

CCASE:
SOL (MSHA) V. TURNER BROTHERS
DDATE:
19840510
TTEXT:

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

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

v.

TURNER BROTHERS, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 83-40
A.C. No. 34-01241-03501

Docket No. CENT 83-51
A.C. No. 34-01241-03502

Muskogee No. 2 Mine

Docket No. CENT 83-52
A.C. No. 34-01357-03503

Welch No. 1 Mine

Docket No. CENT 83-54
A.C. No. 34-01317-03506

Docket No. CENT 83-55
A.C. No. 34-01317-03507

Heavener No. 1 Mine

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Robert J. Petrick, Esq., Muskogee, Oklahoma, for
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for 17 alleged violations of certain mandatory safety and health standards promulgated pursuant to the Act. Respondent contested the proposed assessments, and hearings were held in Muskogee, Oklahoma. The parties waived the filing of written posthearing proposed findings and conclusions, but their oral arguments made on the record during the course of the hearings have been considered by me in these cases.

Issues

The issues presented in these proceedings are (1) whether the violations occurred as stated in the citations issued by the MSHA inspector in question, (2) the appropriate civil penalties to be assessed for any violations which have been established by the preponderance of the evidence adduced at the hearings, and (3) whether several of the citations were in fact "significant and substantial" as alleged by the inspector who issued them.

Applicable Statutory and Regulatory Provisions

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

Discussion

The citations and allegations of violations in each of these dockets follow below.

CENT 83-40

Section 104(a) Citation No. 2076868, March 21, 1983, cites a violation of 30 CFR 77.410, and the condition or practice cited is as follows:

The Caterpillar 777 rock haul truck, company no. 258, hauling rock from the 004 pit to the stock pile area would not give an automatic audible warning when put in reverse. The warning device was not in operating condition. Four front end loaders, two dozers, three haul trucks, and four persons on foot were in the area in the pit when this truck was being operated in reverse.

Section 104(a) Citation No. 2076869, March 21, 1983, cites a violation of 30 CFR 77.1605(d), and the condition or practice cited is as follows:

The Caterpillar 777 rock haul truck, company no. 249, hauling rock from the 004-0 pit to the stock pile area was not provided with an audible warning device (front horn) in operating condition. Three haul trucks, four frontend loaders, and four persons on foot were in the area where this truck was being operated.

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Section 104(a) Citation No. 2076870, March 21, 1983, cites a violation of 30 CFR 77.1710-(i), and the condition or practice is as follows:

The caterpillar 966 frontend loader, company no. 314, equipped with a ROPS operating in pit 004-0 was not equipped with seat belts for the operator to wear. This loader is operated up and down an incline going in and out of the pit where there is a danger of it overturning.

Section 104(a) Citation No. 2076871, March 21, 1983, cites a violation of 30 CFR 77.1109-(c)(1), and the condition or practice is as follows:

The D-10 Caterpillar bulldozer, company no. 818, operating at pit 004-0 was not equipped with a portable fire extinguisher.

CENT 83-51

Section 104(a) Citation No. 2007403, May 3, 1983, cites a violation of 30 CFR 71.101, and the condition or practice is as follows:

A valid respirable dust sample taken by MSHA 4/19/83 from the operator's cab of a Caterpillar D-10 bulldozer operating in pit 001-1 (cassette # 40399373), showed a respirable dust concentration of 1.5 Mg/M3. This sample was sent to the Pittsburgh Health Technology Center for quartz analysis 4/20/83. The results of this analysis indicates a quartz percent [sic] of 18%. Therefore, the operator was not maintaining the average concentration of respirable dust in the atmosphere during each shift to which each miner at this work position (Designated 001-0, 368) is exposed at or below a concentration of respirable dust computed by dividing the percent [sic] of quartz into the number (10) ten as required by section 71.101, Title 30, CFR.

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CENT 83-52

Section 104(a) Citation Nos. 2076408, 2076411, and 2076412, were all issued on May 17, 1983, and each cites a violation of 30 CFR 77.410. The conditions or practices cited are as follows:

2076408. The Caterpillar 980-C Frontend loader operating at Pit 001-1, cleaning coal was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

2076411. The 510-B, PM Grader operating at Pit 001-0 cleaning coal was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

2076412. The Caterpillar 988-B Frontend loader operating at Pit 001-0 (loading rear dump trucks) was not equipped with an automatic warning device that would give an audible alarm when such equipment was put in reverse. No persons on foot in the area at the time this violation was observed.

Section 104(a) Citation No. 2076409, May 17, 1983, cites a violation of 30 CFR 77.1605(d), and the condition or practice is as follows:

The Caterpillar 980-C operating in pit 001-0, cleaning coal was not provided with an audible warning device (horn) in operating condition. No persons on foot in the area at the time this violation was observed.

Section 104(a) Citation No. 2076410, May 17, 1983, cites a violation of 30 CFR 77.1110, and the condition or practice is as follows:

The fire extinguisher on the 510-B PM Grader operating at Pit 001-0 cleaning

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coal was not being maintained in a useable and operating condition in that the guage on the fire extinguisher showed the Fire extinguishers to be discharged. Three other fire extinguishers in the area at the time this violation was observed.

CENT 83-54

Section 104(a) Citation No. 2007402, March 15, 1983, cites a violation of 30 CFR 71.100, and the condition or practice is as follows:

The results of (3) valid respirable dust samples taken by MSHA 3/08, 09, 10/83 from the operator's cab of the Reed SK35 Drill at Pit 001 show the average concentration of respirable dust as 3.7 Mg/M3. Therefore the operator is not maintaining the average concentration of respirable dust in the atmosphere during each shift to which each miner at this work position (Designated 002-0, 384) is exposed at or below the allowable limit of 2.0 Mg/M3. The Reed SK35 Drill, serial number 1061193 is one of (2) two drills working at Pit 001 at the time these samples were collected.

The inspector modified the citation on March 23, 1983, and the justification for this action states as follows:

The results of a respirable dust sample collected by MSHA 3/10/83 from designated work position 002-0, 384 and forwarded to Pittsburgh Health Technology Center for quartz analysis show a quartz percent of 33 percent. Therefore, citation number 2007402 issued 3/15/83 is modified to show the respirable dust standard as 0.3 Mg/M3.

On March 28, 1983, the inspector extended the original abatement time from March 25, 1983, to April 5, 1983, and the justification for this action states as follows:

The mine operator removed the Reed SK35 highwall drill, serial # 1061193 (Dwp 002-0, 384) from service and replaced this drill with a Reed SK35, serial # 1061206 that is equipped with an air

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conditioned pressurized cab. Therefore, more time is granted to allow the operator to collect the five (5) samples required by section 71.201(d).

On April 11, 1983, the inspector again extended the abatement time, to May 11, 1983, and the justification for this action states as follows:

The Heavener Mine No. 1, I.D. # 34-01317, was placed in a "B" nonproducing status April 1, 1983. Therefore, citation # 2007402 is further extended to allow production to resume before respirable dust samples required by section 71.201(d), Title 30 CFR can be collected by the operator.

On April 11, 1983, the inspector modified the original citation as follows:

Citation Number 2007402 issued 3/15/83 is hereby modified to show the part/section Title 30 CFR as 71.101 (respirable dust standard when quartz is present).

On May 18, 1983, the inspector issued a section 104(b), order of withdrawal (2007405) affecting the Reed SK35 highwall drill at pit 001, and the condition or practice justifying this order is shown as follows:

The results of the five (5) respirable dust samples taken by the operator to comply with the requirements of section 71.201(d), Title 30 CFR indicated an average concentration of 1.6 Mg/M3. Due to ineffective efforts by the operator to control respirable dust in the atmosphere of designated work positions 002-0, 384 at or below the allowable limit of 0.3 Mg/M3. Citation Number 2007402 is not extended.

On May 18, 1983, the inspector modified the section 104(b) order, and on June 1, 1983, he terminated it after compliance with the applicable respirable dust standards.

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CENT 83-55

All of the citations issued in this case are section 104(a) citations served on the respondent on June 6, 1983.

Citation No. 2076969, cites a violation of 30 CFR 77.1605(d), and the condition or practice is as follows:

The caterpillar rock truck, company no. 912 being operated at Pit 001-0 was not provided with an audible warning device (front horn) in operating condition. This truck was hauling top soil and other equipment was being operated in the area. One rock truck, two frontend loaders, and one road grader.

Citation No. 2076970 cites a violation of 30 CFR 77.1110, and the condition or practice is as follows:

The 96 caterpillar bulldozer being operated at Pit 001-0 was not provided with a fire extinguisher maintained in a usable and operative condition. The fire extinguisher on this dozer was equipped with a gauge that showed the extinguisher to be discharged.

