CCASE:
SOL (MSHA) V. TDURNER BROTHERS
DDATE:
19840907
TTEXT:

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. CENT 84-5 A.C. No. 34-01357-03504
v.	
TURNER BROTHERS, INC., RESPONDENT	Docket No. CENT 84-16 A.C. No. 34-01357-03505 Welch Mine No. 1 Docket No. CENT 84-27 A.C. No. 34-01317-03509 Docket No. CENT 84-44 A.C. No. 34-01317-03511 Heavener No. 1 Mine

DECISION

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Robert J. Petrick, Esq., Muskogee, Oklahoma, for the 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 four alleged violations of certain mandatory safety and health standards found in Parts 71 and 77, Title 30, Code of Federal Regulations.

Respondent filed answers contesting the proposed penalties, and hearings were held in Muskogee, Oklahoma, on July 10, 1984. The parties waived the filing of post-hearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearings have been considered by me in the adjudication of these cases.

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. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

ISSUES

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of these decisions.

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 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 that the respondent's surface stripping coal operations affect interstate commerce, and that the mining operations are subject to the Act. The parties also stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of reasonable civil penalty assessments will not adversely affect its ability to continue in business.

Discussion

During the course of the hearings in these cases, the parties advised me that they proposed to settle the following dockets:

CENT 84-5

Citation No.	Date	30 CFR Section	Assessment	Settlement
2076417	8/23/84	77.1605(b)	$46	$30

CENT 84-16

Citation No.	Date	30 CFR Section	Assessment	Settlement
2076418	8/23/83	71.400	$20	$20

CENT 84-27

Citation No.	Date	30 CFR Section	Assessment	Settlement
2077340	11/22/83	77.1710(d)	$147	$147

The parties presented arguments on the record in support of their proposed settlements. Citation No. 2076417, was issued after the inspector found that a scraper being used to spread topsoil for reclamation purposes had brakes which were not adequate enough to hold the machine on a five percent grade. Petitioner's counsel stated that after further consultation with the inspector who was present in the hearing room, petitioner cannot support the "S & S" finding, and that the inspector has modified the citation to delete this finding. In support of this action, counsel asserted that the cited scraper was operating in an area where no miners were on foot exposed to any hazard, and that the brake condition was corrected within an hour after it was discovered.

Citation No. 2076418, was issued when the inspector found that a waiver which the respondent had obtained concerning the providing of bathing facilities, clothing change rooms, and flush toilets at its surface worksite, had expired. Petitioner's counsel stated that upon further consultation with the inspector, it has now been confirmed that upon application by the respondent pursuant to the applicable procedures found in section 71.403, the waiver concerning the application of cited section 71.400, has been further extended until September 27, 1984, and the citation has been terminated. Counsel confirmed that MSHA has in fact issued the waiver. Counsel also pointed out that the surface mining facility in question is located approximately 10 miles out of town and is isolated from ready sources of water.

Respondent's counsel confirmed that the respondent has provided "Porta-John" toilet facilities for the miners at the site in question, and that the miners working at the facility are in agreement with, and do not oppose, the waiver which has been granted for the facility. Counsel also stated that upon the expiration of the current waiver, the respondent will file for another extension.

Findings and Conclusions

After careful consideration of all of the arguments presented by the parties in support of the proposed settlement of Citation Nos. 2076417 and 2076418, I concluded and found that the proposed settlements were reasonable and in the public interest. Accordingly, pursuant to Commission Rule 29 CFR 2700.30, the settlements were approved from the bench. My decision in this regard is hereby re-affirmed.

Citation No. 2077340, was issued after the inspector observed that two mechanics who were performing maintenance repair work on an end loader parked at the base of a highwall were not wearing hard hats or caps. Petitioner's counsel asserted that the parties proposed to settle this violation by the respondent agreeing to pay a reduced civil penalty in the amount of $74. Counsel stated that it was his understanding that the two mechanics had removed their hard hats in order to crawl under the loader to perform some repairs. Counsel also asserted that while MSHA's district manager is in agreement with the proposed settlement reduction, the inspector who issued the citation would not agree to modify and delete his "S & S" finding, and that he disagreed with the factual basis for the proposed settlement. Under the circumstances, the inspector was called as the Court's witness to testify as to circumstances which prompted him to issue the contested citation.

