term "inby" as common to the industry, this can give assistance in establishing the location of the last open crosscut in this case. The above also applies to the term "outby."

The term "inby" is defined by the DMMRT, p. 527 as follows:

> a. Toward the working face, or interior, of the mine; away from the shaft or entrance; %y(3)5C b. In a direction toward the face of the entry from the point indicated as the base or starting point. c. The direction from a haulageway to a working face %y(3)5C. d. Opposite of outby. [Emphasis added.]
> The term "outby" is defined by the mining dictionary as follows:
>
> a. Nearer to the shaft, and therefore away from the face toward the pit bottom or surface; toward the mine entrance. The opposite of inby. Also called outbyeside. B.C.I.; Fay. b. In a direction toward the mouth of the entry from the point indicated as the base or starting point.

The mining dictionary referred to above defines the term "face" in pertinent part as "the solid surface of the unbroken portion of the coalbed at the advancing end of the working place," "a point at which coal is being worked away," or "a working place from which coal or mineral is extracted."

In one of the earlier cases decided under the 1969 Act, the

former Board of Mine Operations Appeals defined the term "inby the last open crosscut" and in so doing affirmed a judge's ruling that it means "inby the interior-most rib or wall." In this case the term exterior rib line was defined to mean the line of the wall closest to the portal of the mine. Mid-Continent Coal and Coke Company, 1 IBMA 250 (December 29, 1972).

The face of F-Main South section was located a short distance south of crosscut 97á23 (Exh. GX-13). Inspector Jacobson testified that the last open crosscut for rooms 1 through 4 and 6 through 7 was crosscut 97á23. He further stated that he believed 96á23 was the last crosscut for room 5 as there was not an opening between rooms 4 and 5. (Tr. at 12).

I do not find this argument by Inspector Jacobson and the Secretary persuasive as to this issue. It is not consistent with the other rooms in this section of the mine. If the reason is that room 5 at 97á23 is only three sided, so is room 7, room 4 and 1. Yet, Jacobson has indicated on Exhibit GX-13 by drawing in blue dotted lines to show the outby edge of the last open cross cut as extending along 97á23. Only in room 5, does he distinguish this difference without other explanation than the cut was not made through between 4 and 5. I reject the Secretary's argument. The definitions of a crosscut indicates it is a passageway at right angles to the main entry, and being 97á23 is the last crosscut driven at right angles from the face of room 5, it is the last open crosscut at that location.

The Secretary further argued in his brief that great weight should be given to the Mining Enforcement and Safety Administration's Assistant Administrator's interpretation of 30 C.F.R. 57.21-78 as contained in a memorandum dated November 8, 1974 and the testimony of Inspector Jacobson relative thereto (Sec.Br. at 4 and Exh. GX-13A). In this memorandum, the contention is that the last open crosscut is a return airway for ventilating air and only permissible equipment shall be allowed in or beyond the last open crosscut. This is because it is a place where flammable gasses are present or may enter the air current.

I do not find that this argument is valid. It is well settled that inspectors' guide lines and manuals do not have the status of official mandatory safety standards. See Kaiser Steel Corporation, 3 IBMA 489, (1974), King Knob Company, Inc., WEVA 79-360 (June 29, 1981). The "policy" statement instructing inspectors to cite equipment in the last open crosscut as it is a return airway is not consistent with the wording of the standard which refers to non-permissible equipment beyond the last open crosscut.

In this case the Secretary referred to the above memorandum and argued that the location where the cited equipment was observed was a return air flow (Sec.Br. at 5, 6). The most credible evidence of record does not support this argument. The facts

established that the ventilation system at this location in the mine, and as shown on Government's Exhibit GX-13, has fresh air traveling up room 5 towards the face. After sweeping the face, the return air is exhausted through vent tubing or ducts. There are six fans pulling the air through these ducts, one fan in room 1 and 7, and two fans in room 2, and 6 (Tr. at 16 and 55). There is no evidence that the cited pieces of equipment were in a return air course.