Citation No. 2076971, cites a violation of 30 CFR 77.410, and the condition or practice is as follows:

The caterpillar 14G road grader being operated on the haul roads at the 001-0 pit was not equipped with an automatic warning device that will give an audible warning when the road grader was put in reverse. The warning device was not in operating condition.

Citation No. 2076972 cites a violation of 30 CFR 77.208(e), and the condition or practice is as follows:

The valves on two compressed gas cylinders, one oxygen and one acetylene, were not protected by covers. The cylinders were located on a portable welding machine near pit 001-0. Two mechanics were working in this area.

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Citation No. 2076973 cites a violation of 30 CFR 77.410, and the condition or practice is as follows:

The 988 caterpillar front end loader being operated loading coal into trucks in the 001-0 pit was not equipped with an automatic warning device in operating condition that would give an audible warning when the loader was pit in reverse. Three persons were on foot working in the pit where the loader was being operated.

Citation No. 2076978 cites a violation of 30 CFR 77.1605(b), and the condition or practice is as follows:

The international coal haulage truck operating at pit 001-0 was not equipped with a parking brake in operating condition in that when the parking brake was set on a small incline going into the pit it would not hold the truck.

Testimony and Evidence Adduced by the Parties

CENT 83-40

Citation 2066868, 30 CFR 77.410 (Tr. 12-19).

Inspector Donalee Boatright cited a Caterpillar 777 rock haul truck after he asked the driver to back it up and heard no backup alarm sound. A horn was on the truck, but it was inoperative, and he believed that a wire was loose. The truck was taken out of service, and the device was repaired.

Mr. Boatright stated that he issued the citation at 9:30 a.m., and that the shift started at 7:00 a.m. He indicated that the alarm in question could have been working at the beginning of the shift, and it also could have been checked at the beginning of the shift. A simple two or three minute test is all that is required to test the alarm, and he conceded that wires can come loose or that normal wear and tear may render them inoperable.

Mr. Boatright described the pit where the truck was at as approximately 140 feet wide. He stated that when the truck is loading rock there are two loaders loading it and the truck back up to where the loaders are positioned for loading. In addition, in another part of the pit "over from where the trucks were loading, they were taking out coal."

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Mr. Boatright stated that if the truck ran over someone, a fatality would occur, and if it struck someone "a glancing blow," lost workdays or restricted duties would result. He indicated that at the time of the citation, there were three or four front end loaders working four persons were on foot in the area, and two dozers were in the area. At times, the people operating the equipment would get off the equipment and would also be exposed to a hazard. He indicated that all of this equipment was working "more or less in the same area."

On cross-examination, Inspector Boatright described the parameters of the pit area and ramp where the truck in question would travel, and he described the pit as approximately 100 to 140 wide and 250 feet long (Tr. 23). He stated that the truck was hauling material out of the pit and traveling to a stockpile which encompassed a total trip area of some 2,000 to 2,500 feet (Tr. 24). He described the travel route of the truck and indicated on a sketch (exhibit R-2), where the truck would have traveled. He confirmed that the truck would travel into the pit area, go by the coal stockpile in a forward direction until it reached the face, and would then back into the area where two loaders would be waiting to load (Tr. 27). He also indicated that on the day he issued the citation, there were people on foot in the area where the truck was in reverse, and that they were "cleaning coal and taking coal down there" (Tr. 28).

Mr. Boatright further explained where the truck was operating, as follows (Tr. 29):

JUDGE KOUTRAS: No, no. Mr. Inspector, I think the point Mr. Petrick is trying to make is that you've indicated on here on the face of your citation is that there were four people on foot, and you've marked this violation as significant and substantial. Now what he's trying to determine is whether or not the people that you've described as being on foot were really exposed to this truck backing over them. In other words, were they in the immediate vicinity of the truck at the time that the truck would normally go into reverse?

THE WITNESS: At the time I saw them, they weren't directly behind the truck, no, sir, but they were in the pit area.

JUDGE KOUTRAS: But they were in the pit area. All right.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: All right, that's fine.

Q. (By Mr. Petrick). But the truck you're talking about--the triple seven truck was loading spoil, shale; was it not--

A. Yes, sir.

Q.--rock? Okay. And the coal that they were working on was cleaned and ready for processing taken out and being cleaned; was it not?

A. They were cleaning and loading it.

Q. Okay. And what was the distance between the time the area where the loaders were loading this triple seven truck and the coal area where they were cleaning?

A. I did not measure that. I did not measure the distance.

Q. Do you have a guess? 100 feet, 200 feet?

A. No, it wasn't. I would say not more than 7,500 feet. But it was all in the pit area right here (indicating).

Q. Okay. But my scenario so far as driving by the coal pad area is that they were always in the forward gear. They did not go into reverse until they got by the coal pad, the coal area.

A. That's probably right.

* * *

Q. (By Mr. Petrick). Now, Mr. Boatright, right before you inspected this truck, did you watch the operation for any length of time?

A. I had probably been an hour and a half or so I guess, I don't know.

Q. And during that period of time--well let me ask you this way: Wasn't there two 992's in the pit taking rock at that particular time?

A. I believe there was.

Q. And the tandem that the truck is working in, there's three triple seven trucks. One pulls in and gets loaded and goes on its way to unload the thing. And then the second one comes in, backs in, gets its load, goes on. The third one backs in, gets loaded, and it goes on. By that time the first one has dumped and comes back, so you're running it in a cycle; is that not correct?

A. Yes, sir, they run in a cycle.

Q. Now in addition to that, in the pit area there is a grader that takes care of the road, there's a water haul truck that takes care of--taking care of the dust and that type of stuff on the road. Were they in the area? Did you observe them?

A. Seemed like I saw a road grader, but I don't recall the water truck.

Q. Okay. Now also on the coal scene where these four men were working in the area, the most immediate piece of equipment to those four men was a 966 or 980 loader; was it not?

A. I believe they was using a 966 loader cleaning the coal.

Q. And it had a back-up horn, it was running back and forth all over the place right next to those men; wasn't it?

A. It was running back and forth cleaning up coal, yes, sir.

Q. Okay. And it had a back-up horn and the back-up horn was sounding?

A. Yes, sir.

Q. The back-up horns on the two 992's were sounding, weren't they?

A. As far as I recall they were, yes, sir.

Q. And the same with the grader when it was backing up, wasn't it? What I'm driving at, Mr. Boatright, is that at any given period of time in that pit is it not a fact that all of the other back-up horns were going?

A. Yes, sir. I think that was the only violation of a back-up horn I found.

Q. And what I'm saying is in the immediate proximity the back-up horn is going all the time on one of those pieces of equipment. So, so far as your gravity of being reasonably likely that somebody's going to get run over due to the result of this back-up horn not working, that's not really true. Because there's other back-up horns alerting people all the time in that pit in that area?

A. For the particular piece of equipment that it's on it's alerting, but not for the one that it's not operating on.

Q. Well the two 992's are right next to the triple seven truck, aren't they?

A. When a triple seven truck backs under them they are, yes, sir.

Q. And were the back-up horns different so far as sound is concerned, so that you can tell whether you've got a 992 coming at you or a triple seven truck?

A. I wouldn't say the sound was different.

Citation 2076869, 30 CFR 77.1605(d) (Tr. 39-44).

Inspector Boatright confirmed that he issued this citation on another Caterpillar 777 rock haul truck at approximately 9:45 a.m. after finding that the front horn was inoperative. He believed that the problem was caused by a loose wire, and the horn was repaired by 11:00 a.m. This citation was at the same location and area of the previous one (2076868).

Mr. Boatright stated that the purpose of the horn is to warn people and other equipment in the area, and that at

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the time the citation issued, employees were on the ground, but he observed no "near misses," and observed no one actually in the path of the truck. However, in his opinion, the people and equipment previously testified to "could get in the path of this truck." He also believed the probability of an injury occurring in this area would be greater because of all of the equipment operating there.

Mr. Boatright stated that simply pushing the horn button would indicate whether the horn was working. He described the truck as being otherwise "in good shape," and that a foreman was in the pit area.

On cross-examination, Mr. Boatright indicated that the truck would not drive over the coal which was being cleaned up out of the pit, and he confirmed that when the trucks are loaded they would not go faster than five miles an hour at the ramp. However, he did not know how fast they would travel coming and going from the pit. He could not recall whether the pit crew was taken out by pick-up truck or whether they walked out, and he stated his rationale for his gravity finding as follows (Tr. 51-53):

JUDGE KOUTRAS: Mr. Petrick, if I may interject. Even in your scenario there, assuming that was the case, assuming that the foreman brought these three or four fellows in the pickup and the trucks come by, and these three or four fellows are out of the danger zone, if you will, on this particular day. The foreman comes back and puts them in the pickup truck and he drives away. Just at that time here comes a truck now with an inoperative horn, then in that situation his testimony would probably be the same, that the truck, the pickup truck would be exposed to a possible hazard of being struck by the truck because he wouldn't be able to sound his horn; isn't that true?