MSHA Inspector Lester Coleman confirmed that he issued the citation in question after observing that the two mechanics, who he identified by name, were not wearing hard hats or caps while performing maintenance on an end loader which had been parked at the base of the highwall in the active pit area. Mr. Coleman stated that the two mechanics had been dispatched to the area to perform some repair work needed to correct a condition which had been previously cited on the loader, and that their work was the work required to abate that particular violation.

Inspector Coleman testified that he observed no hard hats or caps in the area or on the loader, and that the two mechanics had in fact admitted to him that they had no hard hats or caps with them. Inspector Coleman confirmed that in order to abate the citation, one hard hat had to be obtained from the mine office, and that the respondent had to either go to town to purchard a second hard hat, or obtained one from one of its other mining operations in the area.

Inspector Coleman stated that while he observed no rocks falling off the highwall, since the mechanics were close to the base of the wall, had a rock fallen, it would have struck them. He confirmed that he was aware of incidents at other mines where rocks had fallen from highwalls

and struck miners on the head, and in the instant case it was his view that the two mechanics were exposed to a hazard from falling rocks. For this reason, he believes the violation is a "significant and substantial" one.

Although respondent's counsel cross-examined Inspector Coleman, the respondent presented no testimony or evidence in defense of the citation or of the inspector's findings. Further, the respondent did not rebut Inspector Coleman's testimony regarding the absence of hard hats, and its defense is that the mechanics "were in a hurry" to complete their abatement work or another violation.

After full consideration of the testimony and arguments concerning this violation, the proposed civil penalty reduction and settlement was rejected from the bench. Respondent then proposed to pay the full amount of the initial civil penalty of $147, and that was approved. I hereby re-affirm these bench findings, and the citation IS AFFIRMED as issued, including the inspector's "S & S" finding.

CENT 84-44

This case concerns a section 104(d)(1) unwarrantable failure order issued by MSHA Inspector Lester Coleman, on January 24, 1984, with special "S & S" findings, charging the respondent with a violation of mandatory safety standard section 30 CFR 77.1605(b). The order, No. 2077410, describes the "condition or practice" cited by Inspector Coleman as follows:

> The 992 C caterpillar end loader operating in the 001 pit was not provided an adequate parking brake in that the one provided was inoperative and would not hold the machine against movement (rolling) on a small percentage grade (approx. 5%). There was (2) workmen on foot cleaning coal down grade in front of where the loader was working.

Procedural Rulings.

I take note of the fact that respondent's answer to the petition for assessment of civil penalty asserts that the Act does not require the mandatory assessment of civil penalties. In support of this contention, respondent asserted that while the citation concerned a "technical" violation of the Act, the law does not require that every violation, technical or otherwise, be assessed a civil penalty.

Respondent's contention IS REJECTED. It seems clear to me, that upon a finding of a violation of any mandatory safety standard, a civil penalty must be imposed by the presiding judge, but only after all full consideration of all of the statutory civil penalty criteria found in section 110(i) of the Act.

During the course of the hearing, counsel for both parties expressed the view that the validity of the unwarrantable failure order, including the question as to whether there has been an "unwarrantable failure" to comply with the law, is in issue in a civil penalty proceeding. This notion IS REJECTED. It seems clear to me that any such challenge must be made within thirty (30) days of the service of any order on an operator, and that since the petitioner here did not preserve his appeal rights by filing an independent notice of contest on this issue, it is precluded from raising it in this proceeding (Tr. 33-36).

Respondent's counsel stated that his intent was to challenge the special "S & S" findings made by the inspector in this case, as well as the "special assessment" levied by MSHA's Office of Assessments for the alleged violation of section 77.1605(b) (Tr. 38). The parties were informed that the matter of "S & S" may be pursued in this case, but that the "unwarrantable failure" finding and the validity of the order per se is not an issue, and counsel for the parties agreed with my ruling in this regard (Tr. 36, 40). The parties were also informed that I am not bound by any "special assessment" made by MSHA, and that the Secretary's Part 100 regulations concerning initial civil penalty assessments are not binding on the presiding judge (Tr. 40-41).