Petitioner further contends that the respondent had a recirculation problem in this section of the mine The most credible evidence of record fails to support this claim. At the time the citations were issued, MSHA inspector Potter monitored methane in the immediate area and found there was none (Tr. 37). Jacobson testified to some reports and data regarding a recirculation problem at respondent's mine. However, this data referred to a period of time prior to the accident and another period of time two and half years after the citations were issued which is not shown to have been relevant or material to these citations.

Charles McLendon, respondent's chief engineer, who holds a degree in mining engineering, testified that he did not believe methane would accumulate at the intersection of room 5 and crosscut 96á23 for the reason that any methane at the face would be removed through the vents and the fans would prevent any recirculation (Tr. at 80-82). I find this testimony more credible than that of the inspector as it is based upon tests performed by the party responsible at the time for the ventilation system in the mine. The inspector's opinion was based upon outdated data and speculation.

In view of the foregoing findings and conclusions, I find the petitioner has failed to establish violations of section 57.21-78, as charged in citation Nos. 336643 and 336644, and order that these two citations are vacated and petitioner proposal for assessment of civil penalties dismissed.

Docket Nos. WEST 81-28-M and WEST 81-32-M

The above two cases are related as they involve the same alleged defective part in respondent's cited No. 16 man trip. In Docket No. WEST 81-28-M, MSHA inspector Merrill Wolford issued Citation No. 575827 on April 18, 1980 alleging several violations of 30 C.F.R. 57.9-2 which standard provides as follows:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

In the citation, the inspector stated as follows:

> The #16 mantrip has the idler steering control arm worn out. The flexible U joint to the steering gear has a

> broken bolt and (sic) lose. The right front spring bracket is worn egg shaped. The accelerator pedal is missing. The brake lights are inoperative and (sic) only one taillight works. This vehicle was voluntarily taken out of service by Safety Engr. to be repaired (Exhibit GX-14).

In Docket No. WEST 81-32-M, inspector Wolford observed on May 9, 1980, respondent's No. 16 mantrip operating in the F-28 panel and determined that the previously cited steering idler control arm ball joint had not been repaired. Wolford issued 104(b) (FOOTNOTE 3) Order No. 576844 in which he again alleged a violation of 30 C.F.R. 57.9-2 and stated as follows:

> Citation #0575827 was issued on the #16 mantrip for safety defects on 04-18-80 with a termination date of 1600 hrs. on 04-25-80. This mantrip was observed being used in F-28 panel on 05-09-80 still with a badly worn and (sic) loose steering idler control arm ball joint which could cause the driver to lose control. This vehicle is used to haul men and (sic) materials about 1 mile from the #2 shaft to the F-28 panel work area. This vehicle had been voluntarily taken out of service by the Safety Engr. to be repaired on 04-18-80. This vehicle is now ordered removed from service until properly repaired.

In Docket No. WEST 81-28-M, citation No. 575827, the petitioner proposed the assessment of a penalty in the amount of $725.00. In WEST 81-32-M, petitioner filed a proposal for penalty alleging that citation 576843 was issued for a violation of 30 C.F.R. 57.9-73 and proposed a penalty in the amount of $1,200.00. Section 57.9-73 provides "Mandatory. Defective equipment, removed from service as unsafe to operate shall be tagged to prohibit further use until repairs are completed."

At the commencement of the hearing involving these two cases, the parties entered into a stipulation in which the respondent admitted all violations alleged in citation No. 575827 except for that which pertained to the subject ball joint. The respondent

agreed to pay the proposed penalty of $725.00 in settlement of all the other violations. It was further agreed by the respondent that if a violation was found regarding this ball joint, the penalty could be increased. As to WEST 81-32-M, order No. 576843, if a violation is found as to the subject ball joint, an additional penalty can be assessed in this case (Tr. at p. 6, 7, 8 and Resp's Br. at 2). Following the hearing the respondent submitted a brief. The Secretary decided to waive his right to submit a post hearing brief stating he would rely upon the arguments presented at the trial.

The threshold issue in this case is whether the ball joint in the idler steering control arm of the No. 16 mantrip was defective. If so, did it affect safety?