THE WITNESS: That's right, if neither one of them had brakes or go up there or whatever.

JUDGE KOUTRAS: That's right. But in my hypothetical, with all of these other hypotheticals then, that situation would certainly pose a more direct gravity situation than it would given the fact that these four guys over there working on the coal pile as the trucks go by on the road, that's some distance removed; isn't that true?

THE WITNESS: Yes.

JUDGE KOUTRAS: Yes, I understand all of that. Okay. But see, the problem here is that this case was assessed based on the description as provided by the inspector on the face of this citation, and you're trying to establish in this hearing is that the gravity was less than what MSHA believed it was; isn't that true?

MR. PETRICK: That's right.

JUDGE KOUTRAS: Okay, fine.

Q. (By Mr. Petrick). Did you also inspect this triple seven truck for brakes at the same time?

A. Yes, sir.

Q. The brakes were in proper working order, were they not?

A. Yes, sir.

Q. Nothing to prevent the operator from stopping the truck in the event that somebody were to stray into the path of it?

A. This equipment--you can have the best brakes in the world on it. When you get one of those trucks loaded, you don't stop them just like--

Q. Yeah, but in this pit area you're not talking about driving more than five miles an hour, are you?

A. No, sir, but I'm not talking--taking long if it runs into somebody, or speeds, or somebody walks in front of it.

Q. Isn't it true with that truck driving five miles an hour, just will stop just as fast as your automobile in driving it five miles an hour?

A. No, sir, I don't think it would stop as fast as you could an automobile with 85 tons, as you said, on it.

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Citation 2076870, 30 CFR 77.1710(i) (Tr. 56-59):

Inspector Boatright cited a 966 Caterpillar frontend loader because it was not equipped with a seat belt. The loader was equipped with ROPS (rollover protection), but without a seat belt for the operator to wear, there would be a danger if the vehicle overturned. The loader was immediately taken out of service and seat belts were installed within an hour.

Mr. Boatright stated that the loader traveled up and down a ramp which was at a 12-14 percent incline, and that the cited standard requires that when equipment is operating in an area where there is a danger of overturning, the operator shall wear his seat belt. Here, the loader was not equipped with a belt. The only person exposed to any hazard here would be the loader operator. Mr. Boatright determined that there was no seat belt by a simple visual inspection of the loader.

On cross-examination, Mr. Boatright stated that the cited regulation requires that all loaders be equipped with seat belts regardless of what they are doing, and that all operators of such loaders must wear the belts (Tr. 60). He then stated that the question as to whether the regulation would apply would depend on how the loader is equipped, and he confirmed that he issued the citation because he believed there was a danger of the loader overturning. Even if the loader were operating on a level pit area, he would still issue the citation because the loader has to use the ramp (Tr. 61). He described the loader as being 8 to 12 feet wide, and while he did not measure the width of the ramp, he estimated that it was probably 50 to 75 feet wide (Tr. 65). His interpretation of the regulation is that seat belts are required if "there's a possibility of overturning" (Tr. 65).

Citation 2076871, 30 CFR 77.1109(c)(1) (Tr. 72-76).

Inspector Boatright cited a D-10 bulldozer for not having a portable fire extinguisher. He stated that he did not consider this violation "significant and substantial" because there was other equipment operating in the area that had fire extinguishers on them. A fire extinguisher was obtained from the nearby mine office and placed on the bulldozer to abate the citation, and this took about ten minutes.

Mr. Boatright confirmed that the cited bulldozer was equipped with a "built-in" fire suppression system inside the operator's cab, but that the standard still requires a portable fire extinguisher.

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CENT 83-55

Citation 2076969, 30 CFR 77.1605(d) (Tr. 150-153).

Inspector Boatright cited a Caterpillar rock haul truck at 9:15 a.m., because it had an inoperable front horn, and the respondent repaired it. The truck was hauling topsoil to the mine reclamation area, and Mr. Boatright was concerned with the fact that if another piece of equipment crossed in front of the truck, the driver would have no way of warning the equipment operator. He believed that "there could be" other equipment operating in the area, and that there was a "possibility" that the operator would not see the truck.

Mr. Boatright confirmed that no employees were exposed to any hazards on the ground, but if the truck collided with another piece of equipment, "lost work days, restricted duty, even fatal" would result. If the condition were to continue, he believed that it was reasonably likely that such injuries would occur, and he asserted that his instructions are to issue "S & S" violations, using this standard.

Mr. Boatright stated that the shift started at 7:00 a.m., and that it was possible that the truck was checked, but that he "couldn't say."

On cross-examination, Mr. Boatright stated that the pits at this mine are 150 feet wide and a half mile long, and he confirmed that the truck was traveling on a road which was 75 feet or more wide, hauling top soil from one location to another. He conceded that the roads had more than adequate clearance for the trucks to drive around in the area in question. He also confirmed that he observed no laborers on the ground in any area where the truck was operating. He also confirmed that any elevated roadway used by the truck would be bermed (Tr. 153-155).

When asked to explain why his citation stated that four people would be exposed to a hazard, he identified two front-end loaders, a road grader, and another truck operating "in the area." However, he conceded that the truck would be stopped when it was being loaded, and that he was simply counting the equipment that was in the area. However, he also indicated that he has no way of knowing when any of these equipment operators will get out of their equipment (Tr. 157).

Mr. Boatright that the truck and loaders are all equipped with seat belts, ROPS, but that he still believed that if they collided, the operators would be thrown around the

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cabs, and possibly through the windshield (Tr. 158). He had no idea how fast the equipment would be traveling (Tr. 159). His rationale for finding a "significant and substantial" violation is reflected in the following bench colloquy (Tr. 162-163):

Q. But I get the impression that what you've found in this case, as in the others, you saw other equipment working in the pit. You saw men that were operating that equipment, and you figured that at some point in time during the mining process it's all together possible that some fellow may get out of his equipment and walk across the road, or a piece of equipment might get over close to a truck, and that therefore this is why they should have horns and back-up alarms. And since they didn't have them, this is why you found the gravity that you found; isn't that true?

A. Yes, sir.

Citation 2076970, 30 CFR 77.1110 (Tr. 168-169).

Inspector Boatright cited a 9L Caterpillar Bulldozer after observing that a fire extinguisher on the machine was not charged. He determined that it was not charged by observing "a gauge indicating that it had been discharged, and the pin was pulled." A fire extinguisher is needed in the event of small fires on the machine, and since fire extinguishers were available on other equipment in the area, he marked the negligence "as low and unlikely." He confirmed that the machine operator tested the extinguisher and determined that it had been discharged.

Citation 2076971, 30 CFR 77.410 (Tr. 170-171).

Inspector Boatright cited a 14-G Caterpillar road grader after finding that the back-up alarm was inoperative. The grader was operating in the pit haul road and spoil areas, and he found the gravity to be "low" because the machine is seldom put in reverse. The condition was corrected within two hours.

Citation 2076972, 30 CFR 77.208(e) (Tr. 171-175).

Inspector Boatright cited an oxygen and an acetylene gas cylinder stored in a trailer near where two mechanics

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were working on a bulldozer which had unprotected valves. The cylinders had no gauges or hoses, and the protective covers had not been put back on them. The covers were immediately replaced, and they were located next to the cylinders. He assumed that the mechanics had used the cylinders and left the covers off.

Mr. Boatright indicated that the cylinders were vertical, and that if the valves were knocked off by a piece of equipment or someone hitting them, the tank could be ruptured. He believed the negligence was "moderate" in that the pit foreman or superintendent should have discovered the conditions.

On cross-examination, Mr. Boatright confirmed that the cylinders were immediately adjacent to each other and they were the only ones in the trailer (Tr. 175). He did not speak with the mechanics, and he indicated that the cylinders were secured by a chain which was around them. Although he did not ascertain what was in the cylinders, he indicated "they weren't empty cylinders, they were full" (Tr. 177). However, based on his interpretation of the standard, he would have cited the cylinders regardless of whether they were full or empty (Tr. 178).

Mr. Boatright confirmed that he observed no one actually using the cylinders, and when asked to explain his "significant and substantial" finding, he stated as follows (Tr. 180-186):

Q. Your testimony is that he said that they were full?

A. I asked him if the cylinders were empty or full, but I would have still cited those cylinders if they had been empty.

Q. If he told you that they were empty, you would have still cited him; is that what you're telling me?

A. That's exactly--

Q. And what kind of gravity finding?

A. I wouldn't have cited them if they had--

Q. I'm not trying to confuse you, I'm trying to understand. Go ahead.

A. It says they will be protected by covers.

Q. That's right.

A. It don't say whether they're empty or--

Q. That's right. But if he'd told you they were empty, you would have cited them because they didn't have the covers on them; right?