MSHA's Testimony and Evidence.

MSHA Inspector Lester Coleman testified as to his background and experience, including ten years service as an MSHA inspector and prior work in the mining industry as a mine foreman. Mr. Coleman described the mine in question as a surface coal mining stripping operation employing approximately 40 to 50 miners working 12-hour shifts, four days a week.

Mr. Coleman confirmed that he issued the order in question on January 24, 1984, during the course of his inspection of the mine. He stated that he observed the loader in question digging coal, and that two men on foot were working "downgrade from the machine" cleaning coal pits with shovels. He also observed another end loader which was "working in conjunction" with the cited machine, and that the second loader would be at different locations in the course of doing its work (Tr. 47). The respondent stipulated that the cited loader in question weighed approximately 188,000 pounds (Tr. 49).

Mr. Coleman stated that while he personally did not test the parking brake in question, the machine operator informed him that it did not work. When Mr. Coleman asked the operator to demonstrate the brake, the operator set the brakes and raised the machine bucket, and the machine rolled (Tr. 47). When asked why he believed the failure to have an adequate parking brake on the machine posed a hazard, Mr. Coleman replied as follows (Tr. 49):

A. They can park the machine on the grade down there, get out and leave it unattended or something or other, and it could roll off, probably roll into the other piece of equipment or possibly roll over one of the work hands or just roll out in front of the other machine and not contact it but cause the guy to run around it and run over one of the other guys or something.

On cross-examination, Mr. Coleman confirmed that the regular brakes used to control and stop the end loader in question when it was operating in forward and in reverse were operable, and that as long as the operator was in the machine he saw no problem and did not believe that there was any hazard or likelihood of an accident. His only concern was over the fact that if the machine were left unattended, the inadequate parking brake would present a hazard.

Mr. Coleman stated that while he never observed the particular cited machine left unattended he has observed other equipment unattended when the operator parks it in the pit area and then goes for a drink of water or to the bathroom (Tr. 55). However, he conceded that when an operator leaves his machine in these circumstances, he will stop it, set the brakes, and then drop the bucket to the ground. The bucket is dropped in order to comply with mandatory safety standard section 77.1607(p), which requires that all machine movable parts be secured or lowered to the ground when the machine is not in use (Tr. 55). If the machine were parked with the bucket facing downhill, the machine would stop. However, he believed that the area where the end loader was stripping coal had a rock bottom, and that the stripped grade was from one to three percent and it was possible for the machine to slide across the hard surface (Tr. 56).

Mr. Coleman stated that when he first arrived at the pit area the loader in question was located somewhere else. The foreman sent someone to bring the loader to the pit area without informing him of the parking brake condition, and when it was brought to the pit, the brake was checked (Tr. 57). Mr. Coleman conceded that the area where the machine was operating was less than a 5% grade, and that while it was "flat," he conceded that "it wasn't very much of a grade" (Tr. 58). He also conceded that the machine operators were "usually pretty good" about lowering the bucket to the ground when their machines are parked (Tr. 58). He stated that he has never observed a situation where a machine operator has alighted from his machine without lowering his bucket or ripper down (Tr. 62).

Mr. Coleman indicated that during any working day there are three or four times when a machine operator normally has occasion to use his parking brake. One is in the morning when

the machine is parked and before it is started up, a second time is at noon during lunch, a third time is when the machine is parked at night, and a fourth time is when the operator alights to get a drink or water or go to the bathroom (Tr. 60) However, since the mine has different grades, and since a foreman may stop a machine operator on a grade to speak with him, he was concerned about the inadequate brake (Tr. 61).

Mr. Coleman confirmed that he has inspected the mine on four or five previous occasions, and that he has never issued any citations for violations of section 77.1607(p) (Tr. 63). He also confirmed that he never observed the two coal cleaners around or near the machine while it was being parked, and he conceded that his belief that a fatality would occur stemmed from his assumption that the machine operator might decide to get off the machine while it is parked on a grade with the bucket up (Tr. 64).