The No. 16 mantrip is a vehicle assembled from various automative components for use in mines. The front end is from an International Scout II (Tr. at 70). The alleged defect cited in this vehicle is a part of the front end and specifically described as the worn condition of the ball joint of the idler steering control arm (Tr. at 13). The operation and function of the idler steering control arm is to attach the shaft of the steering assembly to the wheel of the mantrip so that the wheel turns when the steering wheel is operated. It was only the one ball joint of this assembly closest to the steering wheel alleged by the inspector to be defective (Tr. at 17, 18).

Inspector Wolford testified that when he observed the front end of the No. 16 mantrip on May 9, 1980, the ball joint lacked any dust cover or grease sealer, and that the grease fitting referred to as a "zerk" was missing. He observed that there was no lubrication in the joint (Tr. at 19 and Exhibit GX 15-B). Further, that the housing around the ball joint appeared worn in an egg shape and the nylon bushing material that was used as a liner had come out of the drag link housing (Tr. at 27, 28).

Wolford testified that the worn condition of the ball joint would affect steering of the vehicle and might under the right circumstances come apart or break. The No. 16 mantrip is used in the mine to haul eight to nine miners in and out of the working areas. It is also used to transport supplies. At the Alchem mine, the vehicle is used underground in confined areas over rough surfaces. A loss of control of the vehicle could cause it to go into a rib and roll over. The vehicle is not supposed to be operated at speeds of over 15 miles per hour and probably would not go over 25 miles per hour (Tr. at 33, 34).

An examination of the drag link was made on April 16, 1981 by Kazimir Niziol, a mining engineer with MSHA's Safety and Health Technology Center in Denver, Colorado. Niziol issued a written report in which he described the cited ball joint to be in very

poor condition with the grease fitting and dust cover missing and containing no trace of grease. He stated that the ball stud was extremely loose in all directions being approximately; 1/8 inch to 3/16 inch. Also the drag link was bent into an S shape. In this report Niziol stated his conclusions as follows:

> The steering system of any vehicle is an important safety consideration. Any damage, deterioration or excessive wear to steering components is extremely dangerous. When such conditions are found to exist, the worn parts should be immediately replaced or the vehicle removed from service. Loose pins, ball joints or any other loose parts increase front wheel impact and also result in loss of control of the vehicle even at low speeds. The draglink examined exhibited such wear and was considered to be dangerous particularly since the vehicles operate underground in confined conditions and on rough surfaces. (Exh. GX-15).

The respondent argues that although MSHA proved the ball joint was loose, it did not show that it was a defect that in any way actually affected the safe operation of the mantrip (Resp's. Br. at 4). In support of this position, it points out that the inspector did not attempt to drive the mantrip or try the steering mechanism under operating conditions to determine if the wheels would "chatter" or the ball come out of the socket.

In support of respondent's position, William C. Adler, a foreman for Allied at the Alchem mine, testified he had driven the No. 16 mantrip during April and May, 1980, and that he had not experienced any problems with the steering (Tr. at 151). James N. Ingram, a civil engineer employed in Allied's reliability engineering department, testified that he had supervised tensil tests of the steering assembly ball joints conducted at the University of Wyoming in May 1981. Three ball joints were tested including the one cited here, a new ball joint, and one selected at random off of a similar mantrip. The conclusion was that the cited ball joint was essentially as strong in tensil strength as the others tested and did not fail until the application of 15,700 pounds (Tr. at 103 and Exh. R-3). Ingram also tested the amount of loads or pressure which would be required to cause failure of the other parts of the steering assembly rather than the base joint. He testified that the other parts would fail before the subject ball joint (Tr. at 73, 74 and 76-78).

I have carefully reviewed and considered the testimony, exhibits, and brief submitted in this case and conclude that there was an equipment defect involving the subject ball joint on the No. 16 mantrip.

This case presents a classic example of two experts presenting directly opposite views on the question at issue here. However,

the uncontroverted evidence establishes that the subject ball joint showed wear, was without a grease zerk, and lacked lubrication. The amount of movement of the ball in the socket and its transference to the wheels is disputed but its existence is not denied by the respondent. The fact that the joint was worn is admitted by respondent. However, it is argued that it was not proven that it was defective (Resp.Br. at 8).