A. Yes, sir.

Q. But what kind of a gravity finding would you have made?

A. There wouldn't have been too--

Q. And why?

A. It was in violation of the standard.

Q. And why would there not have been too much of a gravity finding?

A. Because there wouldn't have been any hazards.

* * *

Q. Did you ever observe those mechanics or anybody else using those cylinders?

A. Not that particular day, no, sir.

Q. Would you tell me again what factors went into your determination that there was a significant and substantial danger as a result of those covers being off those cylinders?

Let me make sure--we stopped in the middle of things. They were secured, were they not?

A. Yes, sir.

Q. And were standing?

A. Yes, they were standing.

Q. And up off the ground so that normal activity, if somebody walking on the ground, it would have been very unlikely that the top of those cylinders would have been touched?

A. A possibility it could have been.

Q. How far were those two mechanics away from these cylinders? What was the distance between the mechanics and the cylinders?

A. I'd say the trailer was 50, 60 feet away from where they were working.

Q. 50, 60 feet away from where they were working?

A. Yes.

Q. And how far away was the bulldozer they were working on? Further away than that?

A. That was about where the bulldozer was at in relation to where--

Q. Is there anything in between the bulldozer, the mechanics and those cylinders?

A. Not at that particular time, no, sir.

Q. Did you observe any other activity in the area at the time?

A. This is in the pit area, backed up behind the pit area. They haul in the pit area where this was at.

Q. Yeah, but you've got a pit that's a half a mile long?

A. Yes.

Q. Was there any other equipment in the immediate area of this trailer?

A. Not right in the immediate area, no, not right by it.

* * *

Q. Tell me what factors you used to determine that we were--had a significant and substantial violation?

A. Well I felt like the negligence on the thing was moderate, because you had a superintendent in the area and there was a pit foreman working there, and they should have saw these things not being on it.

Q. Well that's--let me get back to what I asked you before. You didn't determine how--when it had last been used, or whether it was getting ready to be used; did you?

A. I'm sure it wasn't being ready to be used. If it was, it shouldn't have been off anyway. They should have put the gauges on it they were going to use it. There were no gauges there to even put on it.

Q. Well how much is involved in putting a set of gauges on that thing? How much time?

A. Very little time.

Q. A minute and a half?

A. I'd say probably.

* * *

Q. Okay. What other factors to into being significant and substantial?

A. If it continued to stay there, I'd say it would be reasonably likely that something would happen with the equipment there.

Q. Like what?

A. Like people working in this area. Your mechanics are working on the equipment and driving around, yes, sir.

Q. But you didn't observe any of that. All you're talking about is--getting back to this same standard that you've heretofore testified--you're speculating that something like that might happen. You didn't actually observe that in any way, shape or form?

A. No, sir, not right next to it.

Q. Nearest the thing that you observed to those two cylinders was 60 feet away?

A. Approximately 60 feet.

~1240

Citation 2076973, 30 CFR 77.410 (Tr. 193-196).

Inspector Boatright cited a 988 Caterpillar frontend loader at 11:00 a.m. after determining that the back-up alarm was inoperative when the equipment was operated in reverse. The loader was loading coal out of the pit and into the truck, and it operated forward and in reverse during this loading process. Three people were on foot in the area where coal was being loaded, and he believed it was "possible" and "reasonably likely" that these people would be in the path of the loader while it was in reverse. One of the individuals was a coal foreman, and the other two were cleaning around the coal with shovels, and they were working close to the loader. However, he saw no one actually step behind the loader or "almost get run over." The alarm was repaired that same day, and he believed the pit foreman should have noted that the back-up alarm was not working.

On cross-examination, Mr. Boatright did not believe the loader operator ever operated the loader more than five miles an hour, and at all times the employees were either in front or on the side of the machine, and when asked to explain his "significant and substantial" finding, he stated as follows (Tr. 198-202):

Q. So taking into account your observation of Turner Brothers operation, there's no reason for any of those workers that you've denominated there, to be behind that loader in any way, shape or form?

A. I don't know that those loaders are going to always be where they're at on that coal when they're in that pit area.

Q. Well we're back to the same situation we've been in before. I'm talking about your observation at that particular time?

A. I did not see one behind the loader at that particular time, no, sir.

Q. But yet you say there's a reasonable likelihood that one of those people are going to be hurt, and I don't understand how, if they're not behind it. Are you telling me that one of them might get away and wander over there because he doesn't have anything to do, and just get behind that loader and get run down? Is that what you're telling me?

A. I'm telling you it's possible when you have people on foot in the area, when there's equipment like that.

Q. Have you ever seen a laborer in Turner Brothers' organization stand around not doing anything?

A. No, sir, not too often, or anyone else.

Q. They all got a job to do and there's somebody out there making sure they're doing it; isn't there?

A. Yes, sir.

* * *

Q. Okay. Now you've checked the box with regard to significant and substantial. Again, what factors went into your determination from this particular case--on this particular case as to what other factors had caused you to check that box?

A. I think it would be reasonably likely if this loader continued to operate like this and backed over someone, that you would have a serious accident or a fatality.

Q. But here's nobody in the area, nobody's job in the area, that would--that you've testified about, that would indicate that you saw anybody, or there was--in other words, what I'm started to say, and I lost the train of thought of this sentence. But unless somebody went over there and was goofing off or not doing his job, there would be no likelihood at all that anybody's get hurt as a result of that back-up horn being inoperable; is that correct?

A. Like this pit--you were talking about this pit coming down the side, coming out here 75 feet and loading the coal. When you're taking this

coal and coming out here, this loader's backing up here. You don't know whether somebody's going to walk back and forth between it when you've got people on foot in that area, whether they're going to walk back in that area or not, or passing by there or something.

Q. Okay. But you've had enough observation at Turner operation that there's nothing for anybody on foot to do in that area where the coal has already been taken?

A. They could be walking back through that area to come out of the end of the pit.

Q. For what purpose?

A. To get out of the pit. If they had to get out of the pit for some reason.

Q. They could have walked across the coal seam, too, couldn't they?

A. They sure could have. Or they could have walked between the loader and the highwall there it could have backed in there.

Q. What other factors went into your determining that there was a significant and substantial hazard?

A. Well I think if it continued, it would be reasonably likely it would happen. And I've heard--

Q. You said that?

A. Sir?

Q. You said that before?

A. I think if it occurred, you would have loss of workdays or restricted duty. That was the determination that I marked.

Q. And that's all the factors that you've taken into account in checking the box that says there was a significant and substantial hazard, or was reasonably likely so far as your gravity is concerned?

A. Yes, sir.

~1243

Citation 2076978, 30 CFR 77.1605(b) (Tr. 203-207).

Inspector Boatright cited an International coal haul truck after he had the driver stop it on a small incline and set the parking brake. The brake would not hold the truck, and it rolled. The condition was corrected.

Mr. Boatright stated that the truck had been operating on level ground for two days and that a mechanic told him that a valve was not working. Mr. Boatright went to inspect the truck, and it appeared that it had been put back into service without the parking brake in operating condition.

Mr. Boatright stated that he never observed the truck parked where he tested it, and he indicated that the truck is not parked "too much." However, when the truck is not hauling coal, and when the driver is having lunch, it is parked on the north side of the pit. He believed that all of the trucks are shut down for lunch.

Mr. Boatright did not believe the pit superintendent was negligent because he thought the parking brake was probably working, and that "it could have been." However, the mechanic told Mr. Boatright that the truck had "an old rusty-looking valve" that did not appear to be working.

Mr. Boatright believed that the violation was "significant and substantial" because "the likelihood of an injury occurring could be reasonably likely if this condition continued to occur."

On cross-examination, Mr. Boatright stated that the parking areas where the trucks park for lunch is "fairly level," but that there are some areas in the pit, which are not on level ground, where the truck could be parked. He also confirmed that the area where the truck was parked and being worked on for two days was "fairly level," and he confirmed that he has not seen many trucks roll as the result of a defective parking brake (Tr. 207-209).

Mr. Boatright conceded that the parking areas used by the trucks during the lunch break are on level ground. He also conceded that when the trucks are parked at the end of the shift they are all parked in a row on level ground.

Mr. Boatright's reasons for a finding of "significant and substantial," is reflected in the following bench colloquy (Tr. 211-212):

MR. PETRICK: I'm having a terrible difficulty, your honor, with understanding his reasoning for checking the significant and substantial hazard situation.