Mr. Coleman stated that the foreman told him that he knew about the parking brake condition on January 23, and that to his knowledge the foreman had not ordered the parts to make the repairs. Mr. Coleman confirmed that the brake was repaired the next day (Tr. 66).

Mr. Coleman stated that the area where the loader was cleaning coal was approximately 150 feet square, and that it was operating in a seam approximately 16 to 18 inches thick. The two men in question were working away from the seam, and he conceded that if the machine happened to roll with its bucket up in the air, it should catch on the 18 inch seam before reaching the area where the men were working. However, since there was a ramp along the edge of the coal seam, he believed that the machine could go up the ramp. Even so, he conceded that it would roll back and away from the two men (Tr. 68).

In response to questions from the bench, Mr. Coleman indicated that the loader in question was parked in another area of the mine. However, the foreman wanted to use it to break up the coal in the pit and he sent a workman to bring the machine to the pit (Tr. 70). Once it was driven to the pit area, Mr. Coleman decided to inspect it because an employee had informed him that the parking brake did not work and that is why the machine was parked. Upon checking the machine and finding the parking brake inadequate, Mr. Coleman cited it and had it taken out of service immediately (Tr. 71). He further explained as follows (Tr. 71-72):

> Q. So it actually was not doing any loading at the time you observed it?
>
> A. No, he was going to use it to break out.

Q. But it was not being used to break out coal?

A. No.

Q. You took it out of service to assure that it wouldn't be put in service, is that the idea?

A. Yes.

Q. So you didn't just happen to walk in this pit area and see this loader out there breaking coal and the two guys over there shoveling and then have it tested and then take it out of service?

A. No, I didn't.

Q. So you acted based on what somebody else told you, and when the loader was brought over there you tested it and found the parking brakes were inoperative and you wanted it taken out of service?

A. Yes.

Q. So it actually never began breaking and doing all the things that Mr. Petrick suggested it was doing while you were there; is that right?

A. That's correct.

Mr. Coleman stated that when the loader parking brake was tested the bucket was in a raised position, and that the brake was never tested with the bucket lowered. Had he tested it with the bucket down, and found that the machine would not roll, he would still have issued the violation because "the law that I cited him under requires that he has a parking brake" (Tr. 73). When asked whether he would also have made an "S & S" finding had the machine not rolled with the bucket down, he replied "yes," and he explained as follows (Tr. 73-74):

A. Because of the importance of the thing. And the machine is there parked on several different grades. And, granted, usually it's more level than, you know, it's two, three, five percent or something like that. And the law requires that they have it and that the--to me the significant reason, a lot of times they get out and they will park the machine with it still running. A machine that big vibrates and it would start to roll.

Q. So your concern when you made an S and S finding in this case is that during the normal operation with this inoperative parking brake sometime during the shift or whatever something could conceivably happen that would cause the loader to get away and if it did it could likely strike somebody and if it did that it would likely kill them; is that it in a nutshell?

A. Or another machine, haulage trucks. They have haulage trucks that haul in the area, too.

Q. So you were trying to cover all bets, more or less?

A. Yes.

Q. Is that your understanding on how you go about making an S and S, significant and substantial finding?

A. Well, if it was significant or substantially contribute to or cause an accident or something, that's kind of the way I looked at it.

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of section 77.1605(b), for having an inadequate parking brake on a rubber-tired end loader. Respondent presented no witnesses in defense of the citation, and simply relied on the cross-examination of Inspector Coleman to establish that the violation was not significant and substantial.

Mandatory safety standard section 77.1605(b), requires that mobile equipment be equipped with adequate brakes, and that all front-end loaders also be equipped with parking brakes. Although the standard does not specifically require that such parking brakes be adequate, I read this into the language of the standard as a logical requirement. Here, once the parking brakes was tested, it was found to be inadequate since it did not prevent the end loader from rolling. The respondent has not rebutted MSHA's prima facie case of a violation of section 77.1605(b), and the violation IS AFFIRMED.