The term defect is defined in Webster's Third New International Dictionary (1976 Ed.) at p. 591 as follows:

> 1. An irregularity in a surface or a structure that spoils appearance or causes weakness or failure;
> 2. want or absence of something necessary for completeness, perfection, or adequacy in form or functions.

As stated previously, I find from a careful review of all the evidence in this case that the subject ball joint was defective. Also, I am persuaded that the most credible evidence supports petitioner's argument that the defect to the ball joint in the steering mechanism could affect safety. Even assuming, that the mantrip does not travel over 15 miles per hour, as argued by the respondent, the fact remains that the vehicle is hauling eight to nine miners underground in a confined area over rough-terrain where the steering mechanism of the vehicle is vital to stability and direction. I am not persuaded that the tensil tests performed on the ball joint as reported by James Ingram would reflect the danger that exists from the ball joints condition as described by all the parties. The tensil strength would determine the metals ability to withstand certain forces. However, the looseness in the steering and the deterioration of the ball joint from lack of lubrication seem to me to be vital in this case.

Respondent has cited the case of Medusa Cement Co., 1 MSHRC 2454, (May 1980) (ALJ), in support of its position in this case. I find that there is a distinction between the facts of these two cases which effect the final conclusion. In the Medusa case, supra, the Judge found that the defect, a broken bushing, would not adversely affect the control of the grader involved and render it unsafe to operate. Further, there was only the one miner, the operator, exposed to any risk. It is also noted that in Medusa, the Judge distinguished his facts from those in Phelps Dodge Corporation, 1 FMSHRC 2018 (Dec. 1979) (ALJ) wherein Judge Merlin decided that a violation of 55.9-2 occurred when a truck was not safe when it was found all the lugs on a wheel were loose. The distinction here is whether the equipment defect would affect safety and based upon two different fact situations, a different conclusion was reached.

In light of the stipulation entered by the parties regarding Docket No. WEST 81-28-M, I find that the penalty already agreed upon in the amount of $725.00 should be raised by the amount of

$75.00 for the violation of a defective ball joint making a total penalty to be $800.00.

Docket No. WEST 81-32-M

As stated at the beginning, the parties agreed that if I should find a defective ball joint in the prior case affecting safety, an additional penalty may be assessed for the violation alleged in citation No. 576843. I find that the evidence shows the respondent was negligent in failing to repair the defective ball joint after it had been cited under citation No. 575827. The citation read that the respondent had voluntarily taken the equipment out of service by the respondent's safety engineer to have it repaired (Ex. GX-14). The evidence of record shows that all the other defective parts were repaired but the ball joint was not repaired which subsequently required the vehicle to return to the shop several times for mechanical work (Exhibits GX-15, F and G). These complaints all related to the steering mechanism. Upon the inspector's return approximately two weeks later, the repair work was still not accomplished.

I am not persuaded that a penalty of the size originally proposed by the Secretary is warranted in this case. The facts suggest that the respondent did not determine that replacement of the part was necessary. It would appear that the defect was not corrected because of a failure of communication and not through an attitude of defiance.

I find that a penalty of $100.00 is appropriate in this case.

Docket No. WEST 81-332-M

Petitioner alleges respondent violated 30 C.F.R. 57.9-2 which standard provides:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

On October 9, 1980, MSHA inspector David Anspach conducted an investigation following an accident at the Alchem mine and issued a 104(a) type citation No. 337557 which included the following statement:

> A 400 gal. oil tank that was being towed in GME roadway broke loose and struck a man that was standing in front of a lube truck. The retaining pin between the towing bar and the 400 gal. tank came loose releasing the tank. The tank equipped with 4 fixed wheels continued on the roadway striking a man between the tank and a stopped lube truck (Exh. GX-17).

Following a hearing in Green River, Wyoming, the parties submitted post hearing briefs.

Issue

The specific issue in this case is whether there was a defect in the tow bar connecting the 400 gallon tank trailer to the tractor before the equipment was used. If so, then a determination must be made as to the amount of the penalty to be assessed the respondent.