JUDGE KOUTRAS: Well I don't have any difficulty understanding why he did it in this case. The truck didn't have a parking brake. The standard says it should have one. I'll correct the inspector, if I will--but that's not his fault--he says the standard requires you to have one in working order. It says no such thing. It just says to be equipped with parking brakes.

But there are decisions that say if it's not in working order, it's like not having one.

MR. PETRICK: All right.

JUDGE KOUTRAS: Maybe the standard should read, "it also shall be equipped with operable parking brakes," but it doesn't. So I'll give you that. I mean, if they're not operating, it's like not having them.

And the reason he found it was S and S is because he found that if this truck happened to be parked on an incline and got away due to a faulty brake, it would more than likely run into something.

Assuming that something was there--and it didn't have them--a collision and an injury. And that's why he considered it to be significant and substantial; isn't that true?

THE WITNESS: Yes, sir.

MR. PETRICK: What I'm trying to point out with his testimony is, there's no likelihood it would be parked on an incline.

JUDGE KOUTRAS: You may prevail on the finding that this may not be S and S. But he's already told you why he felt it was S and S. You're not going to change his mind.

You're free to develop your own record as to the factors that you feel he should have considered and were not present.

~1245

Mr. Boatright clarified the circumstances under which he cited the truck, as follows (Tr. 212-214):

JUDGE KOUTRAS: Let me just ask: What called your attention to this particular truck in the first place?

A. I was on a general inspection, Your Honor, and we have to check every piece of equipment down there. And I was checking the truck when it come into the pit. The parking brake is one of the things you check on your general inspection when you're checking the truck.

Q. Okay. Now on a general inspection, the parking brake is one of the things. But this truck--you took him to an incline to check to see whether he had the parking brakes; is that right?

A. Yes, sir.

Q. Did you know in advance that there was something wrong with the parking brake?

A. No, sir, I sure didn't.

Q. Well what's this business about the truck had been down for a repair for a couple of days?

A. Something else was wrong with it--this particular truck. I'd been there for two days on the inspection, and the point I'm saying, is that it should have been working after it had been down for two days. The parking brake was not in operating order.

Q. What I'm saying is, the truck was down for repairs for two days. And after they repaired it is when you decided to check it out?

A. I had not checked the truck during the general inspection. And also the law says I ought to check each piece of equipment that's operating, during the general inspection.

And they put it back into operation, and I didn't check the equipment until the operator put it back into operation.

~1246

Q. Okay. And that's why you decided to check it is because of your general--

A. Yes, sir.

Q. And in order to check the parking brake to see whether it works or not, you're not going to check it on level ground; right?

A. No, sir.

Q. So you had the driver--what?--take it to an incline?

A. It was on an incline going down into the pit, and I checked it there.

Q. Were you in the cab with him?

A. No, sir, I was standing outside.

Q. And you had him stop the truck on an incline?

A. Yes, sir.

Q. Was it full--

A. Checked the parking brake.

Q. Was it full or empty?

A. It was empty.

Q. The truck was empty?

A. It was stopped on an incline.

Q. And you had him set the brake?

A. Yes, sir, and it would not hold.

CENT 83-51

Inspector Boatright testified that he took some dust samples with an M.S.A. Dust Pump, and that he followed MSHA's usual procedures and instructions in doing so. He confirmed that he took some dust samples, and also made a noise survey when he was at the mine on March 21, 1983. He gave the samples to MSHA Inspector and Health Officer James Cameron, but could not recall how many samples he took, and he did not have his records with him at the hearing (Tr. 78-80).

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When asked whether he took the samples on April 19, 1983, Mr. Boatright stated that he was not sure about the date, and indicated that he would have sampled whatever equipment was operating when he was there. This would have included a D-10 bulldozer, loader, truck, scraper, and a drill, if it were operating. He was not sure as to how many equipment samples were taken (Tr. 81).

Mr. Boatright explained his dust testing procedures, and he indicated that after he places the testing device on a particular piece of equipment, he will check it periodically during the course of the 8 hour shift. After removing the dust cassette, he plugs them, and places them in their respective containers with a dust record card and takes them to his office in McAlester, and the samples are never out of his possession during their transit to the office. He either personally gives them to Mr. Cameron, or leaves them on his desk or takes them to the laboratory if Mr. Cameron is not at the office. Mr. Boatright does not handle them or see them after this (Tr. 83-84).

MSHA Inspector James D. Cameron testified as to his background and experience, and he testified as to the procedures which he followed in processing the dust cassette obtained by Inspector Boatright during his inspection. He confirmed that he sent the cassette to MSHA's Pittsburgh laboratory for processing and that he did so following MSHA's procedures. After receiving the results of the testing, he issued citation 2007403, because the test results indicated that the respondent was out of compliance with the applicable dust standard. He confirmed that the quartz content percentage was high (Tr. 85-92).

Inspector Cameron did not know how many samples Inspector Boatright may have taken on the day of his inspection, and he confirmed that with the exception of the one sample which showed a high presence of quartz, the other samples were in compliance (Tr. 100). He also confirmed that he did not send in other samples for MSHA laboratory analyses because there was insufficient quartz weight gain to show any substantial presence of quartz (Tr. 101).

Inspector Cameron identified exhibit P-3 as a copy of an MSHA computer print-out showing the results of MSHA's Pittsburgh laboratory testing (Tr. 106). He explained that under MSHA's new quartz standards, if a particular piece of equipment which was tested indicated a presence of quartz in excess of the acceptable 0.5 level, a citation would be issued. In this case, the concentration of quartz was shown as

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1.5, and even though it was based on one sample, under MSHA's instructions a citation would issue, and that is why he issued the citation in this case (Tr. 115). Since the one sample in question showed 18 percent of quartz, the testing indicated a concentration of 1.5, and that was sufficient to establish a violation under MSHA's interpretation of the standard (Tr. 117). MSHA's counsel took the position that under the cited standard, one sample which is out of compliance is sufficient to establish a violation (Tr. 125).

Respondent's Testimony and Evidence

William T. Turner, confirmed that he is the President of the respondent company, and is responsible for the supervision of all mining operations. He testified as to his education, and his mining experience, and confirmed that respondent operates four mines in the State of Oklahoma. He testified as the company safety program, daily safety inspections, and he stated that the Muskogee number two mine is comprised of a "group of pits," and he diagramed what the mine looked like (exhibit R-2; Tr. 132-135). He also described the operation of the mine in question, including the mining cycle and development of the pits (Tr. 135-138).

Mr. Turner went on to describe the operation of the cited trucks, and he indicated that the roadway where the trucks traveled were approximately 75 feet in width. He stated that under normal operating procedures, there would be no laborers on foot, and he indicated that the location where coal being loaded would be 75 to 100 feet from where trucks would be passing by (Tr. 140). He also indicated that if any trucks were in the coal loading area, they would be backing away from any trucks which may have been in the area, and that laborers would have no reason to be behind any of these trucks (Tr. 141-142).

CENT 83-54

MSHA Inspector James D. Cameron testified as to his mining background, experience, and training, and he confirmed that he issued Citation No. 2007402, on March 15, 1983. He also confirmed that he took three respirable dust samples from the operator's cab of the Reed SK-35 Drill on March 8, 9, and 10, 1983, in accordance with his usual practice and procedures, and that he tested the samples and found that average concentration of respirable dust exposure for that piece of equipment and operator was 3.7 milligrams per cubic meter of air. Since the mandatory requirements of section 71.100, require that respirable dust exposure be maintained at or below 2.0 milligrams, he cited the respondent with a violation of that mandatory section, and fixed a reasonable time for abatement.

Inspector Cameron explained that the three samples which he took to support his citation were mailed to MSHA's Pittsburgh dust laboratory for quartz analysis pursuant to MSHA's usual practice and procedures. He stated that his local MSHA district office has no testing capabilities for determining the presence of quartz in the dust samples which he took. He stated that if any dust samples contain more than five percent quartz, a new compliance standard is then established pursuant to section 71.101.

Inspector Cameron stated that the first sample of March 8, 1983, was rejected by MSHA's Pittsburgh laboratory because it was somehow defective. The second sample taken March 9, 1983, reflected the presence of 15 percent quartz, and the last sample taken on March 10, 1983, indicated the presence of 33 percent quartz. Under MSHA's policy guidelines and procedures, the last sample in a series where quartz is detected is used to compute the new compliance standard. In the instant case, the last sample showing 33 percent quartz was computed pursuant to section 71.101, to establish the new dust compliance standard for the cited drill as 0.3 milligrams per cubic meter of air, rather than the initial standard of 2.0 milligrams per cubic meter of air as stated in section 71.100. Under the circumstances, he modified his original citation on March 23, 1983, to cite the respondent with a violation of section 71.101 rather than 71.100.

Inspector Cameron stated that after he modified his citation, he extended the abatement time after the respondent removed the cited drill and replaced it with another one which was equipped with a pressurized air conditioning unit in the operator's cab. He extended the abatement time so as to permit the respondent time to collect five dust samples so as to determine whether the replacement drill was in compliance with the newly established standard of 0.3 milligrams. Subsequent samples indicated an average dust concentration of 1.6 milligrams, and since this did not achieve compliance, he decided to extend the abatement time further, and issued a section 104(b) order. He modified the order the same day in order to allow the respondent additional time to install a "Hupp Aire cab pressure system" on the drill, and after this was installed and additional samples taken, the respondent achieved compliance by lowering the dust concentration for the drill to 0.2 milligrams per cubic meter of air (Tr. 217-225).

Inspector Cameron confirmed that the dust samples which he took on March 8, 9, and 10, 1983, indicated the average concentration of respirable dust to be 3.7 milligrams, and he also confirmed that these test results were from his own personal weighing which he conducted at MSHA's laboratory

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in McAlester (Tr. 226). The sampling for quartz content was conducted by MSHA's laboratory at Pittsburgh, but his laboratory tests pursuant to section 71.100 indicated the presence of respirable dust in excess of the required 2.0 amount (Tr. 227). He confirmed that the sample results of 7.3, 2.2, and 1.8, were processed by him and since they indicated an average concentration of 3.7, he issued the citation (Tr. 228). In short, he confirmed that his sampling of the dust exposure on the cited Reed SK 35 highwall drill indicated noncompliance, and that is why he issued the citation (Tr. 229). He confirmed that the drill was taken out of service and replaced with another one (Tr. 230).

Findings and Conclusions

Jurisdiction

MSHA Inspector Donalee Boatright testified that the respondent operates a surface strip mining operation and at one time actively mined at four strip mine locations. One of the locations ceased mining operations approximately three or four months prior to the date of the hearing.

Mr. Boatright testified that respondent's mining operations includes the stripping of overburden and top soil, the blasting of rock, the stripping of the exposed coal seam, and reclamation of the mined-out pit areas. Mr. Boatright estimated the respondent's annual coal production as between 500,000 to 750,000 tons, and he estimated that the respondent employs a total workforce of 40 miners working on rotating shifts, seven days a week.

Mr. Boatright also confirmed that the coal mined by the respondent is shipped out of state, and that the respondent is regularly inspected by MSHA pursuant to the Act (Tr. 8-11). He also confirmed that the mine has an MSHA identification number, and that he has inspected it on previous occasions (Tr. 18-19).

Mr. Boatright stated that mining at the respondent's Muskogee mine ceased sometime in late 1983, and that when the mine was operational, it worked seven days a week, 12 hours a day. Respondent's other mines are still operating (Tr. 11).

Respondent's President, Tom Turner, confirmed that his company uses approximately 70 pieces of major mining equipment

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such as trucks, loaders, and bulldozers, and 30 pieces of other equipment in its mining operations. He also confirmed that the coal produced is shipped out of state and that his mining operation is nonunion (Tr. 146).

Although the respondent entered a general denial of jurisdiction, it did not reassert this issue during the hearings, nor has it advanced any arguments that it is not a "mine" subject to petitioner's enforcement jurisdiction. I conclude that the testimony here indicates that the respondent is a mine subject to the Act and to MSHA's enforcement jurisdiction.

Stipulations

The parties stipulated as to the accuracy of the dates, times, and places where Inspector Boatright issued his citations, as well as to the fact that they were served on the respondent's representative as shown on the face of the citation forms (Tr. 57).

Fact of Violations--Docket CENT 83-40

I conclude and find that MSHA has established by a preponderance of the evidence that the cited Caterpillar 777 rock haul truck had an inoperative back-up alarm, that a second truck had an inoperative front horn, and that the cited D-10 Caterpillar bulldozer was not equipped with a portable fire extinguisher. Accordingly citations 2076868, 2076869, and 2076871 are all AFFIRMED.

With regard to the citation concerning the lack of a seat belt on the cited front end loader, the cited standard section 77.1710-(i) requires that seat belts be provided in a vehicle where there is a danger of overturning and where roll protection is provided. Here, the loader in question was provided with ROPS and the inspector believed there was a danger of overturning because the loader had to travel up and down a ramp which was at an incline of some 12 to 14 percent. He described the width of the ramp as 50 to 75 feet, and the width of the loader as 8 to 12 feet.

The standard in question contains two conditions precedent which must be met before seat belts are required. The standard does not require seat belts for all vehicles, nor does it require seat belts for vehicles equipped with ROPS. The inspector must first make a finding that there is a danger of overturning before he can require that seat belts be installed on ROPS-equipped vehicles.

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In this case, when asked whether or not he issued the citation simply because he found that the loader had to travel up and down a ramp, Inspector Boatright replied "where there was a danger of overturning, yes sir" (Tr. 62). When asked whether he would have issued the citation if the loader were operating on "flat ground," Mr. Boatright stated that he would not. He clarified this answer by stating that since the loader had to travel up and down the ramp, he believed there was a "possibility" of overturning, and that is why he issued the citation. As a matter of fact, Inspector Boatright stated that his interpretation of the standard is that a seat belt is required whenever "there is a possibility of overturning." However, the standard does not state this proposition. The standard says that seat belts are required when there is a danger of overturning. In my view, the question of whether such a danger exists depends on the facts presented at any given time.

On the facts of this case, I cannot conclude that MSHA has established that there was a danger of the loader overturning. I am convinced that the inspector issued the violation simply because the loader in question was equipped with ROPS, and that it traveled up and down the ramp. It seems to me that if MSHA wishes to require seat belts for every vehicle which is equipped with ROPS and which happens to travel up and down an incline it should specifically say so in its standard. Here, the standard only requires a ROPS equipped vehicle to have seat belts if there is danger of overturning. Based on the testimony here, I cannot conclude that MSHA has established that there was a danger of the loader overturning. Simply because it traveled up and down a ramp is insufficient evidence to establish that it would overturn. The evidence here establishes that the ramp was of sufficient width to allow the loader to go up and down without being exposed to other traffic, there is no evidence as to how fast the loader traveled, the conditions under which it traveled the ramp, nor is there any testimony from any loader operators as to whether or not they were in any danger. In short, I conclude that the inspector issued the citation here because he believed that a ROPS-equipped vehicle had to have a seat belt. Under the circumstances, the citation IS VACATED.

Fact of Violations--CENT 83-51 and CENT 83-54

I conclude and find that MSHA has established by a preponderance of the evidence that the allowable respirable dust level for the tested Caterpillar D-10 bulldozer operator exceeded the requirements of cited mandatory standard

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section 71.101. Respondent's evidence did not rebut the findings of the inspector, and although respondent questioned the validity of MSHA's testing procedures, he withdrew his objections when the inspector agreed that the violation was not "significant and substantial."

I find that Inspector Boatright's testimony concerning the procedures he followed in conducting and taking the dust samples to support his citation to be credible. Accordingly, Citation No. 2007403, issued in Docket No. CENT 83-51, IS AFFIRMED.

With regard to Citation No. 2007402, issued by Inspector Cameron in Docket No. CENT 83-54, I conclude and find that MSHA has established by a preponderance of the evidence that the allowable respirable dust level for the tested Reed SK 35 Drill operator exceeded the requirements of cited mandatory standard section 71.101 (as amended by Inspector Cameron on April 11, 1983). Respondent's evidence did not rebut the inspector's findings, and I find that Mr. Cameron's testimony regarding his testing procedures, as well as his detailed explanation of the application of the cited section to be credible. Accordingly, the citation IS AFFIRMED.

Fact of Violations--Docket No. CENT 83-55

I conclude and find that MSHA has established by a preponderance of the evidence that the cited No. 912 rock truck had an inoperable front horn, that the 14G road grader had an inoperable back-up alarm, that the 988 front end loader had an inoperable back-up alarm, and that the 96 bulldozer was equipped with a fire extinguisher which was not usable or operative. Accordingly, Citations 2076969, 2076971, 2076973, and 2076970, are all AFFIRMED.

With regard to Citation No. 2076978, concerning an inoperative parking brake on a coal haulage truck, I take note of the fact that while the regulatory language in section 77.1605(b), that mobile equipment be equipped with adequate brakes, and that all trucks be equipped with parking brakes, may be ambiguous since it simply requires that a truck be equipped with parking brakes, with no specific requirement that they be serviceable or adequate, I conclude that a reasonable application of this standard requires that the parking brake perform the function for which it is designed. In short, a truck with a parking brake which will not hold it or prevent its movement while in a parking mode, regardless of where it is parked, does not satisfy the intent of the standard.

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In the instant case, Inspector Boatright's testimony that the brake would not hold the truck when it was tested on a small incline has not rebutted by the respondent. Mr. Boatright testified that the truck was empty at the time he asked the driver to set the brake, and when he did, the brake would not hold.

I conclude and find that MSHA has established a violation by a preponderance of the evidence, and Citation No. 2076978 IS AFFIRMED.

With regard to Citation No. 2076972, concerning the absence of protective covers on two compressed gas cylinders, I take note of the fact that the cited standard section 77.208(e) provides that:

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.

Inspector Boatright testified that he observed the two cylinders "stored" in a trailer "near" an area where two mechanics were working on a bulldozer. The valves were next to the cylinders, and he assumed that the mechanics had used the cylinders and simply forgot to replace the valves. The cylinders were next to each other in an upright position, and they were secured by a chain which was around them.

Mr. Boatright also testified that he did not speak to the mechanics, nor did he observe them using the cylinders. Although Mr. Boatright stated that the cylinders were full, he indicated that he would have issued a citation even if they were empty. He confirmed that the mechanics were working 50 or 60 feet away from the trailer and the bulldozer was in that same area away from the trailer. He also confirmed that the cylinders were not "being ready to be used."

It seems clear to me from the inspector's testimony that the cylinders in question were not being transported or being used by anyone at the time the inspector made his observations. Since he did not speak to the mechanics, he acted on pure assumptions and speculations which are unsupported by any credible evidence. Further, although his citation narrative gives the impression that the two mechanics were using the cylinders, the facts show otherwise.

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In further explanation as to why he issued the citation, Inspector Boatright stated that the cylinders were "just sitting there" (Tr. 190). He believed that they were being "stored" (Tr. 191), and his citation states that they were on a portable welding machine. He also stated that if the gauges are not on the cylinders, or if the cylinders are not being used, then he would consider that they are "stored" (Tr. 190). He confirmed that the cylinders in question had no gauges or hoses when he observed them.

In response to questions from respondent's counsel, Mr. Boatright conceded that the normal storage area for full and empty cylinders is at the mine office located over a half a mile away from the area of the trailer (Tr. 191). He also indicated that prior to the day he cited the cylinders, whenever he had occasion to observe the trailer or a mechanics truck, the valves and gauges were always protected by covers if they were on the cylinders (Tr. 191).

The question presented here is whether or not MSHA has established that the cited cylinders were "stored" within the meaning of section 77.208(e). If they were, the next question is whether or not on the facts here presented, the cylinders were required to have protective valve covers.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude that the two cylinders in question were stored at the time the inspector observed them. While it may be true that they were not located at the normal storage area, they were on a portable welding machine, in an upright position and were not in use. I conclude that in their location, they were stored, and that the valve covers should have been on them. The citation is AFFIRMED.

Significant and Substantial Violations

Docket No. CENT 83-40

Citation No. 2076868

Inspector Boatright's citation concerning the inoperable backup alarm on the 777 rock haul truck states that four front-end loaders, two dozers, three haul trucks, and four persons on foot were in the pit area when the truck was operated in reverse.

Mr. Boatright stated that the work shift started at 7:00 a.m., and that he cited the truck at 9:30 a.m. The inoperable alarm was the result of a loose wire, and the truck was immediately taken out of service. He conceded that the alarm could have been working before he cited it, and he conceded that wires do become loose.

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Based on all of the facts and circumstances which prevailed at the time of the issuance of this citation, I cannot conclude that MSHA has established that the violation was significant and substantial. Apart from the fact that the inspector observed no one working behind the truck when it was being loaded, the evidence here establishes that until its arrival at the pit loading area, the truck was always driven in a forward mode along a rather wide and clearly defined route. In addition, the two loaders used to load the truck, as well as the other loaders which were cleaning the coal away from the loading area, were all equipped with operable backup alarms which were sounding while being operated in reverse. The loaders loading the coal were operating at the same area where the truck would back up to be loaded, and I cannot conclude that the operators were exposed to any hazards.

With regard to the four men who Inspector Boatright stated were on foot, I cannot conclude that their duties required them to be positioned to the rear of the truck while it backed up to be loaded. Inspector Boatright conceded that he included these men in his citation because it was possible that "somebody within the pit area may possibly stray within the hazard zone" (Tr. 38). This could be true of any violation of this kind. However, in order to support an "S & S" violation, I believe that an inspector should rely on facts which reasonably indicate a likelihood of injury during the normal mining and loading process. Here, the inspector's beliefs that an accident or injury was likely to occur is sheer speculation. Accordingly, his "S & S" finding is unsupported, and it is VACATED.

Citation No. 2076869

Inspector Boatright issued this citation after finding that the front horn on another 777 rock haul truck was inoperative. The condition was abated within an hour or so of the issuance of the violation, and the condition was caused by a loose wire. The inspector cited the violation as "S & S" because he was concerned that an individual or a piece of equipment could inadvertently stray in front of the moving truck, and the truck driver would have no way of sounding his horn.

While it is true that the truck in question was in otherwise good condition, had operative brakes, and traveled approximately five miles an hour while going up and down the pit ramp, it is also true that while driving to and from the pit area, the truck would be moving faster, and the driver could encounter unexpected pedestrian and vehicular traffic in and around his route of travel. Without an operative horn, the driver would be unable to warn such obstacles in his path, and a collision would likely occur. Regardless of whether the truck were empty or full, I believe one can reasonably conclude that in the event of

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a collision, personal injuries or equipment damage would likely result. Under the circumstances, I conclude and find that the violation is significant and substantial, and the inspector's finding in this regard is AFFIRMED.

Docket No. CENT 83-55

Citation No. 2076969

Inspector Boatright issued this citation after finding that a Caterpillar rock haul truck used to haul top soil from the pit to the reclamation area had an inoperative front horn. He was concerned that a collision with other equipment might result in personal injuries or equipment damage.

While it is true here that the area where the other equipment noted in the inspector's citation was an area where the cited truck in question would normally be stopped during the loading process, once the truck left that area it could very well encounter other equipment while on its way to the reclamation area. Without an operative front-horn to warn other vehicular traffic, any resulting collision would likely result in injury to the vehicle operator or to the truck or other equipment. Accordingly, the inspector's "S & S" finding is AFFIRMED.

Citation No. 2076972

Inspector Boatright believed that the cylinder citation was a significant and substantial violation because "if it continued to stay there, I'd say it would be reasonably likely that something would happen with the equipment there." Based on his other testimony as to all the circumstances which prevailed at the time he observed the cylinders, particularly the fact that the cylinders were stored and secured in an upright position with a chain, were not being used, were isolated from the two mechanics, and were far removed from any other equipment, I cannot conclude that it was reasonably likely that any injury or accident would occur. In short, I can find no evidence to support the inspector's conclusion that the violation was significant and substantial. Accordingly, his finding in this regard is VACATED.

Citation No. 2076973

Inspector Boatright's citation concerning the inoperative backup alarm on the 988 front-end loader states that "three persons were on foot working in the pit where the loader was being operated." He testified that the loader was loading coal out of the pit and into the truck, and that it operated forward and in reverse during this loading process. He believed it was "possible and reasonably likely" that a foreman and two workers who were cleaning coal with shovels close to the loader would be in the path of the loader while it operated in reverse.

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On cross-examination, Mr. Boatright stated that at no time did the loader operator operate the machine more than 5 miles an hour, at no time did he see anyone behind the machine, and, in fact, he stated that at all times the employees were either in front or on the side of the machine.

When asked to explain his "significant and substantial" finding, Mr. Boatright stated that he believed "it would be reasonably likely if this loader continued to operate like this and backed over someone, that you would have a serious accident or fatality."

When asked to explain why he believed an accident or injury would occur since no one would have any business being in the area where the loader was operating, Mr. Boatright stated that he would have no way of knowing whether anyone would be walking through the area on foot while leaving the pit. He also indicated more than once that had he permitted the loader to continue to operate with an inoperable backup alarm, that it would have caused an accident in the event it backed over someone.

I can take judicial notice of the fact that if a loader backed over someone, it would likely cause a serious injury. However, I believe that the question of whether a violation is significant and substantial should be based on a reasonable likelihood of an accident based on the actual conditions which prevailed at the time the inspector observes the condition which prompts him to issue a citation.

On the facts of this citation, the inspector has not established that the foreman and the two coal shovelers were in close proximity to the loader, or that their duties required them to be in close proximity to the truck or behind it when it backed up. I am convinced that he included the "three persons on foot" in the citation because he could never insure that they would not stray or wander behind the loader. I find this to be rather speculative, particularly when he conceded on close cross-examination that the three persons he had in mind had no business being in the immediate area where the loading was being done, and that respondent's employees had clearly defined duties and responsibilities. Under the circumstances, I conclude that the inspector's "S & S" finding is unsupportable, and it is VACATED.

Citation No. 2076978

This citation was issued after the inspector found that the parking brake on a coal haulage truck was inoperative and would not hold the truck when the brake was tested by "setting it" while the empty truck was parked on an incline. The inspector was concerned about a possible injury in the event the truck were parked on an incline and "got away" and ran into something.

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Although the inspector here had the driver park the truck on an incline so that he could test the parking brake, there is no evidence that during the normal course of any shift during which the truck is used is it ever parked on an incline. The inspector conceded that the truck is parked on level ground during the lunch break, and that at the end of the working shift it is parked on level ground in a row with other trucks. Although the inspector alluded to the fact that there are some pit areas which are not on level ground, there is absolutely no evidence that the truck in question would ever be stopped or parked in any of these areas. As a matter of fact, the inspector conceded that the haul truck in question is seldom parked during the working shift. Under these circumstances, I cannot conclude that it was reasonably likely that an accident or injury would result from the faulty parking brake during the normal working shift when the truck is used. Absent any reasonable showing that the truck would at any time be parked on an incline, I cannot conclude that it would be likely that the truck would roll and collide with another vehicle while it was parked on level ground. Under the circumstances, the inspector's "S & S" finding is VACATED.

During the course of the hearing, respondent's counsel interposed objections with respect to the admissibility of certain MSHA exhibits concerning certain laboratory testing results in connection with the dust citations issued in Dockets CENT 83-51 and CENT 83-54 (Tr. 84-128). However, the objections were later withdrawn after the parties stipulated and agreed that the two dust citations were not "significant and substantial" violations (Tr. 263-265).

Additional Findings and Conclusions. Dockets CENT 83-40, 83-51, 83-54, 83-55.

Gravity

Citation 2076871, concerning an inoperative portable fire extinguisher on the D-10 bulldozer, involved a low degree of gravity since the record shows that other extinguishers were available nearby, and the bulldozer had a built-in fire suppression system. The inoperative front horn on the 777 rock haulage truck is a serious citation because the driver would be unable to signal anyone in the event of an emergency of sudden appearance of traffic or miners in the path of the truck. The remaining citation for an inoperative back-up alarm on another 777 haulage truck presented a low degree of gravity since I have concluded that no one would likely be exposed to injury (CENT 83-40).

I find that the lack of an operable horn on the haul truck was a serious violation (2076969). As for the remaining citations in this docket, I find that the conditions cited constituted

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a low degree of gravity. While the cited bulldozer (2076970) had no portable fire extinguisher, other operable extinguishers were readily available nearby. The inspector confirmed that the 14-G road grader was seldom operated in reverse, and he found a low degree of gravity for the inoperable back-up device. The circumstances surrounding the cylinder citation reflects that no one was in jeopardy of any harm or injury, and I have concluded that the inoperative parking brake and the inoperative alarm on the 988 front-end loader would not likely lead to any injuries (CENT 83-55).

I cannot conclude that the two dust citations issued in these dockets were serious violations. The inspector agreed to change his initial "S & S" findings to "non-S & S". Apart from this, with regard to Citation 2007403, Inspector Cameron confirmed that he found quartz present in only one sample, but that other samples were in compliance and he did not send them to the laboratory because there was insufficient quartz weight gain to show any substantial presence of quartz.

With regard to Citation 2007402, the citation was extended several times as work progressed to achieve abatement, and the respondent finally installed pressurized air conditioned cabs for its drills. However, absent any detailed testimony concerning the seriousness of the cited dust concentrations, the affected occupations, etc., I have no basis for concluding that the citation here was serious (CENT 83-51 and 83-54).

Good Faith Compliance

Inspector Boatright testified that the respondent was always cooperative in correcting any condition or practice which has been cited as violations in these proceedings, and while mine management did not always agree with him, all of the cited conditions or practices were always corrected (Tr. 141). Mr. Boatright confirmed that the respondent exhibited good faith compliance by abating all of the citations which he issued either within the time fixed by him or in advance of this time (Tr. 43-44). Accordingly, I conclude that respondent exhibited good faith in achieving abatement for all of the cited violations in these proceedings, and this is reflected in the civil penalties assessed for the violations.

Negligence

Inspector Boatright testified that the respondent's surface mining operations are by their very nature "pretty dusty", and that dust, mud, and dirt does clog the truck horns and alarms, thereby causing them to malfunction. He also confirmed that "on the whole", the respondent has a "pretty good safety program", and conducts a "pretty good operation" (Tr. 55-56).

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After careful examination of all of the testimony and evidence in this case, I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to take reasonable care to prevent the cited conditions or practices. I further conclude that all of the violations resulted from ordinary negligence.

History of Prior Violations

Respondent's history of prior violations is reflected in several computer print-outs produced by MSHA concerning the history of paid violations at the Welch #1 Mine, the Heavner #1 Mine, and the No. Two Mine, for the periods March 21, 1981, through June 5, 1983. The information submitted shows that the respondent has made payment for a total of 17 violations issued during these time periods.

Considering the inspector's testimony, as well as the information reflected in the computer print-outs, I cannot conclude that the respondent's prior compliance record is such as to warrant any increases in the civil penalties otherwise assessed by me in these proceedings.

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

I conclude that respondent is a medium sized operator, and that the penalties assessed for the violations which have been affirmed will not adversely affect its ability to remain in business.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Docket No. CENT 83-40

Citation No.	Date	30 CFR Section	Assessment
2076868	3/21/83	77.410	\$50
2076869	3/21/83	77.1605(d)	\$80
2076871	3/21/83	77.1109(c)(1)	\$20

Docket No. CENT 83-51

Citation No.	Date	30 CFR Section	Assessment
2007403	5/3/83	71.101	\$35

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Docket No. CENT 83-54

Citation No.	Date	30 CFR Section	Assessment
2007402	3/15/83	71.101	\$35

Docket No. CENT 83-55

Citation No.	Date	30 CFR Section	Assessment
2076969	6/6/83	77.1605(d)	\$70
2076970	6/6/83	77.1110	\$30
2076971	6/6/83	77.410	\$30
2076973	6/6/83	77.410	\$40
2076978	6/6/83	77.1605(b)	\$50
2076972	6/6/83	77.208(e)	\$35

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above, in the amounts shown for each of the citations, and payment is to be made to the petitioner within thirty (30) days of the date of these decisions. Upon receipt of payment, these proceedings are dismissed.

Docket No. CENT 83-52. Findings and Conclusions.

This docket concerns five citations issued by MSHA Inspector Johnny M. Newport on May 17, 1983, after an inspection at the respondent's Welch #1 Mine. All of the citations are "non S & S" citations issued pursuant to section 104(a) of the Act.

Citations 2076408, 2076411, and 2076412 were all issued for violations of mandatory safety standard 30 CFR 77.410, after the inspector found that two front-end loaders and a grader operating in the pit area were equipped with automatic warning devices that would not give an audible alarm when the equipment was operated in reverse.

Citation 2076409 was issued after the inspector found that a front-end loader operating in the pit area was equipped with an inoperative horn. Citation 2076410 was issued because a grader operating in the pit area was equipped with a discharged fire extinguisher.

At the hearing, the parties proposed to settle this case by the respondent making full payment for the proposed initial assessments in the amount of \$100 for all of the citations. In support of this proposed settlement disposition, petitioner's counsel pointed out that the inspector found low negligence and gravity, that no miners were found to be on foot in any of the areas concerning the inoperable back-up devices and horn, and

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that three operational fire extinguishers were readily available in the area where the grader with the discharged extinguisher was operating. Further, petitioner's counsel asserted that the respondent has a good compliance record for an operation of its size.

In addition to the foregoing, the record establishes that three of the citations were abated within 10 or 15 minutes, one within 30 minutes, and one within an hour or so of its issuance. Further, all of the inoperable devices apparently involved loose wires which were corrected as soon as they were brought to the attention of the pit superintendent.

Conclusion

After careful consideration of all of the information of record, including the pleadings and arguments made on the record in support of the proposed settlement, I conclude and find that it is reasonable. Accordingly, pursuant to 29 CFR 2700.30, IT IS APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the following amounts within thirty (30) days of the date of this decision, and upon receipt of payment by the petitioner, this case is dismissed.

Citation No.	Date	30 CFR Section	Assessment	Settlement
2076408	5/17/83	77.410	\$ 20	\$ 20
2076409	5/17/83	77.1605(d)	\$ 20	\$ 20
2076410	5/17/83	77.1110	\$ 20	\$ 20
2076411	5/17/83	77.410	\$ 20	\$ 20
2076412	5/17/83	77.410	\$ 20	\$ 20
			\$ 100	\$ 100

George A. Koutras
Administrative Law Judge