Significant and Substantial

After listening to the inspector's direct testimony, I had the initial impression that when he arrived at the pit area, he observed the end loader in question digging coal and operating in the proximity of two men who were working "downgrade" cleaning coal. Given the inspector's asserted concern that if left unattended, with the engine running, the machine could have rolled and struck the two men, my first inclination was to find that the violation was significant and substantial. However, for the reasons which follow, I cannot conclude that this is the case.

On cross-examination, and in response to further bench questions, the inspector admitted that when he first arrived at the pit area, the end loader was in fact parked in another area, and was not in operation or breaking or loading coal. He indicated that someone had informed him that the machine had an inadequate parking brake, and when it was brought to the pit, the inspector had the brake tested, and after finding that it would not hold the machine, he ordered the machine taken out of service until the parking brake could be repaired the next day. In short, the machine was never used, and the petitioner has not established otherwise.

The testimony and evidence in this case establishes that the pit area where the end loader in question would normally be operating was flat, and with very little grade. Further, the inspector conceded that during prior inspections of the mine site he never observed the machine left unattended, and in fact he conceded that in his experience, when an operator has to leave the machine to go to the bathroom or take lunch, the machine is always stopped, the front bucket is lowered to the ground, and the operational brakes are set. He also conceded that he has never cited the respondent for a violation of mandatory standard 77.1607(p), which requires that machine buckets be lowered to the ground when not in use, and petitioner advanced no evidence to show that the respondent has ever been cited for such infractions.

The inspector confirmed that the regular brakes used to stop the end loader when it operated forward and in reverse were adequate and operational, and no hazard was presented while the machine was in operation. Although the inspector stated on the face of the violation notice which he issued that the inadequate parking brake would not hold the machine against movement on a grade of "approximately 5%," he conceded during his testimony that it was less than 5%.

The facts here also show that the pit area where the machine in question would normally have operated was excavated to a seam depth of some 16 to 18 inches, and the inspector conceded that the two men he claimed he observed working "downgrade" were in fact out of the pit area. The inspector also conceded that in the event the machine had rolled, it would have come to rest at the edge of the pit, and absent any credible showing that a 188,000 machine can jump up and out of the pit, I cannot conclude that this was reasonably likely to happen. Although the inspector indicated that there was a ramp constructed in the pit to facilitate the machine moving in and out, his "theory" that the machine could have rolled up the ramp, out of the pit, and then rolled down and struck the two men is rejected. There is absolutely no credible facts to establish that this was reasonably likely to occur.

The inspector conceded that when he tested the parking brake, he did so with the bucket up, and not down as it is normally left when the operator leaves the machine. Further, there is no evidence that the inspector ever observed the machine parked in the pit, and he confirmed that he never observed anyone around the machine while parked. Since the parties failed to call the two men in question to testify, I have no basis for determining where they were positioned in relation to the machine, or where they would normally be positioned once the loader was in operation. These are critical facts to any determination as to the likelihood of an accident.

Based on all of the evidence and testimony here presented it seems clear to me that the inspector made his "S & S" finding on an assumption that when and if the machine were placed in service, the operator would park the machine with the bucket up, in violation of section 77.1607(p), and that he would not follow the normal operational procedures for securing the machine when it is left unattended. Given the fact that the inspector conceded that to his knowledge, end-loader operators always follow those procedures, and given the fact that the inspector offered no credible evidence to the contrary, his assumptions are simply unsupportable. I am convinced that the inspector made his "S & S" finding in order to cover every conceivable set or circumstances which may have triggered an accident once the machine was placed in service. Such a theory of "S & S" would require an inspector to find any violation to be "S & S."

In my view, the only fact presented by the petitioner to conceivably support an "S & S" finding in this case is his testimony that the pit foreman admitted that he knew the

parking brake was inadequate, and that the foreman had the machine driven to the pit area and intended to put the machine in service without telling the operator about the brake condition. However, the inspector also confirmed that the same employee who advised him of the inadequate brake also advised him that this reason why the machine had been parked in an area away from the pit where it would normally be operating.