Discussion

The facts in this case are not in dispute. The vehicles involved in this accident were a 400 gallon hydraulic oil tank being towed by a Ford forklift tractor. The location of the equipment was in an underground roadway of the Alchem mine. The tractor was connected to the trailer by a tow bar that was in the shape of an A with the point or narrow part of the tow bar attached to the tractor by a pin that dropped through two braces on the body of the vehicle. The wider part of the tow bar fit over a tube of steel attached to the trailer through which was inserted a pin. A cotter pin was to be inserted in the end of the pin so that the pin would not slip out (Tr. at 11, 12 and Exh. GX-19, 20). As the tractor was pulling the tank along the underground roadway, the tow bar came loose and the tank continued along pinning a miner between the tank and a lube truck (Tr. at 12 and Exh. GX-21). The reason the tow bar came loose in this instance was because the cotter pin was missing. Why the pin was missing is not established in this case.

Respondent contends that in order to prove a violation of standard 57.9-2, petitioner must prove that there was a defect affecting safety which must have existed before equipment was used. In this case, respondent argues that the defect was not proven.

MSHA inspector Anspach testified that the reason the citation was issued was that the cotter pin dropped out of the tow bar. However, under questioning, Anspach testified as follows:

> Q. Could you explain to us why you checked the box there under condition or practice that says, "could not have been known and predicted or cured due to circumstances beyond the operator's control?"
>
> A. This was as a result of that key coming out of there. I don't think there was any way they could predict when that key will come out of there, or when that could come out of there. The reference is to the key, to the cotter pin.
>
> Q. I see.

In this case, we do not have a situation where the inspector who issued the citation claims that the equipment was defective before it was put in use. He admitted under cross examination that it was unknown whether the cotter pin was in or out when the equipment was operated and testified as follows: "as far as that particular pin missing I don't believe they were negligent. What I'm saying is if they looked at it and it was missing I don't know" (Tr. at 20). Also, he answered a question put to him as follows:

> Q. And with respect to the safety chain and whatever--and the failure to have safety chains or welding devises you said the company should have perhaps found that, but your not asserting that for purposes of the violation of 9-2.
>
> A. No. This is after the fact (Tr. at 21).

I find from the evidence of record and particularly the testimony of the inspector that the violation of 57.9-2 was not proven and particularly that part relating to defects in equipment being known before it is put in use. The proposal for a civil penalty should be dismissed. See Grove Stone and Sand Company, 2 FMSHRC 1263 (May 1980) (ALJ).

Petitioner argued that several Commission decisions uphold their position in this case that the respondent violated 57.9-2. I disagree. In Secretary v. Ideal Basic Industries, 3 FMSHRC 843, the Commission considered a piece of equipment put in use with a known defect even though it was alleged the defect was not used. In the instant case, it was never proven that anyone knew of a defect when the equipment was put in use. In Secretary v. Allied Chemical Corp., 4 FMSHRC 503 (March 1982) (ALJ), Judge Morris found that there were defects existing when the machine was put in use. That is a different situation than is being considered in the case at issue here. Similarly, the same was true in Secretary v. Raid Quarries, 4 FMSHRC 728, (1982) (ALJ).

Docket No. WEST 81-332-M is hereby dismissed.

Docket No. WEST 81-405-M

Petitioner alleges respondent violated 30 C.F.R. 57.21-33. The cited standard provides as follows:

> Mandatory. The volume and velocity of the current of air coursed through all active areas shall be sufficient to dilute, render harmless, and carry away methane, smoke, fumes, and dust.

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During a regular inspection of the Alchem mine Inspector Martin B. Kovick issued Citation No. 577485 stating in the condition and practice section as follows:

> In the H.M.S. underground shop, there is not enough air movement to carry away smoke and fumes. There was not enough air to turn an anemometer approximately 4-5 feet from the fan. There is not enough air movement to take a smoke tube reading approximately 4-5 ft from the fan. The whole shope area was filled with what appeared to be smoke fumes and dust. There are approximately four to six men working in the shop and under these conditions. It is apparent that ventilation is not adequate to carry toxic fumes etc. to the return airway.

Issue

Was the volume and velocity of the current of air in the H.M.S. shop sufficient to dilute, render harmless, and carry away fumes and dust?

DISCUSSION

The facts in this case show that on June 17, 1981, MSHA inspector Kovick conducted a regular inspection at respondent's Alchem mine. While underground at the H. Main South shop area, he observed a man using an arc welder to weld on a piece of mining equipment. Kovick testified that he saw blue smoke and haze "hanging" in the shop area. He considered it an excessive amount of smoke and haze (Tr. at 11). At this time the inspector attempted to test the air flow in room 3 with an anemometer but there was not enough air to turn the testing device. He then performed several smoke tube tests. This is done by squeezing off a puff of smoke and measuring the speed of its travel over a distance of ten feet to determine the air flow. Kovick stated that instead of traveling ten feet, the smoke in this case drifted to the ceiling (Tr. at 12). The smoke tube tests were performed also approximately 30 feet from the ventilation exhaust fans (Tr. at 16). The only way that the smoke would go through the ventilation fan was by sticking the tube approximately 4 to 5 inches from the fan (Tr. at 17)%y(2)27 Further tests were conducted and resulted in similar results in rooms 4, and 5 in the H.M.S. shop area (Exh. GX-23). The inspector testified that he was in the shop area for an hour and that he began to feel nauseous from the fumes (Tr. at 24).

Inspector Kovick also conducted two "cricket" tests which is used to obtain air samples for an analysis of gases such as methane, carbon dioxide, and other gases. The report on this test was relatively neutral for the above gases but the inspector failed to request a report for gases given off by welding (Tr. at 37).

Two hours after the inspection in which citation No. 577485 was issued, Jack Thorner, safety engineer and Don Schwartzenberg, mining engineer for respondent, conducted ventilation tests in the H.M.S. shop area. They were also unable to get an anemometer reading (Tr. at 102). They conducted smoke tests in rooms 3 and 4 and concluded that the cubic feet per minute (CFM) of air movement was 9100 and 5050 respectively. Schwartzenberg believed that quantity of air was sufficient for removal of fumes from the shop area (Tr. at 104).

Respondent argues that petitioner has failed to prove that the air movement in the shop area was insufficient to dilute, render harmless and carry away fumes and that the fumes were harmless. This is based upon the testimony of Thorner that at the time of the inspection, he thought the shop seemed clear, except for some smoke in the pockets in the back (ceiling). Further, respondent contends that the results of Kovick's tests were inaccurate. First, that only one test was taken in each room and that they were taken approximately 20 to 30 feet from the stopping which would render them inaccurate as stoppings cause the air flow to eddy (Resp.Br. at 7 and 8).

After a careful review of all of the evidence and arguments in this case, I conclude that the most credible evidence substantiates the fact that a violation of standard 57.21-33 did occur. There was considerable evidence presented by respondent in this case regarding velocity of air and whether or not the fumes were harmful. I find that the various arguments, although well presented, misses the mark as far as interpretation of the standard violated here. The standard 57.21-33 requires that the volume and velocity of the air through the working area be sufficient to dilute, render harmless and carry away methane, smoke, fumes, and dust. In light of the foregoing and the plain language of the standard, I find that the air moving through the shop was not adequate to remove the smoke and fumes that had accumulated. There was no disagreement between the parties that on the day of the inspection, welding was being performed in the H.M.S. shop area. There is a difference of opinion as to the amount of smoke, haze, and fumes that existed in this area when the inspection party arrived. Under all circumstances, I find the testimony of Inspector Kovick more credible on this point than that of respondent's witnesses. He testified that when they entered the shop area you could see the blue smoke and haze hanging in the shop area and it appeared to him to be an excessive amount (Tr. at 11). Jeff Sawyer, respondent's maintenance foreman, said it was normal to have a little smoke in

pockets in the top (Tr. at 67). I do not find Sawyer's testimony persuasive as it was his area of responsibility where the citation was issued. Jack Thorner, safety engineer, also testified that he was along with the inspection party and that he thought the room cited seemed clear to him except for pockets of blue smoke close to the back. Although there is conflicting testimony as to the degree of smoke in the shop, I believe the inspector's testimony is more credible on this point.

The evidence shows that when the inspection party entered the shop area, two of the exhaust fans were turned off, one in room 3 where the welding was being performed and another in room 4. Thorner, confirmed this and stated that he did not know why these fans were off (Tr. at 87, 88). Sawyer had testified that the men in the shop had been welding on a Joffrey Miner in room 3 all day (Tr. at 71). Based upon these facts, it is reasonable to conclude that there would be smoke, fumes, and haze from the welding and if the fans were off, it would not provide adequate air movement to remove the contaminates from the area. The lack of movement of smoke from the inspector's smoke bomb confirms this.

The standard cited refers to methane, smoke, fumes, and dust. It doesn't explicitly require that a determination be made as to how toxic these are. Therefore, I reject respondent's argument that the petitioner failed to prove the fumes were harmful. It is sufficient to show that there was either smoke or fumes in the area. Further, the evidence established that the smoke and fumes were a result of the arc welding that was being performed in the area. Further Kovick and inspector Jacobson testified to the fact that significant hazards are associated with fumes occurring from welding (Tr. at 59-64). This was uncontroverted by respondent's witnesses.

In view of the above, I find a violation by respondent of standard 57.21-33 as alleged in citation No. 577485. I find the respondent knew of the violation as members of management had been present in the area. Also, the fact that exhaust fans were turned off during the welding in the area is evidence of negligence. The gravity is serious as the effect of smoke and fumes on miners working in the area can be injurious to their safety and health when inhaled over a period of time. The respondent demonstrated good faith in abating this violation by installing regulators in the stoppings to replace the exhaust fans. I find that $140.00 is an appropriate penalty in this case.

CONCLUSION OF LAW

Based upon the entire record in these consolidated cases including the stipulations of the parties and upon the factual determinations reached in the narrative portions of this decision, it is concluded:

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1. That the Commission has jurisdiction to decide these seven cases.

1. Docket No. WEST 80-217-M

Based upon motion of the petitioner, and order approving same, WEST No. 80-217-M which included Citation No. 575879 is dismissed.

2. Docket No. WEST 80-292-M

Based upon the stipulation of settlement entered into between the parties, the following agreed settlements for the designated citations are approved as follows:

	Approved Penalty
Citation No. 336642A	$2,500.00
Citation No. 336642B	2,500.00
Total Penalty	$5,000.00

3. Docket No. WEST 80-299-M

The most credible evidence establishes that petitioner failed to prove by a preponderance of the evidence in citation Nos. 336643 and 336644 a violation of 30 C.F.R. 57.21-78 and that this case is dismissed.

4. Docket No. WEST 81-28-M and WEST 81-32-M

In WEST 81-28-M, citation No. 575877, the evidence shows that respondent violated 30 C.F.R. 57.9-2 by allowing a piece of equipment containing defects affecting safety to be used. An appropriate penalty is $800.00. In WEST 81-32-M, citation No. 576843, the evidence shows that respondent failed to remove equipment from service after being cited in violation of 30 C.F.R. 57.9-2. An appropriate penalty in this case is $100.00.

5. Docket No. WEST 81-332-M

The credible evidence establishes that petitioner failed to prove by a preponderance of the evidence that a violation of 30 C.F.R. 57.9-2 occurred warranting the issuance of citation No. 337557. The facts did not prove that respondent knew of a defect in the equipment being cited in this case before it was put in service and WEST 81-332-M is dismissed.

6. Docket No. WEST 81-405-M

Citation No. 577485, issued in this case and alleging a violation of 30 C.F.R. 57.21-33 is affirmed. It is determined that an appropriate penalty in this case is $140.00.

ORDER

Accordingly, based upon the foregoing findings of fact and conclusions of law, the respondent is ordered to pay the total sum of $6,040.00 within forty days of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE
1 57.9-37 Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement.

~FOOTNOTE_TWO
2 An underground passage used for haulage or ventilation.

~FOOTNOTE_THREE
3 104(b) provides in part as follows:

If, upon any follow-up inspection . . . an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the time originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall . . . promptly issue an order.