The respondent failed to call the pit foreman to rebut the inspector's testimony, and also failed to rebut the inspector's testimony during cross-examination. By the same token, the petitioner failed to subpoena the pit foreman, and since the inspector marked the "negligence" portion of his citation to indicate a "reckless disregard" of the requirements of the cited standard, I can only speculate that he did so on the basis of the pit foreman's purported admission. Even so, based on all of the circumstances discussed above, including the fact that the inspector immediately took the loader out of service before it was operated in the pit, the totality of the circumstances presented do not establish that an accident was reasonably likely to occur. Even if the machine were placed in service with an inadequate parking brake, I am of the view that the possibility of an accident was remote and not reasonably likely to occur. Accordingly, the inspector's "S & S" finding IS VACATED.

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

The parties stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of a reasonable penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

History of Prior Violations

Exhibit G-1 is a copy of a computer print-out summarizing the number of violations assessed and paid by the respondent for the period November 1, 1981, to October 31, 1983, for the Heavner No. 1 Mine. That information reflects a total of eleven paid violations, three of which are for prior violations of section 77.1605(b). However, since the petitioner did not submit copies of these prior section 104(a) citations, I have no way of knowing whether or not they were issued for end loaders. However, I do note that two of the citations were issued in November 1982, and are "single penalty" assessments for $20 each, and the other one was issued in June 1983, and was assessed at $50.

Good Faith Abatement

The inspector confirmed that the violation was issued at 12:00 noon on January 24, 1984, and that the conditions were corrected and the violation abated the next day (Tr. 66). Accordingly, I find that the violation was promptly abated in good faith by the respondent.

Negligence

The inspector's unrebutted testimony in this case strongly suggests that the foreman or pit superintendent, had prior knowledge of the inadequate parking brake, but nonetheless had the machine brought to the pit area in that condition, fully intending to use it. The inspector's testimony is as follows:

> A. No, sir, the machine was in another area when I arrived, and the foreman, Superintendent Jim Payne sent another workman to get the loader. And he didn't inform this guy about the condition, so the guy went to another area and brought the loader into this pit area. And when he was bringing it down we checked it (Tr. 57).

And, at Tr. 76-77:

> Q. Okay. Was Mr. Payne there when the machine was brought to the area?
>
> A. Yes.
>
> Q. He's the fellow that asked them to bring it?
>
> A. Yes.
>
> Q. Now, why would Mr. Payne do something like that if he knew that the parking brake was inoperative? Does that make sense, particularly with a federal inspector there. I don't know Mr. Payne, I assume he has got better sense than that, but maybe not, I don't know. Mr. Payne, if you're here, I apologize for that, sir, but I couldn't resist.
>
> A. I can't answer that.
>
> Q. I can't see the pit foreman--is Mr. Payne a foreman of some kind?

A. Superintendent, I think is the way they have him listed.

Q. And there you are, a federal inspector there, and you're telling me that Mr. Payne knew this piece of equipment had defective parking brakes and he tells the fellow to bring it over there and put it in operation.

A. Mr. Payne told me that he knew himself.

On the basis of the foregoing, I conclude and find that the violation here resulted from the respondent's failure to exercise the slightest degree of care to insure that the inadequate brake condition was attended to before bringing the cited machine to the pit area, fully intending to put it into operation. Although I have considered the possibility that the respondent had the machine parked because it intended to repair the inadequate parking brake, absent any mitigating testimony by the respondent, I can only conclude that had the inspector not removed the machine from service, Mr. Payne would have allowed it to be put in service with the inadequate brake condition. Under the circumstances, I conclude and find that the violation resulted from gross negligence on the part of the respondent, and this is reflected in the civil penalty assessed by me for the violation.

Gravity

Although I have concluded that the violation here is not significant and substantial, I cannot conclude that it was nonserious. While it is true that there was no reasonable likelihood that an accident would occur, it seems to me that given the fact that Mr. Payne apparently knew about the condition, and was willing to take a chance and put the machine with an inadequate parking brake, there was a possibility, albeit unlikely, that an accident could occur. Accordingly, I conclude and find that the violation was serious.

Penalty Assessment

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 a civil panalty in the amount of $300 is appropriate for the cited violation.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $300 for a violation of mandatory standard

section 77.1605(b), as stated in violation number 2077410, issued by MSHA Inspector Lester Coleman on January 24, 1984, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge